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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 to 2017 with several major class action rulings from the U.S. Supreme Court.

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 2018 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 2017, 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,

Peter C. Miller
Chairman, Seyfarth Shaw LLP

Author's Note

Our Annual Report analyzes the leading class action and collective action decisions of 2017 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 1,408 decisions analyzed in the Report.

The cases decided in 2017 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, Noah A. Finkel, Timothy F. Haley, Eric Janson, David D. Kadue, Lynn Kappelman, 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, Sam Schwartz-Fenwick, 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

January 2018

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.*, *Monroe, et al. v. FTS USA, LLC*, 860 F.3d 389 (6th Cir. 2017)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (*e.g.*, *Dolemba, et al. v. Kelly Services, Inc.*, 2017 U.S. Dist. LEXIS 13508 (N.D. Ill. Jan. 31, 2017)). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *Durling, et al. v. Papa John's International, Inc.*, Case No. 16-CV-3592 (S.D.N.Y. Mar. 29, 2017)).

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 *2018 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.*, 564 U.S. 338 (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. Windsor*, 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.*, 564 U.S. 338 (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 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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I. Overview Of The Year In Workplace Class Action Litigation

A. Executive Summary

The prosecution of workplace class action litigation by the plaintiffs' bar has increased exponentially over the past decade. More often than not, class actions pose unique "bet-the-company" risks for employers. An adverse judgment in a class action has the potential to bankrupt a business and adverse publicity can eviscerate its market share. Likewise, the on-going defense of a class action can drain corporate resources long before the case even 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 in numerous jurisdictions at the same time. Hence, workplace class actions can adversely impact a corporation's business operations, jeopardize or cut short the careers of senior management, and cost millions of dollars to defend. For these reasons, risks from workplace class actions are at the top of the list of challenges that keep business leaders up late at night.

Skilled plaintiffs' class action lawyers and governmental enforcement litigators are not making this challenge any easier for companies. They are continuing to develop new theories and approaches to the successful prosecution of complex employment litigation. New rulings by federal and state courts have added to this patchwork quilt of compliance problems and risk management issues.

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 at a rapid pace while also undergoing significant change. Notwithstanding the transition to new leadership in the White House in 2017, governmental enforcement litigation pursued by the U.S. Equal Employment Commission ("EEOC") and the U.S. Department of Labor ("DOL") continued to manifest an aggressive "push-the-envelope" agenda by 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.

Adding to this mosaic of challenges in 2018 is the continuing evolution in federal policies based on a new political party occupying the White House for part of 2017. Furthermore, while changes to government priorities started on Inauguration Day and are on-going, others are being carried out by new leadership at the agency level who were appointed in the fourth quarter of this past year. As expected, many changes represent stark reversals in policy that are sure to have a cascading impact on private class action litigation. While predictions about the future of workplace class action litigation may cover a wide array of potential outcomes, the one sure bet is that change is inevitable and corporate America will continue to face new litigation challenges.

B. Key Trends Of 2017

An overview of workplace class action litigation developments in 2017 reveals four key trends.

First, the monetary value of the top workplace class action settlements rose dramatically in 2017. These numbers increased over past years, even after they had reached all-time highs in 2014 to 2016. The plaintiffs' employment class action bar and governmental enforcement litigators were exceedingly successful in monetizing their case filings into large class-wide settlements, and they did so at decidedly higher values than in previous years. The top ten settlements in various employment-related class action categories totaled $2.72 billion in 2017, an increase of over $970 million from $1.75 billion in 2016. Furthermore, settlements of employment discrimination class actions experienced over a three-fold increase in value; statutory workplace class actions saw nearly a five-fold increase; and government enforcement litigation registered nearly a ten-fold increase. Whether this is the beginning of a long-range trend or a short-term aberration remains to be seen as

2018 unfolds, but the determinative markers suggest this upward trend will rise further in 2018, at least insofar as private plaintiff class actions are concerned.

Second, while federal and state courts issued many favorable class certification rulings for the plaintiffs' bar in 2017, evolving case law precedents and new defense approaches resulted in better outcomes for employers in opposing class certification requests. Plaintiffs' lawyers continued to craft refined class certification theories to counter the more stringent Rule 23 certification requirements established in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As a result, in the areas of employment discrimination and ERISA class actions, the plaintiffs' bar scored well in securing class certification rulings in federal courts in 2017 (over comparative figures for 2016). Class actions were certified in significant numbers in "magnet" jurisdictions that continued to issue decisions that encourage – or, in effect, force – the resolution of large numbers of claims through class-wide mechanisms. Yet, while the sheer volume of wage & hour certification decisions in 2017 increased as compared to last year, employers actually fared better in litigating those class certification motions in federal court than last year. Of the 257 wage & hour certification decisions in 2017, plaintiffs won 170 of 233 conditional certification rulings (approximately 73%), but lost 15 of 24 decertification rulings (approximately 63%). By way of comparison, there were 224 wage & hour certification decisions in 2016, where plaintiffs won 147 of 195 conditional certification rulings (approximately 76%) and lost 13 of 29 decertification rulings (approximately 45%). In sum, employers beat slightly more first stage conditional certification motions in 2017, and dramatically increased their odds – a jump of 18% – of fracturing cases with successful decertification motions.

Third, filings and settlements of government enforcement litigation in 2017 did not reflect a head-snapping pivot from the ideological pro-worker (or anti-big business) outlook of the Obama Administration to a pro-business, less regulation/litigation viewpoint of the Trump Administration. Instead, as compared to 2016, government enforcement litigation actually increased in 2017. As an example, the EEOC alone brought 184 lawsuits in 2017 as compared to 86 lawsuits in 2016. Further, the settlement value of the top ten settlements in government enforcement cases jumped dramatically – from $52.3 million in 2016 to $485.25 million in 2017. The explanations for this phenomenon are wide and varied, and include the time-lag between Obama-appointed enforcement personnel vacating their offices and Trump-appointed personnel taking charge of agency decision-making power; the number of lawsuits "in the pipeline" that were filed during the Obama Administration that came to conclusion in the past year; and the "hold-over" effect whereby Obama-appointed policy-makers remained in their positions long enough to continue their enforcement efforts before being replaced in the last half of 2017. This trend is critical to employers, as both the DOL and the EEOC have had a focus on "big impact" lawsuits against companies and "lead by example" in terms of areas that the private plaintiffs' bar aims to pursue. As 2018 opens, it appears that the content and scope of enforcement litigation undertaken by the DOL and the EEOC in the Trump Administration will tilt away from the pro-employee/anti-big business mindset of the previous Administration. Trump appointees at the DOL and the EEOC are slowly but surely "peeling back" on positions previously advocated under the Obama Administration. As a result, it appears inevitable that the volume of government enforcement litigation and value of settlement numbers from those cases will decrease in 2018. The ultimate effect, however, may well prompt the private plaintiffs' class action bar to "fill the void" and expand the volume of workplace litigation pursued against employers over the coming year as the DOL and the EEOC adjust their litigation enforcement activities.

Fourth and finally, class action litigation increasingly has been shaped and influenced by recent rulings of the U.S. Supreme Court. Over the past several years, the U.S. Supreme Court has accepted more cases for review – and issued more rulings – 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 and class action issues that were arguably more pro-business than decisions in past years. More cases also were accepted for review in 2017 that are positioned for rulings in 2018, including what may be the most high-stakes issue impacting employers since the *Wal-Mart* ruling in 2011 – the *Epic Systems, Murphy Oil*, and *E & Y* trilogy of cases on the legality of workplace arbitration agreements with class action waivers. The ruling expected in the *Epic System, Murphy Oil*, and *E & Y* cases in 2018 may well change the class action playing field in profound ways. Coupled with the appointment of Justice Neil Gorsuch in 2017 and potential additional appointments to the Supreme Court by President Trump in 2018 and beyond, litigation dynamics may well be re-shaped in ways that further change the playbook for prosecuting and defending class actions.

C. Significant Trends In Workplace Class Action Litigation In 2017

(i) Higher Class Action Settlement Numbers In 2017

As measured by the top ten largest case resolutions in various workplace class action categories, overall settlement numbers increased exponentially in 2017 as compared to 2016.

This continued the reversal of 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 certify class actions, and to convert their class action filings into substantial settlements.

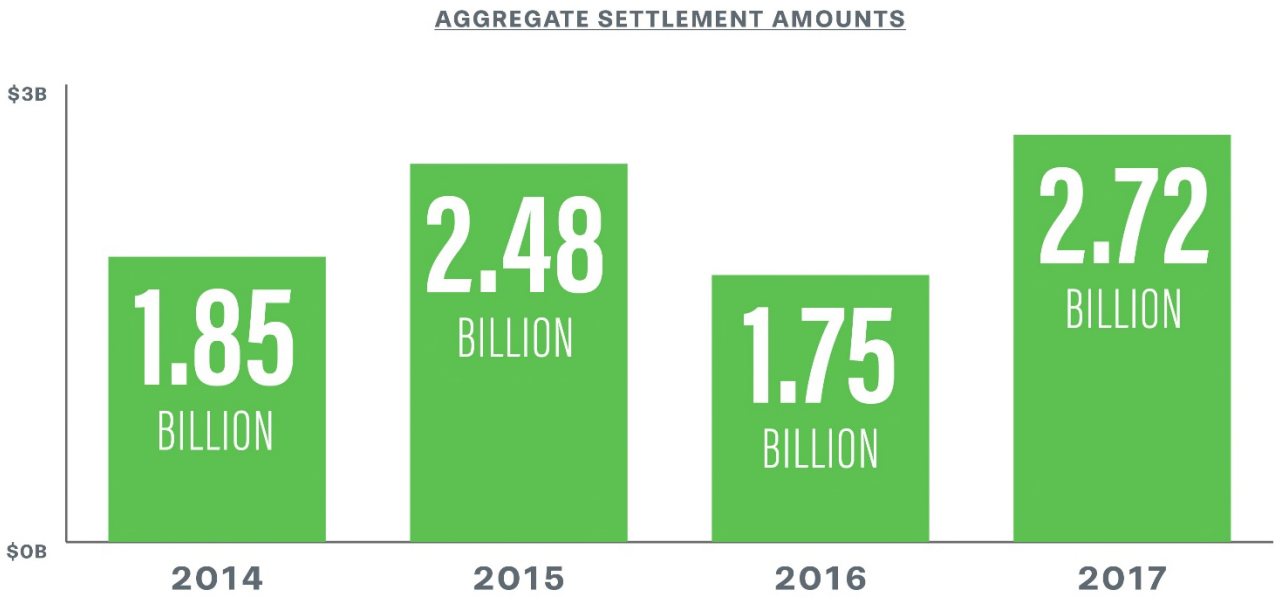
The settlement statistics for 2017 underscore how the plaintiffs' bar has successfully "found a way" around the impediments to transforming their case filings into large settlements on a class-wide basis. This also reflects a process whereby there has been a maturing of case architecture considerations, as plaintiffs' lawyers have "re-booted" their strategic approaches to take account of *Wal-Mart*, and crafted refined class certification theories with better chances of success.

That phenomenon is still being played out, as well as manifesting itself in settlement dynamics.

Considering all types of workplace class actions, settlement numbers in 2017 totaled $2.72 billion, which increased significantly from 2016 when such settlements totaled $1.75 billion.

The 2017 figure also eclipsed the settlement numbers of 2015, which were then at the all-time high of $2.48 billion.

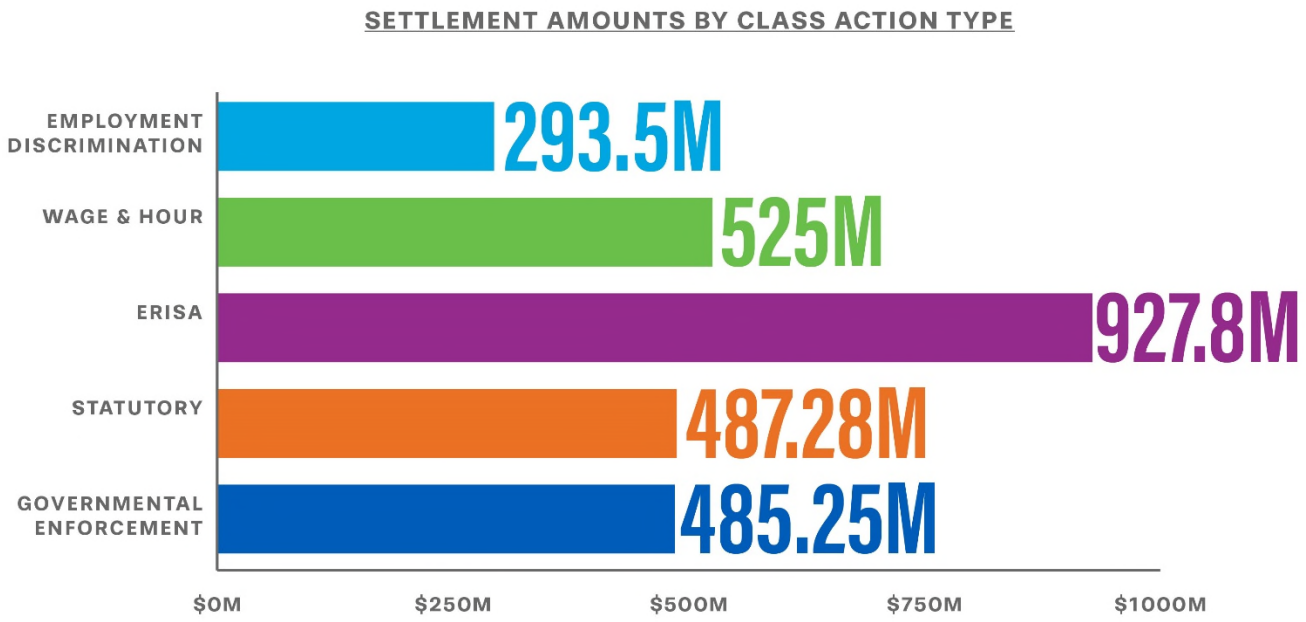
The following graphic shows this trend:



In terms of the story behind the numbers, the breakouts by types of workplace class action settlements are instructive.

In 2017, there was a slight downward trend for the value of wage & hour class action settlements, and significant increases across-the-board for resolutions of class actions involving employment discrimination, statutory workplace laws, and ERISA class actions, as well as governmental enforcement litigation.

This phenomenon is shown by the following chart for 2017 settlement numbers:

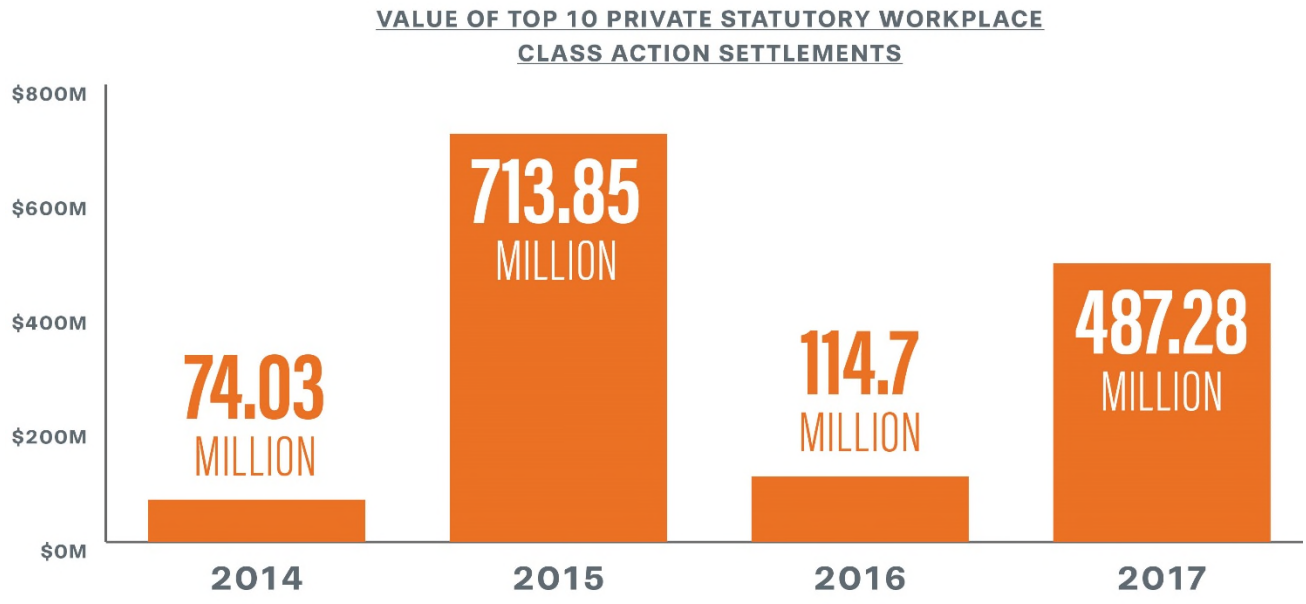


By type of case, settlements values in employment discrimination class actions, private plaintiff statutory workplace class actions, and government enforcement cases experienced the most significant increases.

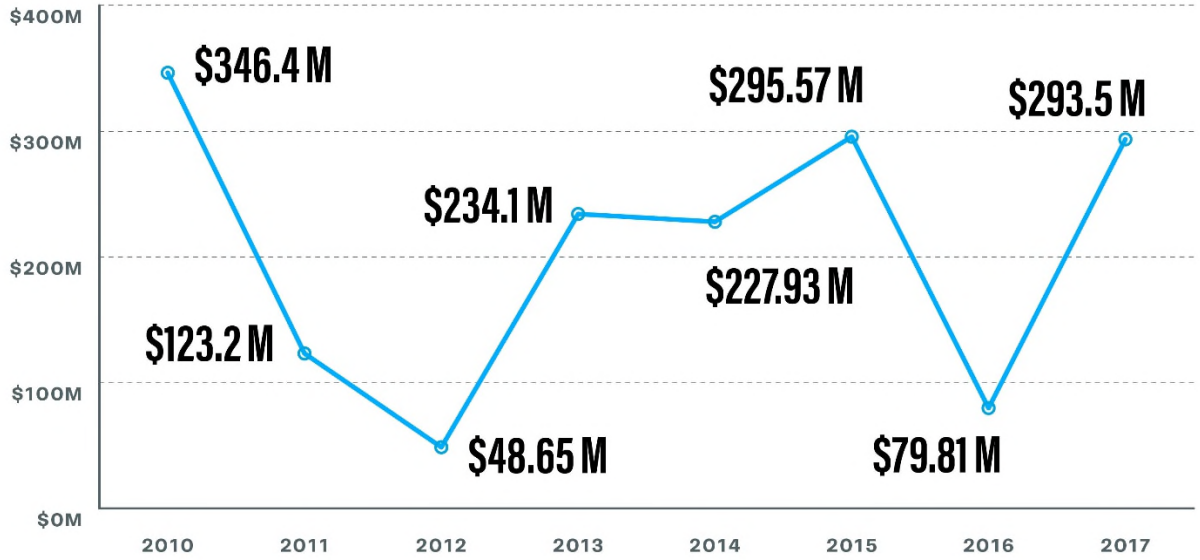
The top ten settlements in the private plaintiff statutory class action category (e.g., cases brought for breach of contract for employee benefits, and workplace antitrust laws and statutes such as the Fair Credit Reporting Act or the Worker Adjustment and Retraining Notification Act) totaled $487.28 million.

This figure increased from $114.7 million in 2016.

The following chart shows this nearly five-fold increase:



Most telling, however, the reversal of the "*Wal-Mart* effect" is shown by the pattern for employment discrimination class action settlements in 2017, as well as a comparison of the settlement figures with previous settlement activity over the last decade. This trend is illustrated in the following chart:



VALUE OF TOP 10 EMPLOYMENT DISCRIMINATION CLASS ACTION SETTLEMENTS

In 2017, the value of the top ten largest employment discrimination class action settlements of $293.5 million was the second highest figure since 2010,[1] and bucked the trend that started in 2011 (after *Wal-Mart* was decided) that showed decreases in settlement amounts over three years of that four-year period. On a comparative basis, the settlement figure for 2017 was the third highest over the past eight years.

This trend, however, did not hold for wage & hour class action settlements. In 2017, the value of the top ten wage & hour settlements was $525 million, a decrease of over $170 million from 2016. However, when analyzed over the past eight years, the figure of $525 million actually was the second highest annual total in that time period.

When coupled together, the two-year period of 2016 and 2017 saw over $1.2 billion in the top wage & hour settlements. Further, this is most telling in examining the last four years, for 2016 represented almost a quadrupling (after two years of declining numbers in 2013 and 2014) in the value of the top wage & hour settlements as compared to 2014.[2]

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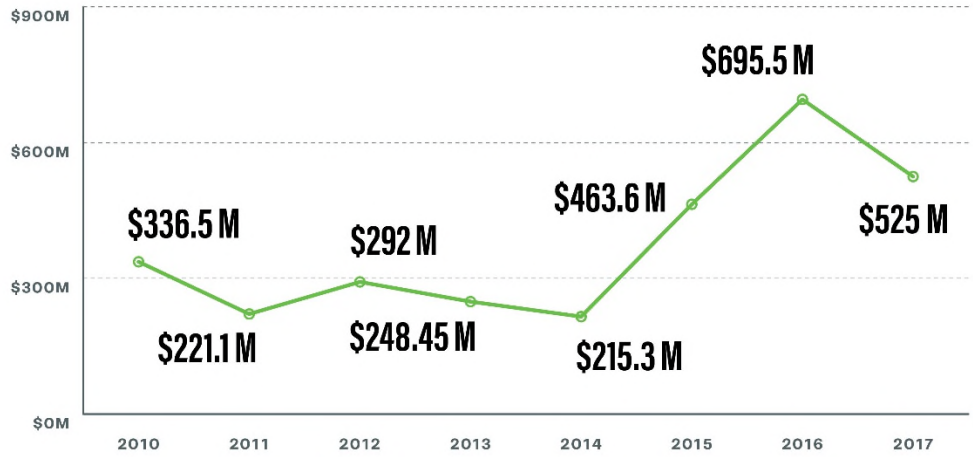
[1] An analysis of class action settlement activity is discussed in Chapter II of this Report. The total of $293.5 million in 2017 was the second highest total since the *Wal-Mart* ruling in 2011. By comparison, the total of $79.81 million for the top ten largest employment discrimination class action settlements in 2016 was the second lowest total since 2006; the figures for each year were as follows: 2015 – $295.57 million; 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, and with the second lowest total in 2017 since the *Wal-Mart* ruling.

[2] By comparison, the top ten wage & hour class action settlements in 2015 totaled $463.6 million, compared to $215.3 million in 2014 and $248.45 million in 2013. The figure of $695.5 million in 2016 is the highest amount over the last decade.

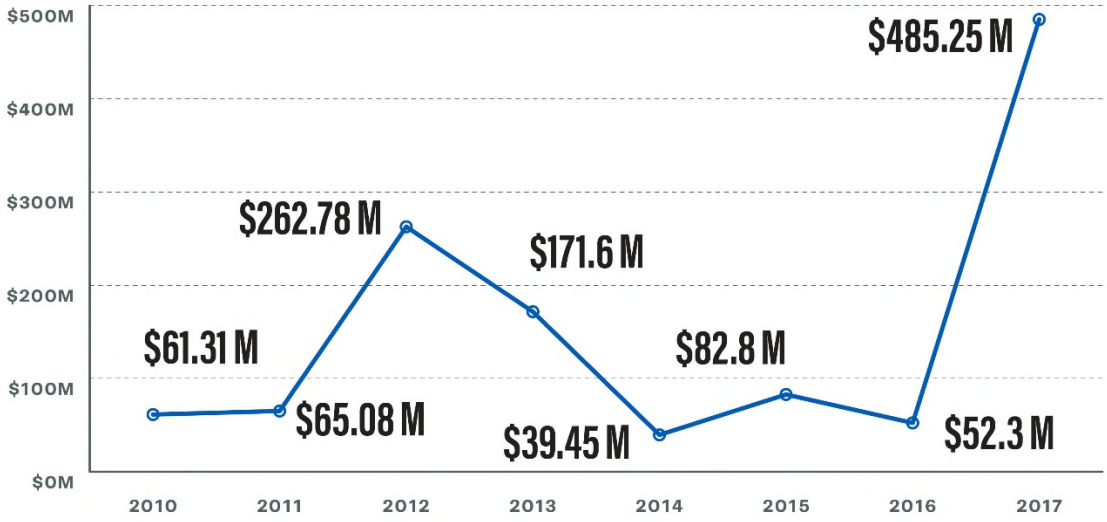
This trend is illustrated by the following chart:



VALUE OF TOP 10 WAGE & HOUR CLASS ACTION SETTLEMENTS

These settlement numbers reflect that *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)).

Relatedly, the top ten settlements in government enforcement litigation experienced a booming upward arc, as they increased nearly ten-fold from $52.3 million in 2016 to $485.25 million in 2017. By comparison, the top ten settlements in 2016 represented a slight decrease even from 2015, when settlements hit one of their lowest points in the past eight years.[3] This trend is illustrated by the following chart of settlements from 2010 to 2017:



VALUE OF TOP 10 GOVERNMENT ENFORCEMENT LITIGATION SETTLEMENTS

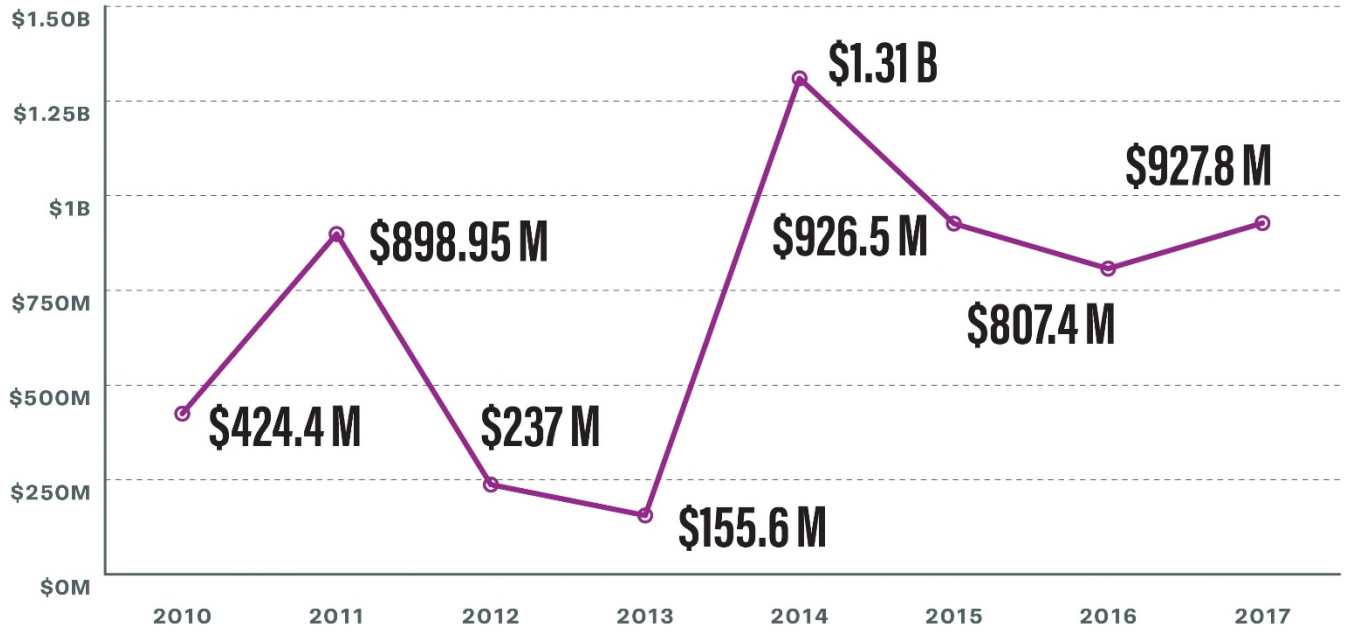
[3] The total for the top ten government enforcement litigation settlements was $82.8 million in 2015, compared to $39.45 million in 2014, $171.6 million in 2013, and $262.78 million in 2012. Other than in 2014 (when governmental settlements hit their lowest point in the last decade at $39.45 million), the value of the top ten settlements in 2016 was the second lowest figure for the past decade.

ERISA class action settlements also were up in 2017, as the top ten settlements totaled $927.8 million. This figure represented an increase from $807.4 million in 2016.

Further, ERISA settlements for the two-year period of 2016 and 2017 were a combined $1.73 billion.

While the 2016 aggregate settlement number was nearly six times greater than in 2013,[4] it entailed a significant decrease from 2014 (when settlements were $1.31 billion).

This trend is illustrated by the following chart of settlements from 2010 to 2017:



VALUE OF TOP 10 ERISA CLASS ACTION SETTLEMENTS

Settlement trends in workplace class action litigation are impacted by many factors.

In the coming year, settlement activity is apt to be influenced by developing case law interpreting U.S. Supreme Court rulings, the impact of the Trump Administration's labor and employment enforcement policies, case filing trends of the plaintiffs' class action bar, and class certification rulings

(ii) Class Certification Trends In 2017

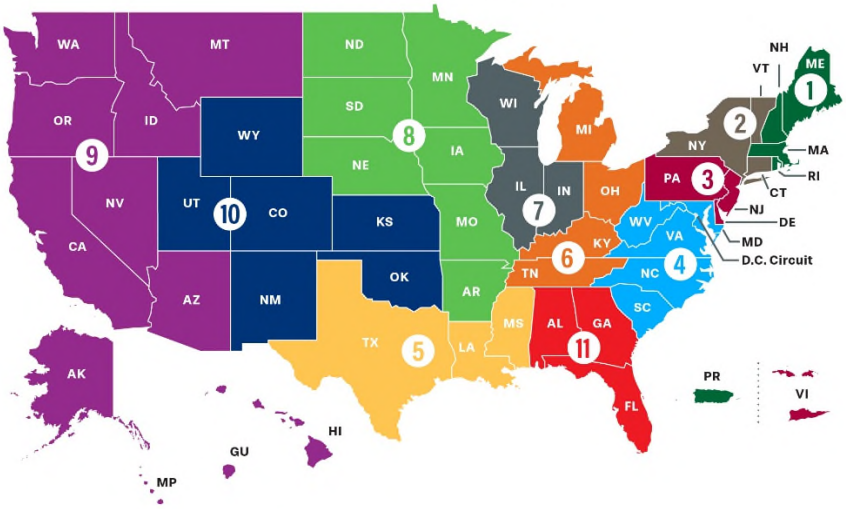
Anecdotally, surveys of corporate counsel confirm that complex workplace litigation – and especially class action and multi-plaintiff lawsuits – remains one of the chief exposures driving corporate legal budgetary expenditures, as well as the type of legal dispute that causes the most concern for companies.

The prime component in that array of risks is now indisputably complex wage & hour litigation.

The circuit-by-circuit analysis of 290 class certification decisions in all varieties of workplace class action litigation is detailed in the following map:

[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.

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	1	1	0	0	0	1	1	1	0	1	1
Certification Motions Denied	0	1	0	0	0	0	0	0	0	0	3	0
Sub-Total:	**7 Granted / 4 Denied**											
ERISA Decisions												
Certification Motions Granted	0	6	0	2	0	1	0	1	5	0	2	0
Certification Motions Denied	0	1	0	1	1	0	0	1	0	0	1	0
Sub-Total:	**17 Granted / 5 Denied**											
FLSA Certification Decisions												
Conditional Certification Motions Granted	6	33	4	12	25	21	17	8	25	10	8	1
Conditional Certification Motions Denied	2	6	2	1	5	5	7	4	23	1	7	0
Decertification Motions Granted	0	3	1	0	1	1	3	1	5	0	0	0
Decertification Motions Denied	0	3	0	0	2	0	1	1	2	0	0	0
Sub-Total:	**170 Conditional Certifications Granted / 63 Conditional Certifications Denied 15 Decertification Motions Granted / 9 Decertification Motions Denied**											
Total:	**194 Total Certification Motions Granted / 72 Total Certification Motions Denied 15 Decertification Motions Granted / 9 Decertification Motions Denied**											

Wage & Hour Certification Trends

While plaintiffs continued to achieve robust numbers of initial conditional certification rulings of wage & hour collective actions in 2017, employers also secured significant victories in defeating conditional certification motions and obtaining decertification of § 216(b) collective actions.[5] The percentage of successful motions for decertification brought by employers rose by nearly 18% in 2017. This was the highest success rate over the past decade.

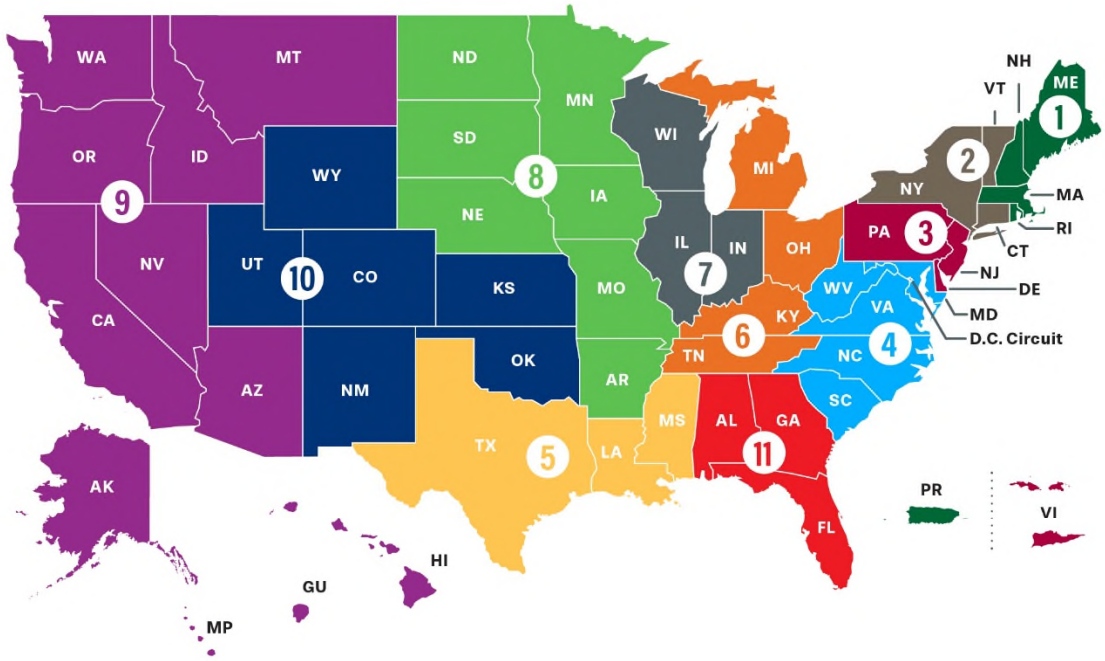
Most significantly, for only the second time in over a decade, and for the second year in a row, wage & hour lawsuit filings in federal courts decreased. That being said, the volume of FLSA lawsuit filings for the preceding four years – during 2014, 2015, 2016, and 2017 – is the greatest in the last several decades.

[5] An analysis of rulings in FLSA collective actions in 2017 is set forth in Chapter V, and analysis of rulings in state law wage & hour class action in 2017 is set forth in Chapter VII, Section B.

As a result, an increase in FLSA filings over the past several years had caused the issuance of more FLSA certification rulings than in any other substantive area of complex employment litigation – 257 certification rulings in 2017, as compared to the 224 certification rulings in 2016 and 175 certification rulings in 2015.

The analysis of these rulings – discussed in Chapter v. of this Report – shows that more cases are brought against employers in "plaintiff-friendly" jurisdictions such as the judicial districts within the Second and Ninth Circuits. This trend is shown in 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	6	33	4	12	25	21	17	8	25	10	8	1
Conditional Certification Motions Denied	2	6	2	1	5	5	7	4	23	1	7	0
Decertification Motions Granted	0	3	1	0	1	1	3	1	5	0	0	0
Decertification Motions Denied	0	3	0	0	2	0	1	2	2	0	0	0

Total: 170 Conditional Certifications Granted / 63 Conditional Certifications Denied
15 Decertification Motions Granted / 9 Decertification Motions Denied

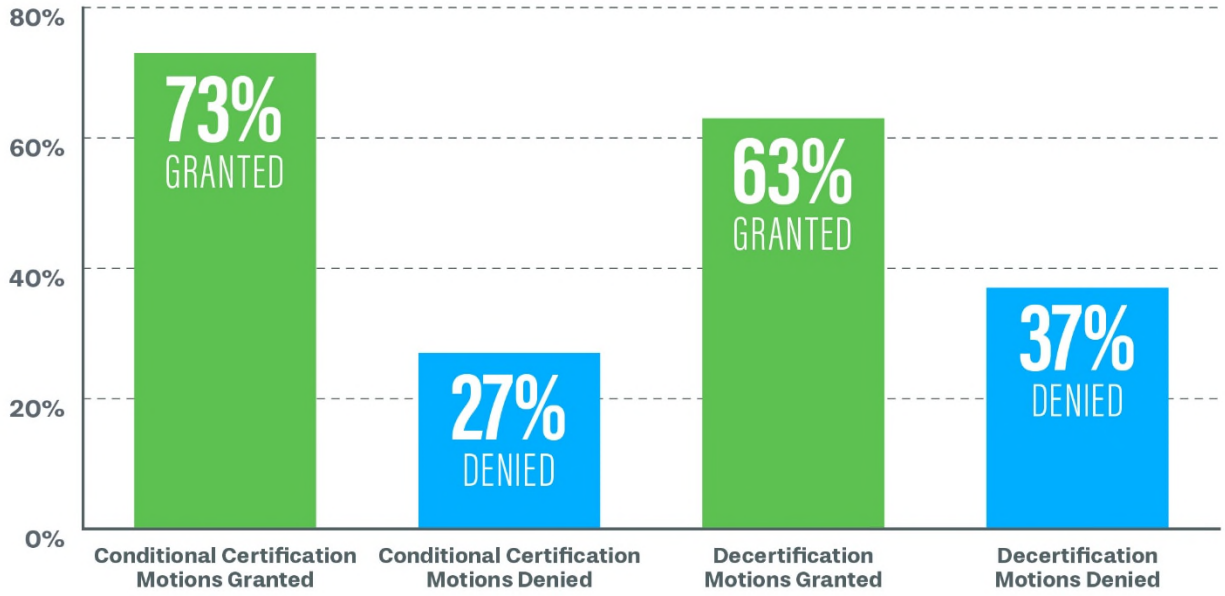
The statistical underpinnings of this circuit-by-circuit analysis of FLSA certification rulings is telling in several respects.

First, it substantiates that the district courts within the Ninth Circuit and the Second Circuit are the epi-centers of wage & hour class actions and collective actions. More cases were prosecuted and conditionally certified – 48 certification orders in the Ninth Circuit and 39 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 Fifth, Sixth, and Seventh Circuits were not far behind, with 30, 26, and 24 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 (170 of 233 rulings, or approximately 73%). However, in terms of "second stage" decertification motions, employers prevailed in a majority of those cases (15 of 24 rulings, or approximately 63% of the time).

The "first stage" conditional certification statistics for plaintiffs at 73% for 2017 are aligned to the numbers in 2016, when plaintiffs won 75% of "first stage" conditional certification motions. However, employers fared much better in 2017 on "second stage" decertification motions. Employers won decertification at a rate of 63%, which was up from 45% in 2016 and 36% in 2015.

The following chart illustrates this trend for 2017:



2017 FLSA CONDITIONAL CERTIFICATION MOTIONS AND DECERTIFICATION MOTIONS

Third, this reflects that there has been an on-going migration of skilled plaintiffs' class action lawyers into the wage & hour litigation space. Experienced and able plaintiffs' class action counsel typically secure better results. Further, 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 or an ERISA 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 and collective actions by plaintiffs' lawyers is viewed as an investment of time and money, 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. Finally, as success in litigation often begets copy-cat filings, that the value of top wage & hour settlements in 2017 topped $525 million – and over $1.2 billion in the last two years – is likely to prompt more litigation in 2018.

Hence, as compared to ERISA and employment discrimination class actions, FLSA litigation is less difficult or protracted for the plaintiffs' bar, 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. The certification statistics for 2017 confirm these factors.

Employment Discrimination & ERISA Certification Trends

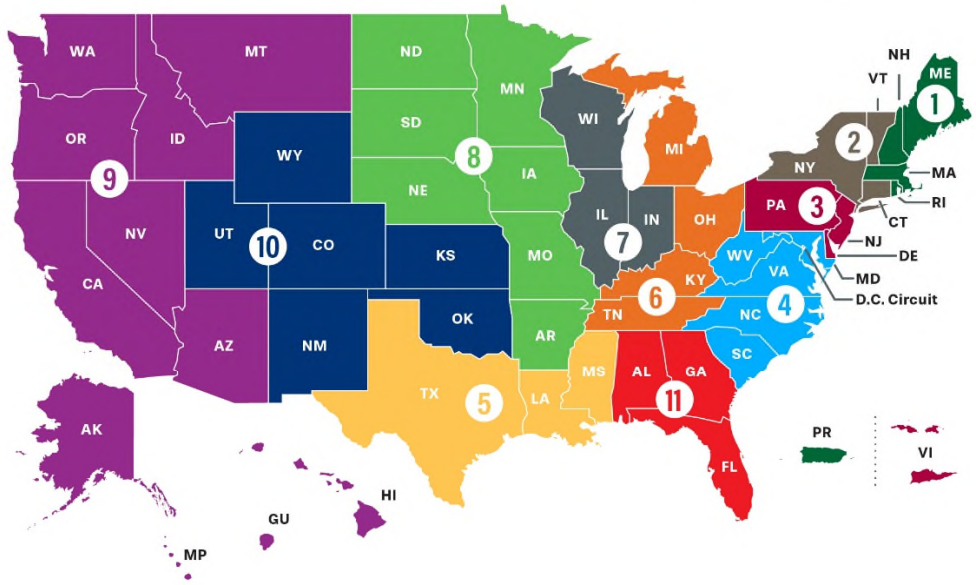
At the same time, the rulings in *Wal-Mart* and *Comcast* also fueled more critical thinking and crafting of case theories in employment discrimination and ERISA class action filings in 2017. The Supreme Court's two Rule 23 decisions have had the effect of forcing the plaintiffs' bar to "re-boot" the architecture of their class action theories.[6] At least one result was the decision two years ago in *Tyson Foods v. Bouaphakeo,* 136 S. Ct. 1036 (2016), in which the Supreme Court accepted the plaintiffs' arguments that, in effect, appeared to soften the requirements previously imposed in *Wal-Mart* and *Comcast* for maintaining and proving class claims, at least in wage & hour litigation.

Hence, it is clear that the playbook on Rule 23 strategies is undergoing a continuous process of evolution. Filings of "smaller" employment discrimination class actions have increased due to a strategy whereby state or regional-type classes are asserted more often than the type of nationwide mega-cases that *Wal-Mart* discouraged. In essence, at least in the employment discrimination area, the plaintiffs' litigation playbook is more akin to a strategy of "aim small to secure certification, and if unsuccessful, then miss small."

In turn, employment-related class certification motions outside of the wage & hour area were a mixed bag or tantamount to a "jump ball" in 2017, as 7 of the 11 were granted and 4 of the 11 were denied.

The following map demonstrates this array of certification rulings in Title VII and ADEA discrimination cases:

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	1	1	0	0	0	1	1	1	0	1	1
Certification Motions Denied	0	1	0	0	0	0	0	0	0	0	3	0

Total: 7 Granted / 4 Denied

[6] An analysis of certification rulings in Title VII employment discrimination class actions in 2017 is set forth in Chapter III, Section A; an analysis of ADEA collective action certification rulings is set forth in Chapter IV, Section A; and an analysis of state court employment discrimination certification decisions is set forth in Chapter VII, Section A. In addition, an analysis of non-workplace class action rulings that impact employment-related cases is set forth in Chapter IX.

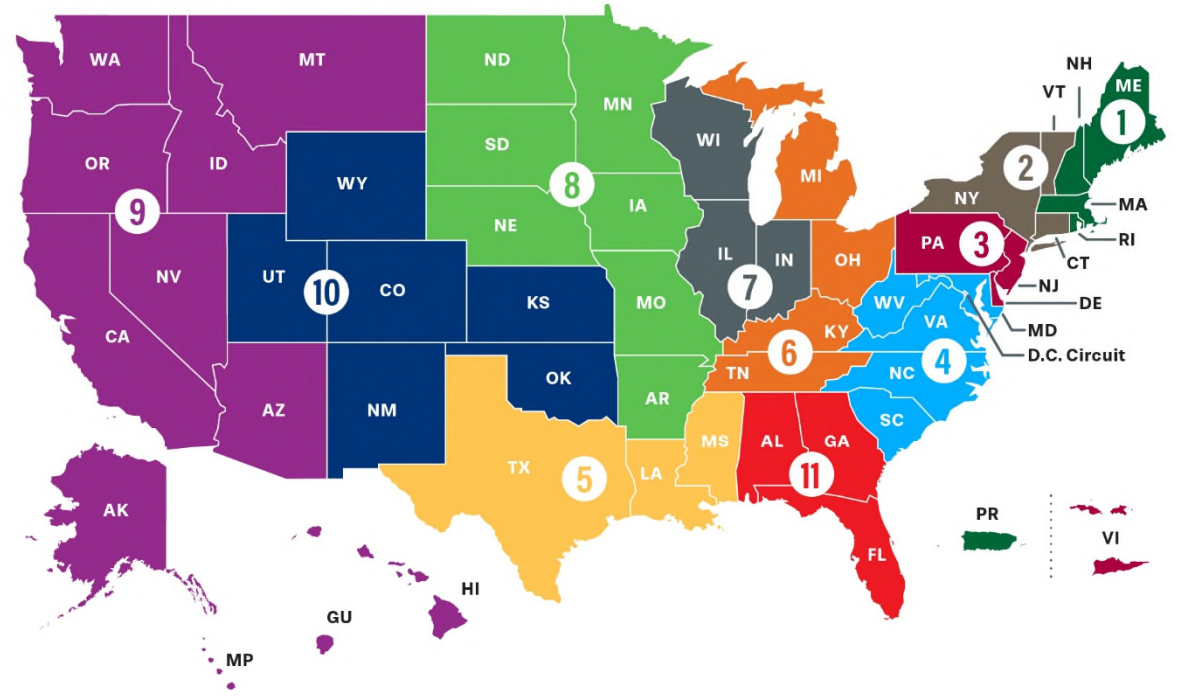
In terms of the ERISA class action litigation scene in 2017,[7] the focus continued to rest on precedents of the U.S. Supreme Court as it shaped and refined the scope of potential liability and defenses in ERISA class actions.

The *Wal-Mart* decision also has changed the ERISA certification playing field by giving employers more grounds to oppose class certification. The decisions in 2017 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 in litigating certification motions in ERISA class actions, as plaintiffs won 17 of 22 certification rulings in 2017.

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	6	0	2	0	1	0	1	5	0	2	0
Certification Motions Denied	0	1	0	1	1	0	0	1	0	0	1	0

Total: 17 Granted / 5 Denied

Overall Trends

So what conclusions overall can be drawn on class certification trends in 2017?

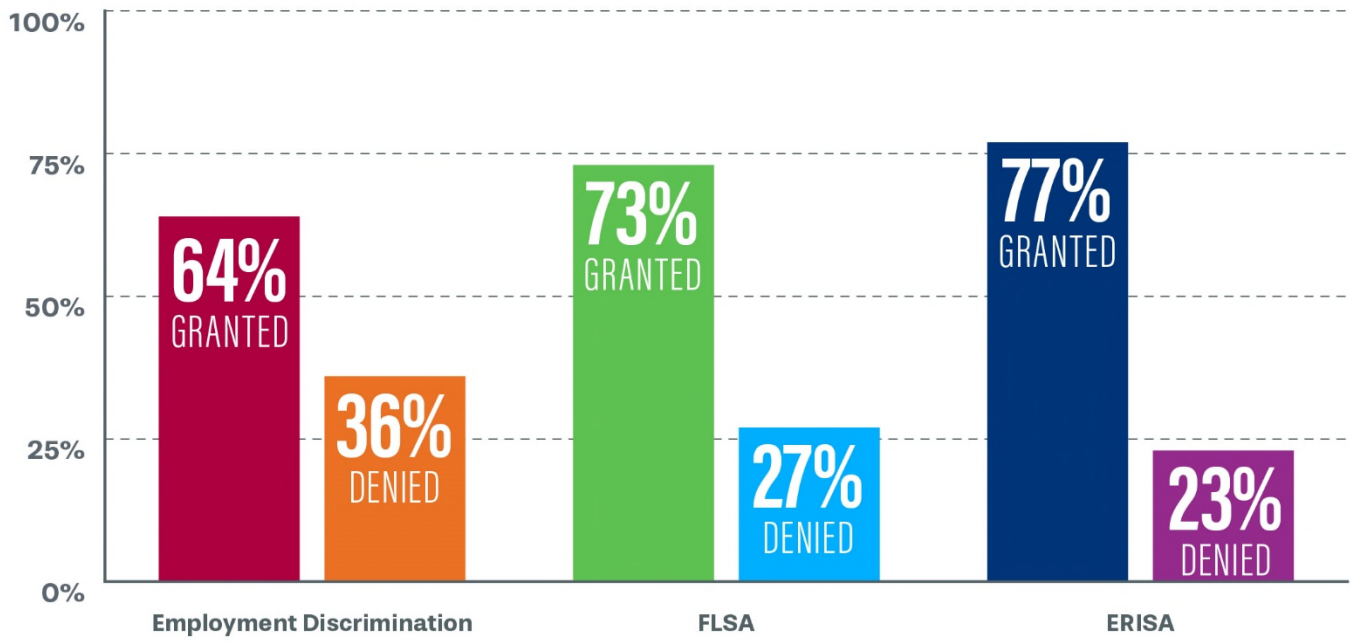
[7] An analysis of rulings in ERISA class actions in 2017 is set forth in Chapter VI, Section A.

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. To the extent class certification aids the plaintiffs' bar in monetizing their lawsuit filings and converting them into class action settlements, the conversion rate is robust.

Whereas class certification was somewhat of a coin toss for employment discrimination cases (7 motions granted and 4 motions denied in 2017), class certification is relatively easier in ERISA cases (17 motions granted and 5 motions denied in 2017), but most prevalent in wage & hour litigation (with 170 conditional certification motions granted and 63 motions denied, as well as 15 decertification motions granted and 9 motions denied).

The following bar graph details the win/loss percentages in each of these substantive areas:

- a 64% success rate for certification of employment discrimination class actions (both Title VII and age discrimination cases);
- a 77% success rate for certification of ERISA class actions; and,
- a 73% success rate for conditional certification of wage & hour collective actions.



2017 CERTIFICATION MOTIONS FOR EMPLOYMENT DISCRIMINATION, FLSA, AND ERISA

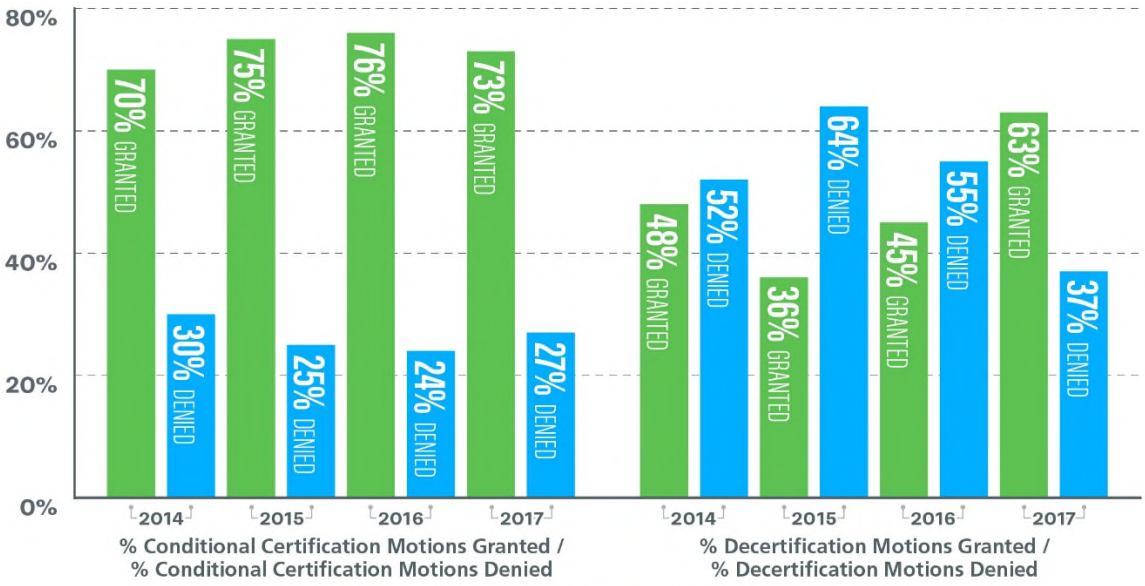
Obviously, the most certification activity in workplace class action litigation is in the wage & hour space.

The trend over the last three years in the wage & hour space reflects a steady success rate that ranged from a low of 70% to a high of 76% (with 2017 right in the middle at 73%) for the plaintiffs' bar, which is tilted toward plaintiff-friendly "magnet" jurisdictions were the case law favors workers and presents challenges to employers seeking to block certification.

Yet, the key statistic in 2017 for employers was an increase in the odds of successful decertification of wage & hour cases to 63%, as compared to 45% in 2016, 36% in 2015, and 52% in 2014.

The on-going defense of litigation and participation in discovery following conditional certification is often an expensive proposition for employers, and many choose to settle to avoid that scenario. However, for employers that face the costs of discovery and then litigate decertification motions, the pay-off in 2017 was a fracturing of cases at the highest success rate in over a decade – a decertification percentage of 63%.

Comparatively, the trend over the past four years for certification orders is illustrated in the following chart:



2014 - 2017 FLSA CONDITIONAL CERTIFICATION MOTIONS AND DECERTIFICATION MOTIONS

While each case is different and no two class actions or collective actions are identical, these statistics paint the all-too familiar picture that employers have experienced over the last several years. The new wrinkle to influence these factors in 2017 was the Supreme Court's ruling in 2016 in *Tyson Foods*. To the extent it assists plaintiffs in their certification theories, future certification decisions may well trend further upward for workers.

Lessons From 2017

There are multiple lessons to be drawn from these trends in 2017.

First, while the Wal-Mart ruling undoubtedly heightened commonality standards under Rule 23(a)(2) starting in 2011, and the Comcast decision 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 2017, their certification numbers were consistent with levels in the last several years.

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 first-stage conditional certification orders under 29 U.S.C. § 216(b). If anything, the ruling two years ago in Tyson Foods has made certification prospects even easier for plaintiffs in the wage & hour space, insofar as conditional certification motions are concerned.

Third, while monetary relief in a Rule 23(b)(2) context is severely limited, certification is the "holy grail" in class action litigation, 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 and ERISA class actions, as plaintiffs' lawyers can recover awards of attorneys' fees under fee-shifting statutes in an employment litigation

context. In this respect, the plaintiffs' bar is nothing if not ingenuous, and targeted certification theories (e.g., issue certification on a limited discrete aspect of a case) are the new norm in federal and state courthouses.

Fourth, during the certification stage, courts are more willing than ever before to assess facts that overlap with 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.

In sum, notwithstanding these shifts in proof standards and the contours of judicial decision-making, the likelihood of class certification rulings favoring plaintiffs are not only "alive and well" in the post-Wal-Mart and post-Comcast era, but also thriving.

(iii) Governmental Enforcement Litigation Trends In 2017

On the governmental enforcement front, the change-over from the Obama Administration to the Trump Administration had little to no impact on reducing the pace of litigation filings and settlements in 2017. Both the EEOC and the DOL intensified the focus of their administrative enforcement activities and litigation filings in 2017. At the same time, the number of lawsuits filed and the resulting recoveries by settlement – measured by aggregate litigation filings and the top 10 settlements in government enforcement litigation – constituted a ten-fold increase as compared to what the EEOC and DOL achieved in 2016.

To the extent the Trump Administration aims to change those dynamics, its agency appointees either were not nominated in time to influence their respective agencies or were not put into place until mid to late 2017. The result was a delay in charges to agency policies and priorities. In this respect, fundamental changes to patterns in government enforcement litigation are more akin to changing the direction of a large sea-going cargo tanker than a small motor boat. Change is inevitable, but it takes time. Thus, the impact of change on governmental litigation enforcement trends is not likely to be felt until well into 2018.

As a result, the EEOC's lawsuit count increased geometrically in 2017. By continuing to follow through on the systemic enforcement and litigation strategy plan it announced in April of 2006 (that centers on the government bringing more systemic discrimination cases affecting large numbers of workers), the EEOC filed more cases as well as more systemic lawsuits. As 2017 demonstrated, the EEOC's prosecution of pattern or practice lawsuits remained an agency-wide priority backed up by the numbers. Many of the high-level investigations started in the last three years mushroomed into the institution of EEOC pattern or practice lawsuits in 2017.

By comparison to previous years, 2017 was a big one for the EEOC in terms of the number of lawsuits filed. Total merits filings were up more than 100% as compared to 2016. In fact, the EEOC filed more lawsuits in the month of September of 2017 than it did in all of the months of 2016 combined.

This past year also marked the first year of the EEOC's new Strategic Enforcement Plan ("SEP"), which is intended to guide enforcement activity for 2017 to 2021. Although the new SEP outlines the same six enforcement priorities as in prior years, few people familiar with how the agency pursues its objectives expect that the EEOC will continue to enforce those priorities in the same way under the Trump Administration. The six enforcement priorities include: (1) the elimination of systemic barriers in recruitment and hiring; (2) protection of immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.

Each of these priorities can be interpreted in multiple ways. For example, the EEOC has consistently focused on the protection of lesbians, gay men, bisexuals, and transgender people as one of the most important emerging and developing issues in the workplace. The EEOC's efforts in this area have resulted in a body of case law in many jurisdictions over the past several years that now holds that discrimination against transgender individuals, or on the basis of sexual orientation, is a form of sex discrimination prohibited by Title VII. However, the

Department of Justice under President Trump has recently disagreed with that interpretation. This may signal that this is one area that will shift in 2018 as high-level personnel changes are made within the EEOC.

The EEOC also focused in the past year on employers' utilization of social media and the use of algorithms and information available on the internet to screen job applicants. Recent comments by the EEOC's staff indicate that this may be one of the "barriers to recruitment and hiring" that the agency will focus on in 2018 and beyond. Along the same lines, the EEOC has shown an increased willingness to bring ADEA lawsuits against employers – especially in the hospitality industry – that it believes are discriminating against hiring applicants aged 40 and over.

The EEOC also recently issued new guidance impacting two of its enforcement priorities, including preserving access to the legal system (*i.e.*, through increased enforcement of the anti-retaliation provisions of Title VII, the ADA, and the ADEA) and preventing harassment in the workplace. Among other things, the retaliation guidance expands the definition of "adverse action" to include one-off incidents and warnings, as well as anything that reasonably could be likely to deter protected activity. With respect to preventing harassment, the new guidance clarifies the EEOC's thinking about what constitutes a hostile work environment and the defenses available to employers when that hostile work environment is the result of supervisors' misconduct. Although important developments in their own right, the real impact of these new guidelines may not be clear until employers see how they are interpreted by the EEOC in active litigation situations. Like the priorities themselves, that will be impacted by whatever new policies and directives are put in place by the new Trump appointees.

It also appears that the EEOC is finally executing on its oft-stated intention to increase enforcement under the Equal Pay Act ("EPA"). The EEOC filed 11 EPA lawsuits in 2017. This is a significant increase over prior years (six EPA lawsuits were filed in 2016, five in 2015, and two in 2014). However, its enforcement efforts in this area may have suffered a setback when the changes the EEOC planned to make to the EEO-1 reporting requirements were put on hold in 2017. It was widely speculated that the new reporting requirements would have assisted the EEOC in bringing more claims under the EPA. Under the leadership of the new Administration, the Office of Management and Budget, pursuant to its authority under the Paperwork Reduction Act, stayed implementation of the EEOC's new EEO-1 regulations this past year.

The Commission's 2017 Performance Accountability Report[8] announced that its systemic litigation program continues to be a focus for the EEOC. The EEOC labels a case "systemic" if it "has a broad impact on an industry, company, or geographic area." The EEOC's FY 2017 report[8] outlined the EEOC's activity from October 2, 2016 to September 30, 2017. It showed the following:

- The EEOC's field offices resolved 329 systemic investigations and collected $38.4 million in remedies (compared to 273 systemic investigations and $20.5 million in 2016). The figures for 2017 constitute significant increases over the previous year, and are near record amounts for monetary relief for systemic cases.
- The EEOC also issued cause determinations finding discrimination in 167 systemic investigations (compared to 113 in 2016). Consequently, not only did the EEOC resolve more systemic investigations compared to 2016, but also it made considerably more cause determinations that it converted into beefed-up recoveries for claimants compared to last year.
- The EEOC secured approximately $484 million in total relief in 2017 in litigation, mediations, and pre-litigation investigations. This tracks closely to last year's total relief figure of $482.1 million. It also includes $355.6 million obtained through mediation, conciliation, and settlement for victims of discrimination in private, state and local government, and federal workplaces. That number is marginally up from last year, which saw $347.9 million in such recoveries.

[8] The EEOC's 2017 Performance Accountability Report is at https://www.eeoc.gov/eeoc/plan/2017par.cfm.

- Litigation recoveries, on the other hand, have been steadily declining over the past few years, hitting only $42.4 million in 2017. This is markedly lower than 2016 and 2015, which saw the EEOC obtain $52.2 million and $65.3 million in litigation recoveries respectively.
- The EEOC filed 184 merits lawsuits in 2017. This is more than double the 86 merits lawsuits that were filed in 2016. Of the lawsuits, 124 were on behalf of individuals, 30 were non-systemic suits with multiple victims, and the other 30 were systemic claims. The EEOC also filed 18 subpoena enforcement actions in 2017. Hence, the EEOC in the first year of the Trump Administration was far more active in filing lawsuits than in the final year of the Obama Administration.
- In FY 2017, the EEOC resolved 99,109 charges, a marked increase over the past two years. As a result, the EEOC decreased its charge inventory by 16.2%, to 61,621 charges. This is the lowest level of charge inventory in 10 years and represents a significant reduction compared to FY 2016, when the EEOC only reduced its outstanding charges by 3.8%.

By comparison, the DOL's enforcement recoveries dwarfed those of the EEOC in 2017, as the DOL undertook aggressive enforcement activities over the past year and scored increases in settlements both in court actions and in the administrative investigation process. Without a full leadership team in place at the DOL's Wage & Hour Division ("WHD"), the enforcement program continued on the same track as it had been under the Obama Administration. In FY 2017, the WHD recovered more than $270 million in back pay wages for more than 240,000 workers, which represented a solid increase from the back wages recovered in the previous year. Given the Trump Administration's focus on policy changes, employers can expect that many of these enforcement strategies will get a closer look as the new DOL leadership team falls into place in 2018.

Over the past several years, the WHD fundamentally changed the way in which it pursues its investigations. Suffice to say, the investigations have been more searching and extensive, and often result in higher monetary penalties for employers. According to the DOL, since early 2009, the WHD has closed 200,000 cases nationwide, resulting in more than $2.2 billion in back wages for over 2.24 million workers. In FY 2017, the WHD collected more than $270 million in back wages. For much of the year, the DOL kept up its aggressive enforcement program, particularly in the hotel, restaurant, and retail industries. Much of the WHD's enforcement and other activities took place under the umbrella of "fissured industries" initiatives, which focus on industries with high usage of franchising, sub-contracting, and independent contractors. At the conclusion of those enforcement actions, the WHD continued to increase its use of civil money penalties, liquidated damages, and enhanced compliance agreements. As the Trump Administration reviews and considers the prior Administration's enforcement policies, we expect that 2018 is apt to bring a stark change in enforcement priorities and strategies.

The new year brought a new Administration and high expectations by employers for change at the WHD. Political reality and the Senate calendar, however, combined to limit the WHD's ability to implement that change. For most of 2017, only Secretary of Labor Alex Acosta and a single Assistant Secretary had been confirmed by the Senate. By year's end, the DOL Solicitor and several Assistant Secretaries had been confirmed; the critical position of the WHD Administrator remained vacant, as well as another dozen or so senior positions at the DOL. With the senior leadership team in place at the DOL by 2018, the agency is likely to make significant headway on the Trump Administration's policy objectives in the coming year.

Nevertheless, 2017 provided an opportunity for the new WHD to address some of its most pressing issues. The DOL was immediately tasked with defending the prior Administration's revisions to the Part 541 overtime exemption regulations, which had been enjoined in federal court in advance of their effective date in late 2016. Those revisions, which would have doubled the existing salary level required for the white-collar exemptions, substantially increased the minimum level required for the highly-compensated-employee exemption, and automatically increased the salary level on a periodic basis. These were the first changes to Part 541 in more than 10 years. However, those changes were ruled invalid on the basis that the salary level established in the regulation exceeded the Department's authority.

The Trump Administration managed to position itself well for future developments regarding the overtime regulations, defending the DOL's authority to set a salary level generally (which some believed had been called

into question by the order declaring the Obama overtime rule invalid), while electing not to defend the specific salary level established in the 2016 regulation. It is likely that DOL will propose yet another change to the regulations in 2018.

The DOL also took the first steps in rolling back the prior Administration's view of what it means to be "employed" under the FLSA. In June of 2017, the DOL announced the withdrawal of the WHD Administrator's Interpretation 2015-1 ("AI"), which contained the WHD's analysis of the employee vs. independent contractor issue, and AI 2016-1, which contained the WHD's analysis of the joint employment issue. Both AIs were regarded as having an incredibly broad interpretation of what it means to have an employment relationship. Although no replacement guidance has yet been issued, the withdrawal of the AIs is seen as a signal that the current Administration does not take such an expansive view of what it means to be "employed" under the FLSA.

Around the same time as its withdrawal of the AIs, the DOL also announced the return to the use of opinion letters. After decades of use, these regulatory tools had been abandoned by the Obama Administration. The DOL's decision to restart its issuance of opinion letters allows employers and employees alike to seek formal guidance from the WHD on some of the most challenging wage & hour issues. No opinion letters have yet been issued, but it is clear that compliance assistance will once again be a valuable tool in the arsenal of the WHD, alongside its enforcement activities.

Not to be outdone, the National Labor Relations Board ("NLRB") also undertook an ambitious agenda in 2017. 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. By the end of the year, however, the Trump Administration's appointees began to roll-back NLRB precedents and positions that had been espoused during the Obama Administration, such as a reversal of the expansive view of joint employer liability, allowing more deference to employer workplace rules, eliminating protections for obscene, vulgar, and highly inappropriate activity under the NLRA.

(iv) 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. Those rulings are at the core of class certification issues under Rule 23. To that end, federal and state courts cited *Wal-Mart* in 586 rulings in 2017; they cited *Comcast* in 238 cases in 2017.

The past year also saw a change in the composition of the Supreme Court in April of 2017, with Justice Neil Gorsuch assuming the seat of Antonin Scalia after his passing in 2016. Given the age of some of the other sitting Justices, President Trump may have the opportunity to fill additional seats on the Supreme Court in 2018 and beyond, and thereby influence a shift in the ideology of the Supreme Court toward a more conservative and strict constructionist jurisprudence. In turn, this is apt to change legal precedents that shape and define the playing field for workplace class action litigation.

Rulings In 2017

In terms of direct decisions by the Supreme Court impacting workplace class actions, this past year was no exception. In 2017, the Supreme Court decided seven cases – three employment-related cases and four class action cases – that will influence complex employment-related litigation in the coming years.

The employment-related rulings included one case brought under the Worker Adjustment and Retraining Notification Act, one ERISA case, and one EEOC case. A rough scorecard of the decisions reflects two distinct plaintiff/worker-side victories, and defense-oriented rulings in five cases.

- ***EEOC v. McLane Co.,* 137 S. Ct. 1159 (2017)** – Decided on February 21, 2017, the case involved the applicable standard of appellate review of district court decisions to quash or enforce EEOC subpoenas. The Supreme Court held that the standard must be based on an abuse of discretion, and contrary lower court decisions – which called for *de novo* review – were rejected. The EEOC has broad statutory authority to issue subpoenas in the course of investigating charges of employment discrimination, and it may seek enforcement of its subpoenas in federal court when employers refuse to comply with them. In that event, the applicable test favors enforcement of the subpoena. The Supreme Court determined that if the charge is proper and the material requested is relevant, the subpoena should be enforced unless the employer can establish that the subpoena is too indefinite, has been issued for an illegitimate purpose, or is unduly burdensome. In sum, the Supreme Court underscored the breadth of the agency's authority to subpoena information from employers in the course of investigating discrimination charges.
- ***Expressions Hair Design, et al. v. Schneiderman*, 137 S. Ct. 1144 (2017)** – Decided on March 29, 2017, this case involved a class action by a group of New York merchants, arguing that a New York statute that prohibits merchants from charging a surcharge to customers who use credit cards violated the First Amendment because it regulates what they say about their prices. The lower courts had dismissed the suit out of hand, concluding that price regulations regulated conduct alone and thus are immune from scrutiny under the First Amendment. The Supreme Court held that because the statute goes beyond the pure regulation of price sufficiently into the realm of regulating speech, it is subject to scrutiny under the First Amendment. As a result, the case was remanded for further consideration of the validity of the statute under the First Amendment. The ruling is a narrow one, but ensures the continuation of class action litigation over the New York statute.

- ***Advocate Health Care Network, et al. v. Stapleton*, 137 S. Ct. 1652 (2017)** – Decided on June 5, 2017, this ruling determined that pension plans that otherwise meet the definition of a church plan definition under the ERISA can qualify for the exemption without being established by a church. The decision is the culmination of a wave of ERISA class actions brought by employees of religiously affiliated non-profit hospitals who asserted that the employers improperly claimed that their pension plans were ERISA-exempt "church plans."

- ***Microsoft Corp. v. Baker, et al.*, 137 S. Ct. 1702 (2017)** – Decided on June 12, 2017, this ruling determined that the voluntary dismissal of individual claims by class representatives after denial of class certification deprives appellate courts of jurisdiction over review of the underlying class certification decision. The case involved consideration of a strategy for appealing denials of class certification whereby plaintiffs responded to a denial of class certification with a voluntary agreement to dismiss their claims. With that dismissal in hand, they would claim they have a final order that they can appeal, planning to revive their claims if the appeal reversed the certification order. The Supreme Court unanimously rejected this practice. It held that plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment simply by dismissing their claims with prejudice – subject, no less, to the right to revive those claims if the denial of class certification was reversed on appeal. The ruling should help corporate defendants in defeating piece-meal attacks on favorable class certification orders.

- ***Bristol-Myers Squibb Co., et al. v. Superior Court Of California*, 137 S. Ct. 1773 (2017)** – Decided on June 19, 2017, this opinion established limitations on personal jurisdiction over non-resident plaintiffs in "mass actions," a litigation strategy often utilized by plaintiffs' class action lawyers to sue corporations in plaintiff-friendly jurisdictions that have little to no connection with the dispute. The Supreme Court determined that the requisite connection between the corporate defendant and the litigation forum must be based on more than a combination of the company's

connections with the state and the similarity of the claims of the resident plaintiffs and the non-resident claimants. The ruling reversed a lower court decision that hundreds of plaintiffs who sued a corporation in California state court over alleged injuries associated with a corporation's product could not sue in that state because they were not residents. In effect, it reversed a decision of the California Supreme Court and directed the dismissal of 592 non-California claims from 33 other states. The ruling has significant implications for the location and scope of class action litigation. As a result, the ruling supports the view that plaintiffs cannot simply "forum shop" in large class actions, and instead must sue where the corporate defendant has significant contacts for purposes of general jurisdiction or limit the class definition to residents of the state where the lawsuit is filed. It should provide some measure of protection to corporations that often are hauled into plaintiff-friendly jurisdictions across the country to which they have nor the plaintiffs suing them had any connection.

- ***CalPERS, et al. v. ANZ Securities, Inc.,*** **137 S. Ct. 2042 (2017)** – Decided on June 26, 2017, this decision involved a relatively technical question regarding the right to opt-out of a class action – when plaintiffs file a class action, are members of the class entitled to opt-out and represent themselves, and how statutes of limitations work in that situation. Federal securities laws include two different kinds of filing deadlines for claims about misrepresentations in connection with the issuance of securities, including a one-year deadline running from the discovery of the untrue statement and an outside three-year deadline running from the date on which the statement was made. The Supreme Court held that tolling under *American Pipe* applies only to the one-year deadline, not the three-year deadline. Applying that rule, it barred the action brought in this case by CalPERS, which had opted-out of a large class action brought against Lehman Brothers; the original action was brought in a timely manner, but CalPERS did not opt-out of that action until more than three years after the challenged statements. The ruling closes off a tactic of successive class claims by barring the traditional power of lower federal courts to modify statutory time limits in the name of equity despite any practical obstacles this creates in class actions.

- ***Czyzewski, et al. v. Jevic Holding Co.,*** **137 S. Ct. 973 (2017)** – Decided on March 22, 2017, this case involved the Worker Adjustment and Retraining Notification ("WARN") Act and the interplay between worker rights under that statute and the rights of creditors in bankruptcy proceedings after a company allegedly violates the WARN Act. In considering whether priority in distributing assets in bankruptcy may proceed in a manner that allegedly violates the priority scheme in the Bankruptcy Code, the Supreme Court held that such a distribution is improper and priority rules may not be evaded in Chapter 11 structured dismissals. The Supreme Court's ruling protects workers with WARN claims and bars priority deviations in bankruptcies implemented through non-consensual structured dismissals.

The decisions in *Advocate Health Care Network, Baker, Bristol-Myers, CalPERS, Expressions Hair Designs, Jevic,* and *McLane Co.* are sure to shape and influence workplace class action litigation and government enforcement litigation in a profound manner. Theses rulings will impact standing concepts and jurisdictional challenges, liability under the WARN and the ERISA, appeals of class certification decisions, challenges to EEOC administrative subpoenas, and rules on *American Pipe* tolling and application of statute of limitations in class actions. To the extent that extrinsic restrictions on class actions – *i.e.*, limits on the ability of representative plaintiffs to appeal certification orders (as in *Baker*), and jurisdictional restrictions on bringing cases in "plaintiff-friendly" jurisdictions (as in *Bristol-Myers*) – were tightened, class actions will become harder to maintain and litigate. On the other hand, *McLane Co.* is certainly a setback for employers and strengthens the EEOC's ability to conduct wide-ranging administrative investigations through its subpoena power.

Rulings Expected In 2018

Equally important for the coming year, the Supreme Court accepted five additional cases for review in 2017 – that will be decided in 2018 – that also will impact and shape class action litigation and government enforcement lawsuits faced by employers.

Those cases include three employment lawsuits and two class action cases. The Supreme Court undertook oral arguments on two of these cases in 2017; the other three will have oral arguments in 2018.

The corporate defendants in each case have sought rulings seeking to limit the use of class actions or raise substantive defenses to class actions or employment-related claims. Further complicating several of these cases, government agencies have either taken opposing stances with each other or reversed positions they held in pervious Supreme Court terms or in the lower court proceedings in these cases.

- ***Epic Systems Corp. v. Lewis, NLRB v. Murphy Oil USA & Ernst & Young LLP v. Morris,* Nos. 16-285, 16-300 & 16-307** – Argued on October 2, 2017, these three consolidated appeals in employment cases deal with the interpretation of workplace arbitration agreements between employers and employees and whether class action waivers within such agreements – which require workers to arbitrate any claims on an individual basis (and waive the ability to bring or participate in a class action or collective action) – violate employees' rights under the National Labor Relations Act to engage in "concerted activities" in pursuit. The Supreme Court's ultimate decision is likely to have far-reaching implications for litigation of class actions and collective actions. The issue started when the NLRB under the Obama Administration began challenging employers' use of arbitration agreements with class action waivers. During briefing of the issue before the Supreme Court, The Department of Justice under President Trump opposed the NLRB's position, and has sided with employers and argued that the Federal Arbitration Act favors the validity and enforcement of arbitration agreements that include class waivers.
- ***Cyan, Inc., et al. v. Beaver County Employees Retirement Fund,* No. 15-1439** – Argued on November 28, 2017, this class action case poses the issue of whether federal law bars state courts from hearing certain securities class actions. The case turns on interpretation of the Private Securities Litigation Reform Act of 1995 – which imposes tougher standards on securities class actions brought in federal courts – and if it mandates that state courts can no longer hear class actions based on the Securities Act of 1933. The ultimate ruling by the Supreme Court will impact what many view as a "cottage industry" of state court-based class action filings in states such as California where class action lawyers target public companies with securities claims over drops in stock process.
- ***Encino Motors, LLC v. Navarro, et al.,* No. 16-1362** – In this case, the Supreme Court will examine whether service advisors at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the overtime pay provisions of the Fair Labor Standards Act. The future ruling in the case may have far-reaching implications on the legal tests for interpretation of statutory exemptions under the FLSA. A broader reading of the exemption potentially could reduce the number of workers allowed to assert wage & hour claims against their employers. The case is set for argument on January 17, 2018.
- ***Janus, et al. v. AFSCME,* No. 16-1466** – In this employment case, the Supreme Court will consider whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment so as to prevent public-sector unions from collecting mandatory fees from non-members. In deciding the constitutionality of "fair share fees" being imposed on public-sector employees as a condition of employment, the Supreme Court's future ruling likely will impact millions of workers in 22 states that do not have right-to-work laws. Since many workers are apt to cease paying union dues if the fair share fee payments requirement is abolished, the future ruling will have a significant impact on the ability of public-sector unions to conduct their business. The case is set for oral argument on February 26, 2018.
- ***Resh, et al. v. China Agritech, Inc.,* No. 17-432** – In this class action case, the Supreme Court will examine whether the tolling rule for class actions established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), tolls the statute of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period. In *American Pipe*, the Supreme Court held that the filing of a class action tolls the running of the statute of limitations for all putative members of the class who make timely motions to intervene after the lawsuit is deemed inappropriate for class action status. In essence, a future ruling in this case will limit or expand the

tolling rule in *American Pipe* to apply only to subsequent individual claims or if it is expanded broadly to successive class actions where plaintiffs were unnamed class members in failed class actions. The case has yet to be set for oral argument.

The Supreme Court is expected to issue decisions in these five cases in 2018.

Each decision may have significant implications for employers and for the defense of high-stakes class action litigation. Further, the decision in *Epic Systems* / *E & Y* / *Murphy Oil* may well end up being one of the most significant rulings for employers since *Wal-Mart Stores, Inc. v. Dukes* in 2011.

D. Complex Employment-Related Litigation Trends In 2017

While shareholder and securities class action filings witnessed an increase in 2017, employment-related class action filings remained relatively stable and aligned with case filing numbers of previous years.

By the numbers, filings for employment discrimination and ERISA claims were slightly higher over the past year, while the volume of wage & hour lawsuits decreased for only the second time in over two decades.

By the close of the year, ERISA lawsuits totaled 6,727 filings (up slightly as compared to 6,530 in 2016 and down slightly as compared to 6,925 in 2015), FLSA lawsuits totaled 7,575 filings (down considerably as compared to 8,308 in 2016 and 8,954 in 2015), and employment discrimination lawsuits totaled 12,040 filings (an increase from 11,593 in 2016 and an increase from 11,500 in 2015).

In terms of employment discrimination cases, however, the potential exists for a significant jump in case filings in the coming year. Workplace harassment issues dominated the news cycles in the fourth quarter of 2017, as the #MeToo movement squarely place sex harassment litigation in the national debate. Inevitably, litigation filings will increase over the next year as a result of this focus.

By the numbers, FLSA collective action litigation filings in 2017 far outpaced other types of employment-related class action filings; virtually all FLSA lawsuits are filed and litigated as collective actions. Up until 2015, lawsuit filings reflected year-after-year increases in the volume of wage & hour litigation pursued in federal courts since 2000; statistically, wage & hour filings have increased by over 450% in the last 15 years.

The fact of the second annual decrease in FLSA lawsuit filings in 17 years is noteworthy in and of itself. However, a peek behind these numbers confirms that with 7,575 lawsuit filings, 2017 was the sixth highest year ever in the filing of such cases (only eclipsed by levels in 2012, 2013, 2014, 2015, and 2016). When viewed on a continuum, the current volume of wage & hour cases within the “pipeline” in the federal courts is as large and vast as ever.

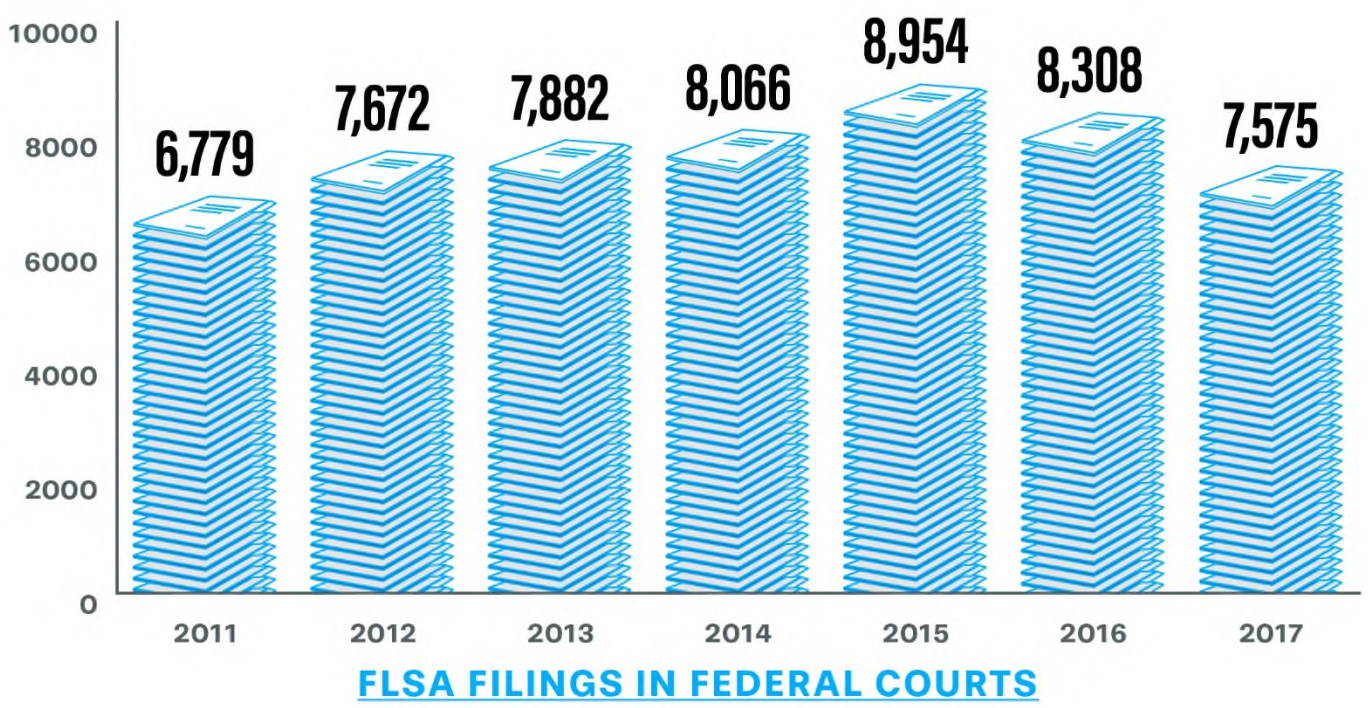
Given this trend, employers may well see a record-breaking increase in the number of FLSA filings in 2018. Various factors are contributing to the fueling of these lawsuits, including: (i) minimum wage hikes in 21 states and 22 major cities that took effect in 2017; (ii) the intense focus on independent contractor classification and joint employer status, especially in the franchisor-franchisee context; and (iii) a decrease in expected filings by the DOL in 2018, which is apt to fuel filings by the private plaintiffs’ bar.

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 mean 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; therefore, 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 2017.

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.

An increasing phenomenon in the growth of wage & hour litigation is worker awareness. Wage & hour laws are usually the domain of specialists, but in 2017 wage & hour issues made front-page news. The widespread public attention as 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. Social media also allows for the virtual commercialization of wage & hour cases through the internet and digital technology.

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. In particular, California continued its status in 2017 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 fourth year out of the last five, the American Tort Reform Association ("ATRA") selected California as one of the nation's worst "judicial hellholes" as measured by the systematic application of laws and court procedures in an unfair and unbalanced manner.[9] Calling California one of the worst of the worst jurisdictions, the ATRA described the Golden State as

[9] The ATR Foundation's 2017 Report is available at http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf

indeed that for plaintiffs' lawyers seeking riches and the expense of employers and where "lawmakers, prosecutors, and judges have long aided and abetted this massive redistribution of wealth." [10]

E. Likely Trends For The Future Of Workplace Class Actions In 2018

The developing trends in workplace class action litigation are continuing to evolve, morph, and adjust to the modern realities of the American workplace. 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 2018?

Based on these evolving trends, we anticipate significant developments in the coming year relative to certification rulings in employment discrimination and ERISA class actions; less aggressive governmental enforcement litigation prosecutions; and continuing growth in wage & hour litigation, either in courtrooms or in arbitrations.

ERISA Litigation –

This year's ERISA class action litigation space saw two primary trends. First, the U.S. Supreme Court issued a significant decision relating to the parameters of what is known as the "church plan" exemption to the ERISA, and unanimously held in *Advocate Health Network v. Stapleton*, 137 S. Ct. 1652 (2017), that a pension benefits plan need not be established by a church to qualify as a church plan exempt from the ERISA's funding and other rules. Although the decision settled one of the major questions in church plan litigation, a second wave of these cases may be starting as the plaintiffs' action bar attempts to challenge the religious *bona fides* of these principal purpose organizations.

Second, the plaintiffs' class action bar filed an influx of new 401(k) and 403(b) fee and investment lawsuits against various employers, with a particular concentration on institutions of higher education. In particular, the university ERISA lawsuits challenge the design model of their 403 (b) retirement plans, and the payment of allegedly excessive fees for record-keeping and administrative services. Many of the cases remain active and rulings are expected throughout 2018 on these issues.

The last 12 months also saw an uptick in ERISA class action filings, and while there were relatively few class certification rulings this year, we expect their number to increase next year as the cases work though the system. However, that trend may be mitigated to some extent by a trend among defendants to stipulate to class certification – a by-product of the greater ease of obtaining class certification in ERISA cases than in other types of workplace class actions. Given the long odds, employers now seem more willing to consider stipulating to narrowed and more focused classes to avoid the cost of litigating certification issues.

Given the volume of ERISA class action filings in 2017, corporate counsel can also expect to see further litigation regarding the reasonableness of 401(k) and 403(b) plan fees and expenses in the numerous class action lawsuits pending around the country on these issues. Further, courts are likely to continue to grapple with the complicated and intertwined issues relating to who has standing to bring claims under the ERISA and when those claims accrue, following the Supreme Court's decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).

In addition, corporate counsel can except to see the following developments:

- In the health and welfare space, plan sponsors can expect some potential additional confusion if Congress and the Trump Administration take up the repeal of the Affordable Care Act. As many plan

[10] *Id.* at 1. The "eight worst" jurisdictions in 2017 according to the ATRA report were: (1) Florida, (2) California, (3) Missouri (and, in particular, St. Louis), (4) New York (and, in particular, New York City), (5) Pennsylvania (and, in particular, Philadelphia), (6) New Jersey, (7) Illinois (and, in particular, Cook and Madison Counties), and (8) Louisiana.

sponsors know, employers have spent the last few years preparing for and then implementing the Affordable Care Act. The potential changes again to health coverage may cause some confusion amongst plan participants, which in turn could lead to an increase in class action litigation if the participants remain unsure about their applicable coverage for various benefits. In this same vein, one can expect that the surge in class actions regarding coverage by out-of-network providers will continue. As many plan sponsors experienced last year, various network providers have challenged the reimbursement rates from insurers and plans, thus dragging both administrators and plans into numerous litigation matters. Given the uncertainty in the future of the Affordable Care Act and the continuing disputes between insurers and out-of-network providers, it is anticipated that this variety of class action litigation will increase in the coming year.

- Further, a fight in the courts is expected regarding the DOL's recently issued final regulations on disability plan administration. These regulations dramatically change the landscape for the handling of disability claims through the frequently offered long-term disability benefits. These regulations are apt to be challenged in the courts given their sweeping and onerous changes. As a result, it is possible that these regulations will never see the light of day. Insurers and plan sponsors need to watch the litigation and its potential results closely. However, if the regulations do go into effect in 2018, as currently contemplated, plan administrators will need to closely examine them to ensure compliance. Additionally, the implementation of these regulations could spur class action lawsuits and DOL enforcement actions if they are not handled appropriately on a plan basis.

Employment Discrimination Class Action Litigation –

Both in terms of private plaintiff employment discrimination class action litigation, employers can expect this area to remain an intense focus in 2018 by the private plaintiffs' bar.

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.
- Given the Supreme Court's plaintiff-friendly ruling in 2016 in *Tyson Foods*, employers can expect more aggressive positions being advocated by plaintiffs' class action lawyers to "end run" *Wal-Mart* and *Comcast*, especially on damages theories under Rule 23(b)(3).
- 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 another end-run around the limitations on Rule 23(b)(3) articulated in *Comcast*.

Government Enforcement Litigation –

In 2018, employers can expect changes based on the Trump Administration's business-friendly priorities. Employers also can anticipate less aggressive enforcement of employment-related laws and regulations by the EEOC, the DOL, and the NLRB.

The EEOC's FY 2017-2021 Strategic Enforcement Plan: In FY 2017, the EEOC created and announced a new Strategic Enforcement Plan ("SEP") to guide its enforcement mission through fiscal years 2017 through 2021. The new SEP establishes the same six enforcement priorities as the previous version of the SEP, including: (i) elimination of systemic barriers in recruitment and hiring; (ii) protection of immigrant, migrant, and other vulnerable workers; (iii) addressing emerging and developing issues; (iv) enforcing equal pay laws; (v) preserving access to the legal system; and (vi) preventing harassment through systemic enforcement and targeted outreach. Those enforcement priorities have proved to be a reliable guide to how the EEOC pursues its enforcement agenda.

The new SEP added two substantive areas of focus to its "developing and emerging issues" priority list. During the next four years, the EEOC has said that it will focus on "complex" employment relationships, including clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy. The EEOC has also identified "backlash discrimination" as a new area of focus, meaning discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as persons perceived to be members of these groups, that might arise against them as a result of current events affecting the Muslim world. Given the EEOC's track record of making good on its word, employers would be well advised to pay attention to these issues.

The EEOC's Continued Focus On LGBT Discrimination: Over the past few years, the EEOC has expended significant litigation resources advocating for the protection of LGBT rights under the existing anti-discrimination laws. It has done this through multiple avenues, including using its own administrative rule-making and quasi-judicial powers to decree that transgender discrimination is a form of sex discrimination because it is tantamount to discrimination on the basis of a perceived failure to adhere to stereotypical gender norms. The EEOC is now using the same tactics to try to establish that Title VII prohibits discrimination on the basis of sexual orientation. The key issue for the future is whether the new leadership of the EEOC appointed by President Trump will view these LGBT issues as part of the EEOC's enforcement agenda.

Potential Changes Brought By The Trump Administration: The biggest political development that will shape the EEOC's agenda in the coming years is the agenda of the Trump Administration. While there is considerable administrative "inertia" behind the EEOC's current agenda, these political changes are likely to have a profound impact on how the EEOC pursues its mission. In particular, the EEOC's increased focus on the strategic use of large, high-impact "systemic" cases to push forward its strategic goals has come under withering criticism by Republican members of Congress. These types of cases can have a significant impact because they tend to affect a larger number of employees and employers, but also they have often come with overly aggressive litigation positions with respect to the EEOC's "latest and greatest" theories of discrimination. Given the intense focus on this area, this may be one aspect of the EEOC's enforcement agenda that becomes an early target of the Trump Administration.

- Had candidate Hillary Clinton won the White House in the November 2016 elections, most believe that the EEOC, the DOL, and the NLRB would have continued to "push the legal envelope" on joint employer, franchisor/franchisee, and the propriety of arbitration/class waiver issues. With the election of President Trump, the future direction of these initiatives is less clear. The new Administration may well pivot on these positions, which in turn will cause a change in the landscape of workplace class action and governmental enforcement litigation.
- While 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, the DOL is likely to change course on those policies. In its investigations, an increasing number of which appear to have been coordinated at higher levels of the agency, the WHD had 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. Maintenance or a lessening of these litigation strategies remains to be seen in 2018.

- With the pro-business priorities of the Trump Administration, federal workplace agencies are certainly expected to be more employer-friendly. Efforts are likely to shift away from punitive enforcement measures and aggressive enforcement litigation toward a more comprehensive strategy of achieving compliance, including employer outreach, education, and other cooperative opportunities.
- Finally, should government enforcement litigation decrease substantially at the federal level due to changes directed by the Trump Administration, employers should brace for the private plaintiffs' bar and States' Attorney General offices to "fill the void" to champion employment discrimination litigation.

Wage & Hour Class Action Litigation –

Despite the slight decrease of FLSA lawsuit filings in the last 12 months, it is expected that the number of wage & hour claims will continue to rise. We expect the needle to point upwards on that issue in 2018.

- News and other commentary regarding the proposed revision to the FLSA overtime exemption regulations that were to become effective on December 1, 2016, attracted the attention of employees and lawyers who represent them. Historically, when the FLSA and related wage & hour laws have received active media attention, the number of lawsuits filed under those laws has spiked.
- Legislatures and government agencies in various states also have revised or are actively planning to revise laws and rules governing how businesses pay employees, including minimum wage hikes. A focus on enacting or strengthening "wage theft" laws is in vogue at the state and local level.
- Regardless of the increased activity that could be linked to the new regulations and their demise, workers' lawyers have continued to focus on cases challenging the classification status of employees in "gray area" jobs that are more likely to call into question amounts of time spent on exempt and non-exempt activities.
- They have also focused on more sophisticated claims involving questions of whether overtime rates were properly determined, bonus calculations, and amounts of time allegedly spent off-the-clock before and after shifts and during meal breaks.
- Likewise, developments in litigation challenging co-defendants – whether franchisees and franchisors or parents and subsidiaries – as joint employers will continue to inspire litigation motivated in part by the view that many business relationships create joint liability for the wage & hour violations of affecting employees of only one party to that relationship.

Plaintiffs' wage & hour lawyers increasingly share the WHD's past focus on challenging the use of independent contractors. This trend may be intensified by several large settlements in 2017 involving this issue, including FedEx's class action settlement of $227 million to 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, especially given that the top wage & hour settlements over the past two years were in excess of $1.2 billion.

Workplace Arbitration – Perhaps the most important workplace class action development for 2018 – which could affect all different kinds of class and collective actions – will be one that could allow employers to prevent workplace class actions from being asserted in the first place. Early in 2018, the U.S. Supreme Court is expected to issue a ruling in three cases that were consolidated for hearing – *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris,* and *NLRB v. Murphy Oil* – arising out the Seventh, Ninth, and Fifth Circuits, respectively. The issue in the three cases is whether an agreement that requires an employer and employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act ("FAA"), notwithstanding the provisions of the National Labor Relations Act ("NLRA"). The case was heard by the Supreme Court in the first argument of the first day of the 2017/2018 year's term and should resolve a circuit split on whether filing a purported class or collective action asserting a violation of an employment statute constitutes protected concerted activity within the meaning of § 7

of the NLRA, whether agreeing with employees to waive their ability to bring such class or collective actions violates § 8 of the NLRA, and, even if so, whether the FAA mandates enforcement of an arbitration agreement containing a class waiver.

Given the breadth of the NLRA – it covers most employees, with the most significant exclusions being for independent contractors and supervisors – a ruling in favor of the employees would render unenforceable the vast majority of arbitration agreements containing class waivers, thus causing corporate counsel for those companies currently using class waivers to prepare for a substantive defense of purported class and collective action and to reconsider whether to maintain an arbitration program.

Yet, at the same time, a ruling by the Supreme Court in favor of the employers could radically reshape the landscape of workplace class actions because the argument that the NLRA precludes enforcement of a class waiver is seemingly the last remaining impediment against enforcement of arbitration agreements containing class waivers. If that argument is rejected, the vast majority of employers would be able to implement arbitration programs to resolve disputes bilaterally and without resort to class or collective proceedings (other than as to certain transportation employees, who are excluded from the FAA's coverage), so long as the arbitration program is properly drafted and implemented. The extent to which employers would enact arbitration programs remains to be seen, but at a minimum, all employers would have to at least consider in 2018 whether to adopt arbitration agreements with class waivers and weigh the pros and cons of them as applied to their company's circumstances.

Considering the Supreme Court's current composition, the history of the rulings in other FAA cases, and the course of questioning from the oral argument on October 2, 2017, employers have reason to be cautiously optimistic that they will be have the option to agree to resolve employment disputes on a bilateral basis, and without resort to class or collective actions.

Certification Standards & Developments – 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, and by 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 2017, but plaintiffs' counsel are likely to continue to modify this tactic going forward, especially if arbitration defenses become more widespread in the wake of the future Supreme Court ruling in *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris,* and *NLRB v. Murphy Oil*.

F. Conclusion

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2017 was a year of great change in the landscape of Rule 23. As these issues play out in 2018, additional chapters in the class action playbook will be written.

The lesson to draw from 2017 is that the private plaintiffs' bar and government enforcement attorneys at the state level are apt to be equally, if not more, aggressive in 2018 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 2018.

II. Significant Class Action Settlements In 2017

While 2016 was a blockbuster year for class action settlement recoveries, overall settlement figures sharply increased in nearly all categories in 2017. The plaintiffs' bar and government enforcement attorneys obtained many significant settlements in a wide range of areas. The "top ten" settlement values in 2017 in workplace class actions were significantly higher than those from 2016. Other than wage & hour class action settlements, which saw a slight drop-off in settlement amounts in 2017, areas such as employment discrimination class actions, ERISA class actions, governmental enforcement lawsuits, and other workplace statutory class actions saw bigger settlement amounts than in past years.

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 and governmental enforcement attorneys secured many large settlements in 2017 for employment discrimination, wage & hour, and ERISA class actions, as well as governmental enforcement lawsuits. The top ten settlements from these categories totaled $2.23 billion in 2017. This represented a significant jump as compared to both 2016 and 2015, when the top ten settlements from these categories totaled $1.67 billion and $1.58 billion, respectively.

As the plaintiffs' bar has aggressively pursued various statutory workplace class actions, the Workplace Class Action Report has recently expanded Chapter 2 to include this category, which encompasses workplace antitrust laws, the Fair Credit Reporting Act, and other various workplace-related statutory laws. The top ten settlements in this category saw a sharp four-fold increase over the past year, totaling $487.28 million in 2017 as opposed to $114.7 million in 2016.

In sum, based on all categories, the top ten aggregate settlement numbers in 2017 increased to $2.72 billion, a significant climb when compared with $1.75 billion in 2016.

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 2017 totaled $293.5 million. This represents nearly a four-fold increase from 2016, where the total was $79.81 million.

1. $90 million – Twenty-First Century Fox, Inc.
2. $45 million – Family Dollar Stores, Inc.
3. $35.5 million – Wells Fargo Advisors, LLC
4. $32.5 million – Metropolitan Life Insurance Co.
5. $24 million – U.S. Department Of Homeland Security
6. $20 million – U.S. Department Of Justice
7. $19.5 million – Qualcomm Inc.
8. $13 million – State Of Washington
9. $7.5 million – Wal-Mart Stores, Inc.
10. $6.5 million – Washington Metropolitan Area Transit Authority

The biggest settlements in 2017 involved pay and promotions class actions. By category, there were five gender discrimination class actions, four race discrimination class actions, and one veterans discrimination class action.

1. **$90 million – *City Of Monroe Employees' Retirement System, et al. v. Twenty-First Century Fox Inc.*, Case No. 2017-833 (Del. Ch. Nov. 20, 2017)** (request for settlement approval of claims stemming from workplace sexual harassment incidents and gender discrimination allegations at Fox News).

2. **$45 million – *Scott, et al. v. Family Dollar Stores, Inc.*, Case No. 08-CV-540 (W.D.N.C. Nov. 14, 2017)** (preliminary approval granted for a class action settlement of gender discrimination claims involving female store managers who alleged discrimination with respect to their pay).

3. **$35.5 million – *Slaughter, et al. v. Wells Fargo Advisors, LLC*, Case No. 13-CV-6368 (N.D. Ill. May 4, 2017)** (final approval granted for a class action settlement of race discrimination claims involving a group of financial advisers and trainees who alleged the bank limited pay and advancement opportunities for African-American employees).

4. **$32.5 million – *Creighton, et al. v. Metropolitan Life Insurance Co.*, Case No. 15-CV-8321 (S.D.N.Y. June 27, 2017)** (final approval granted for a class action settlement for race discrimination claims involving African-American financial services representatives alleging that the company provided very few chances to work with colleagues, which restricted their training opportunities and precluded them from getting favorable accounts).

5. **$24 million – *Moore, et al. v. U.S. Department Of Homeland Security*, Case No. 00-CV-953 (D.D.C. May 3, 2017)** (final approval granted for a race discrimination class action brought by a group of African-American Secret Service agents who alleged they were denied promotions for the highest ranks in the agency).

6. **$20 million – *White, et al. v. Department Of Justice*, Case No. 510-2012-77 (EEOC Jan. 17, 2017)** (preliminary approval granted for a class action settlement involving current and former female prison workers who alleged they were assigned to work in areas of the prison where they were forced to experience sexual harassment from inmates).

7. **$19.5 million – *Pan, et al. v. Qualcomm Inc.*, Case No. 16-CV-1885 (S.D. Cal. July 31, 2017)** (final approval granted for a gender discrimination class action settlement involving 3,300 current and former female employees who claimed they were not paid and promoted on the same scale as men).

8. **$13 million – *Martin, et al. v. State Of Washington*, Case No. 14-2-00016-7 (Wash. Super. Ct. May 5, 2017)** (preliminary approval granted for a class action settlement involving state patrol troopers claiming that Defendant engaged in discrimination in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") by depriving Washington State Patrol employees and applicants of various benefits of employment while they were away on military duty).

9. **$7.5 million – *Cote, et al. v. Wal-Mart Stores, Inc.*, Case No. 15-CV-12945 (D. Mass. May 16, 2017)** (final approval granted for a gender discrimination class action settlement where Wal-Mart was accused of failing to provide spousal health benefits to employees who had lawful marriages to same-sex spouses).

10. **$6.5 million – *Little, et al. v. Washington Metropolitan Area Transit Authority*, Case No. 14-CV-1289 (D.D.C. Dec. 7, 2017)** (preliminary approval granted for a race discrimination class action involving railroad workers who asserted that the employer's criminal background check policy disproportionately discriminated against African-Americans).

Settlements In Private Plaintiff Wage & Hour Class Actions

For wage & hour class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2017 totaled $574.49 million. This represented a decrease from the value of the top ten settlements in 2016, which totaled $695.5 million. At the same time, the overall value of the top ten wage & hour settlements had higher values than in the two preceding years, which totaled $463.6 million in 2015 and $215 million in 2014.

1. $227 million – FedEx Ground Package System, Inc.
2. $110 million – American Commercial Security
3. $61.69 million – The City Of Dallas, Texas
4. $27 million – Lyft, Inc.
5. $21 million – U.S. Security Associates, Inc.
6. $19.1 million – Carlson Restaurants, Inc.
7. $16.7 million – JP Morgan Chase & Co.
8. $16 million – PNC Bank, N.A.
9. $13.5 million – Duane Reade, Inc.
10. $13 million – Wells Fargo

The top ten settlements primarily involved nationwide claims, while three involved state-specific claims (both in California). Furthermore, six of the top ten wage & hour settlements involved lawsuits pending in either state or federal courts in California or New York.

1. **$227 million – *In Re FedEx Ground Package System, Inc. Employment Practices Litigation*, Case No. 05-MD-527 (N.D. Ind. April 28, 2017)** (final approval granted for a class action settlement of wage & hour claims involving drivers from terminals in 19 states claiming that FedEx misclassified them as independent contractors and deprived them of overtime wages, reimbursement for expenses, and employee benefits).

2. **$110 million – *Augustus, et al. v. American Commercial Security*, Case No. BC336416 (Cal. Super. Ct. April 6, 2017)** (preliminary approval granted for a class action settlement of wage & hour claims involving 15,000 current and former guards who alleged the company violated California labor laws by requiring them to carry radios so they could be "on-call" while on break and meal periods).

3. **$61.69 million – *Albert, et al. v. The City Of Dallas, Texas*, Case No. 199-00697-94 (Tex. Dist. Ct. Nov. 14, 2017)** (request for approval of class action settlement stemming from state law breach of contract claims relative to the city failing to pay police, fire, and rescue officers a 15% raise according to a 1979 ordinance).

4. **$27 million – *Cotter, et al. v. Lyft, Inc.*, Case No. 13-CV-4065 (N.D. Cal. Mar. 16, 2017)** (final approval granted for a class action settlement of wage & hour claims of current and former drivers accusing the company of misclassifying them as independent contractors and skimming 20% off their tips as an "administrative fee").

5. **$21 million – *Abdullah, et al. v. U.S. Security Associates, Inc.*, Case No. 09-CV-9554 (C.D. Cal. Aug. 14, 2017)** (preliminary approval granted for a class action settlement of wage & hour claims involving a class of 17,000 security guards accusing the company of failing to give meal breaks).

6. **$19.1 million – *Zorrilla, et al. v. Carlson Restaurants, Inc.*, Case No. 14-CV-2740 (S.D.N.Y. Oct. 26, 2017)** (preliminary approval granted for a class action settlement of wage & hour claims involving tipped workers claiming the restaurant chain violated FLSA and state wage & hour laws in 19 states).

7. **$16.7 million – *Taylor, et al. v. JP Morgan Chase & Co.*, Case No. 15-CV-3023 (S.D.N.Y. Nov. 3, 2017)** (request for settlement approval for a putative class action involving thousands of bank employees' allegations that the banking giant violated the FLSA by failing to pay proper overtime compensation).

8. **$16 million – *Bland, et al. v. PNC Bank, N.A.*, Case No. 15-CV-1042 (W.D. Pa. April 11, 2017)** (final approval granted for a class action settlement relative to FLSA claims brought by current and former mortgage loan officers who accused the company of failing to pay overtime and a proper commission).

9. **$13.5 million – *Jacob, et al. v. Duane Reade, Inc.*, Case No. 11-CV-160 (S.D.N.Y. May 5, 2017)** (final approval granted for a class action settlement of wage & hour claims involving current and former assistant store managers alleging the company failed to pay overtime wages).

10. **$13 million – *In Re Wells Fargo Wage & Hour Cases*, Case No. JCCP4702 (Cal. Super. Ct. Dec. 19, 2017)** (preliminary approval granted for a class action settlement of wage & hour claims for missed meal and rest breaks and off-the-clock claims).

Settlements In Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2017 totaled $927.8 million. This represents a noteworthy increase from the value of the top ten settlements in 2016, which totaled $807.4 million.

1. $352 million -– Providence Health & Services

2. $125 million – Franciscan Missionaries Of Our Lady Health Systems

3. $98.3 million – Bon Secours Health System, Inc.

4. $75 million – Trinity Health Corp.

5. $75 million – Peabody Energy Corp.

6. $75 million – JP Morgan Chase & Co.

7. $42 million – St. Joseph's Hospital & Medical Center

8. $31 million – Holy Cross Hospital

9. $29.5 million – Wheaton Franciscan

10. $25 million – Merrill Lynch, Pierce, Fenner & Smith, Inc.

The largest ERISA class action settlements involved disputes over treating pension plans as “church plans,” breaches of fiduciary duty, failures to make required contributions into retirement funds, and various theories of mismanagement.

1. **$352 million – *Griffith, et al. v. Providence Health & Services*, Case No. 14-CV-1720 (W.D. Wash. Mar. 21, 2016)** (final approval granted for settlement of an ERISA class action alleging a non-profit hospital chain under-funded its pension plan by improperly treating it as a "church plan" exempted from federal funding requirements).

2. **$125 million – *Nicholson, et al. v. Franciscan Missionaries Of Our Lady Health Systems*, Case No. 16-CV-258 (M.D. La. Oct. 24, 2017)** (preliminary approval granted for settlement of a proposed class action alleging that the hospital and the Plans' administrators and fiduciaries had violated the ERISA by improperly classifying the Plans as "church plans" to exempt them from funding requirements).

3. **$98.3 million – *Hodges, et al. v. Bon Secours Health System, Inc.*, Case No. 16-CV-1079 (D. Md. July 10, 2017)** (preliminary approval granted for settlement of a putative class action accusing the hospital of violations of the ERISA by erroneously claiming its Plans were exempt because they are "church plans").

4. **$75 million – *Lann, et al. v. Trinity Health Corp.*, Case No. 17-CV-2237 (D. Md. May 31, 2017)** (final approval granted for settlement of an ERISA class action alleging that Trinity Health improperly claimed its plan qualified as a "church plan" under ERISA).

5. **$75 million – *In Re Peabody Energy Corp.*, Case No. 16-BK-42529 (Bankr. E.D. Mo. Mar. 16, 2017)** (request for settlement approval for an ERISA class action alleging mismanagement of workers' pension plan).

6. **$75 million – *In Re JP Morgan Stable Value Fund ERISA Litigation*, Case No. 12-CV-2548 (S.D.N.Y. Nov. 3, 2017)** (request for settlement approval for an ERISA class action alleging mismanagement of retirement funds and breaches of fiduciary duties with respect to 401(k) plans).

7. **$42 million – *Garbaccio, et al. v. St. Joseph's Hospital & Medical Center*, Case No. 16-CV-2740 (D.N.J. Oct. 5, 2017)** (preliminary approval granted for settlement of a putative consolidated class action alleging the hospital violated the ERISA by under-funding an employee pension plan by claiming its Plan was a "church plan").

8. **$31 million – *Butler, et al. v. Holy Cross Hospital*, Case No. 16-CV-5907 (N.D. Ill. June 29, 2017)** (final approval granted for settlement of an ERISA class action claim filed by former employees accusing the hospital of under-funding its pension plan).

9. **$29.5 million – *In Re Wheaton Franciscan ERISA Litigation*, Case No. 16-CV-4232 (N.D. Ill. Sept. 13, 2017)** (preliminary approval granted for settlement of a class action alleging a non-profit healthcare system denied ERISA protections to the participants and beneficiaries of the Plan by claiming that the Plan qualified as an exempt "church plan").

10. **$25 million – *Fernandez, et al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Case No. 15-CV-22782 (S.D. Fla. Dec. 21, 2017)** (final approval granted for settlement of an ERISA class action accusing the broker-dealer firm of profiting from unreasonable fees charged to 401(k) plans).

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 workplace antitrust laws, the Fair Credit Reporting Act ("FCRA"), and other federal and state statutory law violations. The top ten settlements in this category increased significantly in 2017, as they totaled $487.28 million; by contrast, the total was $114.7 million in 2016.

1. $209 million – National Collegiate Athletic Association

2. $150 million – Dreamworks Animation SKG, Inc.

3. $44.4 million – New York State Department Of Taxation & Finance

4. $41.4 million – Bank Of America, N.A.

5. $8 million – Trans Union, LLC

6. $7.5 million – Uber

7. $7.33 million – Carey Salt Co.

8. $6.749 million – Kelly Services, Inc.

9. $6.7 million – Act II Jewelry, LLC

10. $6.2 million – American Airlines, Inc.

The biggest settlements involved class actions under workplace antitrust laws, the FCRA, and breaches of contracts and denials of employee benefits. Others included class actions over benefit denials, discriminatory taxes, and unfair competition.

1. **$209 million – *In Re NCAA Grant-In-Aid Antitrust Litigation*, Case No. 14-MD-2541 (N.D. Cal. Nov. 20, 2017)** (final approval granted for a settlement of a class action alleging violations of antitrust laws relative to anti-competitive caps on student scholarships).

2. **$150 million – *In Re Animation Workers Antitrust Litigation*, Case No. 14-CV-4062 (N.D. Cal. June 5, 2017)** (final approval granted for a settlement of a workplace class action involving animation and visual effects workers alleging violations of antitrust laws by conspiring to suppress wages via non-poaching agreements).

3. **$44.4 million – *Owner-Operator Independent Drivers Association, et al. v. New York State Department Of Taxation & Finance*, Case No. 5551-13 (N.Y. Sup. Ct. April 19, 2017)** (final approval granted for a class action settlement involving allegations relative to an illegitimate highway use tax that discriminated against out-of-state truck drivers).

4. **$41.4 million – *Childress, et al. v. Bank Of America, N.A.*, Case No. 15-CV-231 (E.D.N.C. Sept. 13, 2017)** (preliminary approval granted for a class action settlement involving 125,000 military members claiming the Defendant violated the Servicemembers Civil Relief Act ("SCRA") when charging illegal high interest charges on principle balances).

5. **$8 million – *Patel, et al. v. Trans Union, LLC*, Case No. 14-CV-522 (N.D. Cal. Oct. 26, 2017)** (preliminary approval granted for a class action settlement regarding allegations that Defendant violated the FCRA by wrongfully describing applicants as terrorists and criminals).

6. **$7.5 million – *In Re Uber FCRA Litigation*, Case No. 14-CV-5200 (N.D. Cal. Aug. 15, 2017)** (preliminary approval granted for a class action settlement regarding allegations that Uber violated the FCRA by using applicants' background checks to make adverse employment decisions).

7. **$7.33 million – *In Re Carey Salt Co.*, Case No. 15-CA-19704 (NLRB Mar. 2, 2017)** (settlement agreement stemming from an employer's unfair labor practices against unionized employees).

8. **$6.749 million – *Hillson, et al. v. Kelly Services, Inc.*, Case No. 15-CV-10803 (E.D. Mich. Aug. 11, 2017)** (final approval granted for a class action settlement relative to a lawsuit brought by job applicants and employees who claimed the company violated the FCRA by conducting background checks without disclosures that were required by law).

9. **$6.7 million – *West, et al. v. Act II Jewelry, LLC*, Case No. 15-CV-5569 (N.D. Ill. Nov. 21, 2017)** (preliminary approval granted for a class action settlement of claims for breach of contract and denial of benefits to workers when the company shut down its direct sales operations).

10. **$6.2 million – *Allman, et al. v. American Airlines, Inc. Pilot Retirement Benefits Program Variable Income Plan*, Case No. 14-CV-10138 (D. Mass. Feb. 15, 2017)** (final approval granted for a class action settlement involving a class of 1,270 American Airlines pilots alleging the airline violated its benefit plans by denying full pension contribution to pilots who were on long-term military leave).

B. Top Ten Government-Initiated Monetary Settlements

In 2017, the EEOC and the U.S. Department of Labor ("DOL") continued their previous pattern of aggressively litigating government enforcement actions, albeit with mixed results.

Based on figures for the U.S. Government's 2017 fiscal year, the EEOC filed 184 new merits lawsuits, including 30 non-systemic multi-party suits and 30 systemic lawsuits. The 30 systemic lawsuits represented a sizeable jump over prior years, as the EEOC filed 18 such cases in 2016 and 16 such cases in 2015. In 2017, the EEOC increased the number of charges resolved to 99,109 charges, up slightly from the 97,443 in 2016. Furthermore, the EEOC reported that it recovered approximately $38.4 million in relief for victims of systemic discrimination, up from $20.5 million in 2016. In addition, the EEOC obtained $484 million in total recoveries through mediation, conciliation, and settlements, a slight increase from the $482 million it collected in 2016.

For all types of government-initiated enforcement actions, the monetary value of the top ten settlements entered into or paid in 2017 totaled $485.25 million. This represents a major increase from 2016, when the total was $52.3 million.

1. $300 million – Avaya, Inc.
2. $95 million – Asplundh Tree Expert Co.
3. $21.6 million – VIUSA, Inc.
4. $15.75 million – First Bankers Trust Services, Inc.
5. $12 million – Texas Roadhouse, Inc.
6. $10.5 million – Bass Pro Outdoor World, LLC
7. $10.1 million – Ford Motor Company
8. $9.8 million – American Airlines, Inc.
9. $5.5 million– Ginsberg
10. $5 million – State Street Corp.

Four of the settlements involved EEOC litigation, three involved DOL enforcement actions, and three involved NLRB, OFCCP, and DOJ enforcement actions.

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

1. **$300 million – *In Re Avaya, Inc.*, Case No. 17-BK-10089 (S.D.N.Y. Aug. 7, 2017)** (settlement agreement stemming from enforcement action for the termination and under-funding of the company's pension plans for hourly and salaried workers).

2. **$95 million – *U.S. Department Of Justice v. Asplundh Tree Expert Co.*, Case No. 17-CR-492 (E.D. Pa. Sept. 28, 2017)** (final approval granted for settlement of an enforcement action brought by the DOJ alleging supervisors misclassified undocumented workers who were in the country illegally).

3. **$21.6 million – *NLRB v. VIUSA, Inc.* (NLRB Oct. 30, 2017)** (settlement agreement stemming from an investigation involving claims from 257 former employees alleging that their employer violated federal labor laws by refusing to hire, recognize, and bargain with the union that represented these individuals because it was a minority-based union).

4. **$15.75 million – *U.S. Department Of Labor v. First Bankers Trust Services, Inc.*, Case No. 12-CV-8648 (S.D.N.Y. Sept. 25, 2017)** (consent judgment entered in a DOL investigation relative to the defendants' alleged violations of ERISA by failing to ensure its stock was bought at a fair price).

5. **$12 million – *EEOC v. Texas Roadhouse, Inc.*, Case No. 11-CV-11732 (D. Mass. Mar. 31, 2017)** (consent decree approved in an EEOC pattern or practice lawsuit alleging age discrimination relative to servers).

6. **$10.5 million – *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 11-CV-3425 (S.D. Tex. July 25, 2017)** (approval of a consent decree stemming from an EEOC pattern or practice lawsuit involving Defendant's hiring practices against qualified African-American and Hispanic applicants).

7. **$10.1 million – *EEOC v. Ford Motor Co.* (EEOC Aug. 15, 2017)** (settlement agreement stemming from an EEOC investigation of sexual and racial harassment allegations by workers at two of the company's Chicago-area plants).

8. **$9.8 million – *EEOC v. American Airlines, Inc.*, Case No. 17-CV-4059 (D. Ariz. Nov. 3, 2017)** (consent decree approved in an EEOC pattern or practice lawsuit alleging violations against disabled workers).

9. **$5.5 million – *U.S. Department Of Labor v. Ginsberg*, Case No. 15-CV-985 (S.D.N.Y. July 25, 2017)** (consent judgment entered relative to a DOL investigation of Defendants' alleged breach of their duties under ERISA while acting as fiduciaries of the plan).

10. **$5 million – *Office Of Federal Contract Compliance Programs v. State Street Corp.*, Case No. R00174213 (OFCCP Sept. 29, 2017)** (entry of conciliation agreement stemming from an investigation of the employer's discrimination against African-American and female executives in the senior vice president, managing director, and vice president positions by paying them less than their white and male colleagues).

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 2017 that included 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 2017 were the following:

- Institute a new policy making same-sex spouses eligible for employer-sponsored benefits;
- Provide a report to the EEOC regarding any employees requesting employer-sponsored benefits for same sex spouses, and whether or not such requests were granted;
- Install a computerized time-keeping system;
- Hire formerly disqualified candidates or upgrade the seniority of current employees;
- Train human resources staff on the anti-discrimination provisions of the Immigration & Nationality Act;
- Cease and desist from requiring applicants to be subjected to pre-offer medical examinations or make any pre-offer medical inquiries;
- Dismiss an allegedly retaliatory lawsuit against an employee who previously filed an EEOC complaint; and,
- Expunge any poor evaluations or discipline of employees from employment records.

The top ten settlements in 2017 involving significant injunctive relief provisions include:

1. ***EEOC v. Prince George's County*, Case No. 15-CV-2942 (D. Md. June 1, 2017).** The EEOC brought an EPA action against Prince George's County's Department of Environment alleging it rebuffed a female engineer's efforts to negotiate a higher starting salary that would match her experience and education. Under the terms of the consent decree entered by the Court, in addition to paying her lost wages and liquidated damages, the county employer agreed to increase her salary by nearly $25,000 to ensure parity with her male comparators. The employer also agreed to hire a consultant to ensure that its compensation policies and procedures and individual salary determinations comply with the Equal Pay Act, and further agreed to provide training on federal anti-discrimination laws to the county's position review board members, managers, and supervisors.

2. ***EEOC v. S&B Industry Inc.*, Case No. 15-CV-641 (N.D. Tex. Feb. 15, 2017).** The EEOC brought an action against a cellphone repair facility alleging it violated the ADA by refusing to hire two deaf applicants. Under the terms of the consent decree, the employer agreed to have managers, supervisors, and human resource professionals attend a training session presented by the Deaf Action Center, a Dallas organization that provides advocacy services for individuals with hearing impairments, covering topics such as the use of sign language interpreters in employment and interview settings. The company also agreed to post a notice about the settlement, provide training for employees on the ADA, keep a written log of all complaints of disability discrimination, and report to the EEOC on a semi-annual basis.

3. ***Salazar, et al. v. McDonald's Corp.*, Case No. 14-CV-02096 (N.D. Cal. Sept. 15, 2017).** The Court approved a consent decree relative to a wage & hour class action lawsuit brought on behalf of current and former employees at eight franchisee restaurants. The McDonald's employees accused the franchisee restaurants of violating wage and overtime provisions required under California law. In addition to monetary relief, the consent decree requires the employer to pay overtime premiums to current and future hourly employees who work more than eight hours, review all time and payroll records at least once a day, and provide detailed wage statements to employees.

4. ***EEOC v. Downhole Technology, LLC*, Case No. 17-CV-574 (S.D. Tex. April 26, 2017).** The EEOC alleged that a manufacturer of equipment retaliated against an employee who complained that he was racially harassed when co-workers displayed a white hood to intimidate, ridicule, and insult him. In a consent decree entered by the Court, in addition to monetary relief, the company agreed to educate its employees about the history of hate groups, their symbols, and the harm they cause to others. The employer also agreed to revamp its anti-discrimination policy and establish a toll-free telephone number through which employees would be able to report discrimination and harassment.

5. ***EEOC v. Allsup's Convenience Stores, Inc.*, Case No. 15-CV-863 (D.N.Mex. Sept. 25, 2017).** The EEOC brought an action under the ADA alleging that a convenience store employer subjected pregnant employees to different working conditions by making negative comments to them and giving them less favorable tasks and shifts. The three-year consent decree settling the suit required Allsup's to pay $950,000 to 28 women who were discriminated against based on pregnancy or a pregnancy-related disability, provide offers of re-employment to the 28 women, and provide them with letters of reference.

6. ***Seaman v. Duke University Health System*, Case No. 15-CV-462 (M.D.N.C. Aug. 25, 2017).** The Court approved a settlement agreement stemming from allegations of an illegal conspiracy involving University of North Carolina and others in a no-poaching agreement for medical faculty. The employer's senior administrators and deans had entered into agreements that eliminated or reduced competition among them for skilled medical labor. Under the terms of the consent decree, the medical school and the UNC Health Care System are enjoined and prohibited from making agreements to refrain from recruiting, hiring, or competing for employees.

7. ***EEOC v. Orion Energy Systems, Inc.*, Case No. 14-CV-1019 (E.D. Wis. April 5, 2017).** The EEOC brought a lawsuit alleging that a lighting company employer's wellness program violated the ADA by unlawfully requiring medical examinations and making disability-related inquiries. In addition to paying $100,000 in monetary relief, the employer agreed that it will not maintain any wellness program in the future that poses disability-related inquiries or seeks a medical examination that is not voluntary within the meaning of the ADA and its regulations. The company also agreed to conduct an additional training meeting with its chief executive officer and other high ranking executives, which includes an explanation of the provisions of the consent decree and the requirements of the ADA and its regulations as they pertain to wellness programs.

8. ***People Of The State Of Illinois, et al. v. Xing Ying Employment Agency*, Case No. 15-CV-10235 (N.D. Ill. Sept. 5, 2017).** The Court approved a consent decree stemming from allegations of discrimination involving two restaurants and an employment agency that under-paid and mistreated immigrant workers, many of whom were undocumented workers. In addition to paying $212,500 in monetary relief, the businesses are required to change their employment practices, keep records of employees' hours and wages, provide training on employment discrimination laws, develop and implement an anti-discrimination policy, and provide training. The employers also must not compel workers to pay for food as a condition of their employment.

9. ***EEOC v. IDEX Corp.*, Case No. 15-CV-22777 (S.D. Fla. April 19, 2017).** The EEOC alleged that the company violated the ADA when its supervisors repeatedly asked a regional manager invasive questions about his cancer treatments and questioned his ability to perform job tasks. In addition to providing $380,000 in monetary relief to the terminated employee, the consent decree also requires the employer to train all human resources managers on the ADA's prohibition against disability discrimination, and review hypothetical accommodation request scenarios with managers. The company also agreed to post and distribute notices concerning the decree through email, its company website, and at locations nationwide.

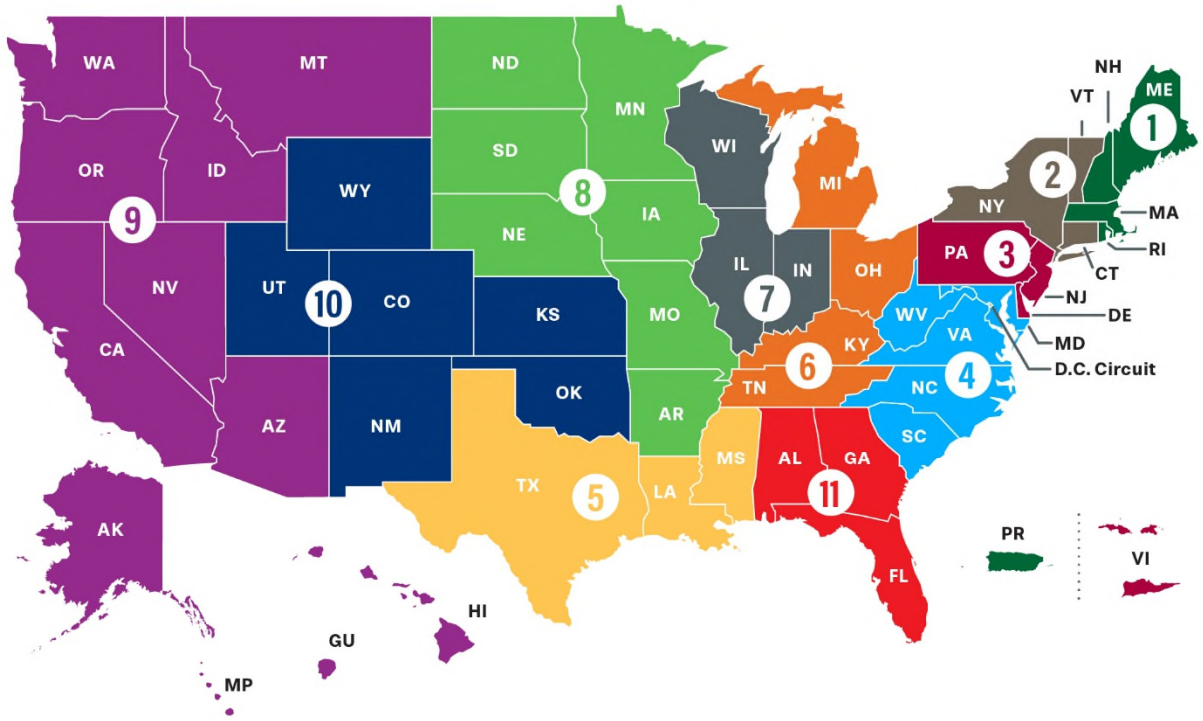
10. ***EEOC v. Chemtrusion, Inc.*, Case No. 16-CV-180 (S.D. Ind. July 20, 2017).** In an ADA action, the EEOC alleged that a manufacturing services company refused to hire or provide reasonable accommodations to a class of job applicants because of medical information it obtained during pre-employment medical examinations. In addition to monetary relief, the consent decree requires that Chemtrusion: (i) instruct its hiring personnel and medical providers not to conduct medical inquiries until after a conditional offer is made; (ii) conduct individualized analyses before withdrawing job offers; (iii) train its hiring personnel on what the ADA requires with respect to medical examinations and hiring; (iv) submit decisions to rescind job offers to legal counsel for review; and (v) track rescinded offers.

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

This Chapter examines rulings in 2016 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 2017, as illustrated by the following map:

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	1	1	0	0	0	1	1	1	0	1	1
Certification Motions Denied	0	1	0	0	0	0	0	0	0	0	3	0

Total: 7 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

***Lamarr-Arruz, et al. v. CVS Pharmacy, Inc.*, 2017 U.S. Dist. LEXIS 157842 (S.D.N.Y. Sept. 26, 2017).** Plaintiffs, a group of market investigators or store detectives, filed an action asserting a hostile work environment pursuant to the Civil Rights Act of 1991, the New York Human Rights Law ("NYHRL"), New York State Executive Law ("NYSEL"); and the New York City Human Rights Law ("NYCHRL"). Plaintiffs moved for

certification of a class based on their hostile work environment claims pursuant to Rule 23. Plaintiffs sought to certify a class of all Black and Hispanic market investigators and/or store detectives who have worked and/or are working in New York City and/or under the same regional loss prevention managers ("RLPMs") as New York City market investigators at any time during the applicable liability or statute of limitations periods. *Id.* at *2. Plaintiffs claimed that the conduct of RLPMs and store managers created a hostile work environment for Hispanic and Black employees. Plaintiffs submitted documentary evidence in the form of declarations, depositions, and pleadings from 14 other market investigators who had filed individual hostile work environment actions that were pending against Defendant. *Id.* at *5. The 16 market investigators claimed to have worked under eight of the 12 RLPMs and at around 111 (78%) of the approximately 142 stores in the New York City area owned by Defendant during the class period. *Id.* at *6. Plaintiffs claimed that some combination of RLPMs and/or store managers instructed them to racially profile Black and Hispanic customers, and also used language that was racially degrading. *Id.* Plaintiffs also adduced evidence of complaints from Defendant's customers that they were the subjects of racial profiling and racially derogatory language at various stores. The Court found that Plaintiffs failed to establish that there were common questions of law or fact that could be answered on a class-wide basis that covered all of the members of the purported class who worked for all of the RLPMs and store managers over an extended period of time. *Id.* at *17. Accordingly, the Court held that Plaintiffs failed to meet the commonality requirement of Rule 23. As to Rule 23(b)(3), the Court determined that common issues did not predominate over individual issues with respect to the hostile work environment claim. The determination of actionable conduct was not subject to generalizable proof. *Id.* at *18. The Court explained that investigators reported to 12 different RLPMs within the Loss Prevention Department. *Id.* at *19. The Court determined that the main contention in the action was that the market investigators all received the same instruction from their RLPMs – to target Black and Hispanic customers – that they were obliged to follow if they wanted to keep their jobs. However, the Court stated that the evidence showed the majority of the RLPMs did not instruct any market investigators to profile based on race or use any racially degrading language. *Id.* The Court therefore determined that the specific allegations would require individualized inquiries to determine liability, and then to determine damages. *Id.* at *20-21. The Court also found that Plaintiffs failed to meet the superiority requirement, as 14 of the 16 Plaintiffs had commenced individual actions against Defendant arising out of similar allegations. *Id.* at *22. Those actions were at various stages, and many had been pending for over a year. The Court stated that the proposed class was not so numerous that a class action would be superior to individual actions, especially given that a class action in this case would simply devolve into individual trials on the merits for each class member. *Id.* at *23. Therefore, the Court held that Plaintiffs failed to satisfy the commonality requirement of Rule 23(a)(2) and the requirements of Rule 23(b)(3). Accordingly, the Court denied Plaintiffs' motion for class certification.

(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

***Sellars, et al. v. CRST Van Expedited Inc.*, 2017 U.S. Dist. LEXIS 47674 (N.D. Iowa Mar. 30, 2017).** Plaintiffs, three female truck drivers, brought claims against Defendant under Title VII and the California Fair Employment and Housing Act. Defendant employs thousands of truck drivers on two-person teams, so that one driver can sleep while the other drives. *Id.* at *4. Plaintiffs alleged that Defendant maintained a pattern or practice of discrimination amounting to a hostile work environment and retaliation toward female drivers who reported sexual harassment. Specifically, Plaintiffs alleged that three practices of Defendant created a hostile work environment, including: (i) failing to find a harassment complaint corroborated without an admission by the accused himself or a third-party's eyewitness account; (ii) failing to discipline male drivers even when a harassment complaint was corroborated; and (iii) tolerating the failure of responsible employees to act promptly in the face of a harassment complaint and instead encouraging the accuser to keep driving with the accused. *Id.* at *9-10. Plaintiffs also alleged that three practices of Defendant constituted retaliation against female drivers who reported harassment, including: (i) requiring an accuser to exit the truck upon complaining and thereby precluding her from earning wages by continuing to drive; (ii) forcing accusers to cover transit and lodging costs after exiting the truck; and (iii) extending student-driver training for those student-driver accusers who were forced to exit the truck after complaining of harassment. *Id.* at *22-23. Plaintiffs moved for certification of two classes under Rule 23, which consisted of: (i) female drivers subjected to a hostile work environment based on sex ("hostile work environment class"); and (ii) female drivers subjected to retaliation in response to complaints of sexual harassment ("retaliation class"). *Id.* at *35-36. Plaintiffs also moved to certify a California-only class of female drivers. The Court certified the hostile work environment and retaliation classes only with respect to particular issues under Rule 23(b)(3) and Rule 23(c)(4), and denied certification of the California-only classes. The Court's decision to certify the classes rested upon Plaintiffs' proposal of bifurcating the case in two phases. Under Plaintiffs' proposal, Phase I – the "liability" phase – would determine whether Defendant: (i) created or tolerated a hostile work environment; and (ii) retaliated against women based on sex. *Id.* at *42-43. If such "liability" were established, each case would then proceed to Phase II to determine in individual trials whether: (i) each Plaintiff subjectively believed the work environment to be hostile (a finding required to prove a hostile work environment claim and, therefore, a part of liability omitted from Phase I's "liability" trial); and (ii) damages. *Id.* at *43. The Court found that Plaintiffs' theories of discrimination provided common questions of law and fact that predominated over individual questions affecting the claim. The Court emphasized that the fact that Plaintiffs would attempt to prove those theories through anecdotal evidence. With respect to the retaliation class, the Court found that Plaintiffs' theory that Defendant retaliated by requiring female drivers to exit the truck after complaining of harassment provided common questions of law and fact, which predominated over individual questions affecting the claims and thereby satisfied Rule 23(a) and 23(b)(3). *Id.* at *59. However, the Court opined that Plaintiffs' two other theories of retaliation presented too many individualized questions to be adjudicated by representative evidence, even in a bifurcated trial. In finding that the classes on these issues satisfied Rule 23(a) and Rule 23(b)(3), the Court cited Rule 23(c)(4) in certifying them, which allows a class "with respect to particular issues," as opposed to an entire claim. *Id.* at *71. Nonetheless, in considering Plaintiffs' "alternative" request for certification under Rule 23(c)(4), the Court noted a circuit split as to whether a Plaintiff must show that his entire claim satisfies the predominance requirement of Rule 23(b)(3) before certifying particular issues under Rule 23(c)(4), or whether a Plaintiff need only show predominance with respect to the particular issue for certification under 23(c)(4). The Court acknowledged that while the Eighth Circuit has not yet decided the issue, the Court would follow the Second, Fourth and Ninth Circuits in certifying the sufficiently common issues presented by Plaintiffs despite the fact that Plaintiffs' claims in their entirety did not merit certification. *Id.* at *74. Accordingly, as to the hostile work environment class, the Court certified the issues of whether Defendant had any of the following policies, patterns or practices that create or contribute to a hostile work environment: (i) failing to find their complaints were corroborated without an eyewitness or admission; (ii) failing to discipline drivers after complaints were corroborated; and (iii) failing to discipline responsible employees for not promptly responding to sexual harassment complaints. *Id.* at *78-79. As to the retaliation class, the Court certified the issue of whether Defendant had a policy, pattern, or practice of retaliating against women complaining of sexual harassment by requiring them to exit the truck after complaining. *Id.* at *80. Accordingly, the Court granted Plaintiffs' motion for class certification in part.

(ix) Ninth Circuit

***Buchanan, et al. v. Tata Consultancy Services*, 2017 U.S. Dist. LEXIS 212170 (N.D. Cal. Dec. 27, 2017).** Plaintiffs, a group of employees, filed a putative class action alleging that Defendant maintained discriminatory employment practices based on national origin in violation of Title VII of the Civil Rights Act of 1964. Specifically, Plaintiffs claimed that Defendant maintained a pattern or practice of intentional discrimination whereby it treated employees who were of South Asian or Indian national origin more favorably than those who were not of South Asian or Indian national origin. *Id.* at *2. Plaintiffs filed a motion for class certification of two classes, including: (i) a hiring class consisting of all individuals who were not of South Asian or Indian national origin who sought a position with Defendant in the United States and were not hired between April 14, 2011 and the date of class certification; and (ii) a termination class consisting of all individuals who were not of South Asian or Indian national origin who were employed by Defendant in the United States, were placed in an unallocated status, and were terminated between April 14, 2011 and the date of class certification. *Id.* at *49-50. In analyzing Plaintiffs' motion, the Court addressed commonality under Rule 23(a) and predominance under Rule 23(b). The Court determined that with regard to the two proposed classes, Plaintiffs' claims hinged on several common questions capable of proof with evidence common to the class. The Court stated that with regard to the proposed termination class, Plaintiffs offered sufficient proof that Defendant operated under a general policy of discrimination. *Id.* at *53. By contrast, the Court found that Plaintiffs failed to offer sufficient proof that Defendant operated under a general policy of discrimination with regard to the proposed hiring class. The Court opined that the potential size of the proposed class could easily exceed 250,000. *Id.* at *54. The Court also determined that with regard to the documentary evidence offered in support of the proposed hiring class, the evidence was anecdotal and failed to establish a general policy of discrimination even if persuasive as to individual incidents involving individual class members. *Id.* at *54-55. The Court further noted that Plaintiffs offered no evidence of a "leadership directive," "corporate directive," or "management decision" with regard to hiring. *Id.* at *55. Finally, the Court stated that Plaintiffs failed to address the fact that Defendant's clients were apparently involved in the hiring process for positions that required technical skills which presents individual inquires. *Id.* Accordingly, the Court denied Plaintiffs' motion as to the hiring class. As to the termination class, the Court found that Plaintiffs' established numerosity for purposes of Rule 23(a), as expert testimony showed that Defendant involuntarily terminated between 896 and 1,116 non-South Asian and non-Indian employees during the class period. *Id.* at *56. The Court also held that Plaintiffs made a sufficient showing of typicality. The Court stated that Plaintiff Slaight was an adequate class representative and his counsel would adequately represent the class, and therefore the adequacy requirement under Rule 23(a)(4) was also satisfied. *Id.* at *57. As to superiority, Court reasoned that a liability determination would resolve as a whole the question of whether Defendant engaged in a pattern or practice of discrimination, thus obviating the need for further litigation on this issue, saving judicial and class member resources, and avoiding the possibility of inconsistent judgments. *Id.* at *61. Accordingly, the Court granted Plaintiffs' motion for class certification of the termination class and it denied Plaintiffs' motion for class certification of a hiring class.

(x) Tenth Circuit

No reported decisions.

(xi) Eleventh Circuit

***Gittens, et al. v. The School Board Of Lee County, Florida,* 2017 U.S. Dist. LEXIS 115987 (M.D. Fla. July 7, 2017).** Plaintiffs, four African-Americans educators, brought an action alleging that Defendant had a pattern or practice of failing to hire African-American candidates to administrative positions in violation of Title VII of the Civil Rights Act of 1964. Plaintiffs filed a motion for class certification, which the Court denied. Plaintiff held various teaching and administrative positions at various schools within the School District. *Id.* at *6-12. All four Plaintiffs had advanced degrees, and sought administrative positions at various schools, including the position of assistant principal. All four had at least one interview for the assistant principal position, and two were interviewed by panels of all-White school administrators. All four Plaintiffs were rejected for assistant principal positions. To be considered for an assistant principal position, an applicant must first apply and be accepted into the AP Pool. *Id.* at *13. Once accepted, an individual may then apply and be hired for a specific assistant principal position at a certain school. Each individual school advertises its open assistant principal positions, screens the applicants, conducts its own interviews and, when selected by the Principal of that specific school,

the candidate's name is submitted to the Superintendent, who then sends it to the School Board for final approval. Plaintiffs moved to certify a class of current and former employees who had applied for various positions with the School Board, including assistant principal positions. The Court denied Plaintiffs' motion for class certification. First, the Court rejected Plaintiffs' class definition, "[a]ny and all black/African-American employees who applied for an AP Pool position in the four years preceding this action but who were denied such a position by Defendant," as being improperly vague and ambiguous. *Id.* at *18-20. The Court noted that that the class definition was unclear as to whether "denied" referred to the AP Pool or the actual assistant principal position. After the Court found that Plaintiffs satisfied the numerosity requirement of Rule 23, it held that Plaintiffs failed to establish that there were common questions of law or fact sufficient to satisfy the commonality requirement. The Court opined that "[s]imilar to [*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)], Plaintiffs here wish to bring suit calling into question a relatively large number of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored." *Id.* at *28. The Court held that the exercise of discretion by schools and principals over time at different schools precluded a finding of commonality. *Id.* at *30. Turning to the typicality requirement of Rule 23, the Court reasoned that the named Plaintiffs also failed to meet this requirement because each individual school advertised its opening for an assistant principal position and had its own decision-maker screening applicants and conducting interviews before the school principal selected the top applicant. *Id.* at *37. The Court determined that Plaintiffs did not meet their burden to show that their claims were based on the same event, pattern, or practice as the claims of other putative class members. Regarding the adequacy of representation requirement, the Court cited the motion to withdraw of Plaintiffs' counsel for the named Plaintiffs as caused by "a breakdown in the attorney-client relationship." The Court concluded that Plaintiffs failed to meet their burden. *Id.* at *39-40. Finally, Plaintiffs could not meet the Rule 23(b) requirements since not all of the Rule 23(a) requirements were met. *Id.* at *40-41. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Perrero, et al. v. Walt Disney Parks And Resorts U.S., Inc.*, Case No. 16-CV-2144 (M.D. Fla. June 16, 2017).** Plaintiffs, a group of administrative office employees, filed a class action alleging that Defendant intentionally discriminated against them based on their national origin and race in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 1. Plaintiffs filed a motion for class certification, which the Court denied. Plaintiffs asserted that they were among a group of employees who were terminated and replaced by Indian nationals. *Id.* at 2. Plaintiffs alleged that they were made to train the new employees and that during the training period, Defendant was curt, unprofessional, and gave the Indian workers special treatment. *Id.* Plaintiffs alleged that this behavior created a hostile work environment. Defendant contended that in 2013, it made a business decision to reorganized its Information Technology ("IT") department and hired vendors to outsource routine work. *Id.* at 3. Defendant eliminated IT positions based on an employee ranking criteria, including hire date, time in role, current training, recent ratings, performance issues, and other issues. Once reviews were completed, Defendant informed 253 employees that they would be terminated unless they obtained other jobs with Defendant or one of its affiliates. Of the 253 affected employees, 105 obtained employment, and the remaining 148 were terminated. *Id.* at 3-4. Defendant argued that the motion for class certification should be denied because: (i) Plaintiffs failed to establish that common questions predominated over individual ones; (ii) Plaintiffs failed to demonstrate commonality because they cannot prove intentional discrimination with common evidence; and (iii) Plaintiffs failed to offer evidence to support a race discrimination class claim. *Id.* at 6. The Court agreed with Defendant and found that Plaintiffs' claims and the relief sought were inherently individualized and fact-intensive, as Plaintiffs had a variety of jobs, performed different functions, and worked at different levels at the company. *Id.* at 8. Further, Defendant employed Plaintiffs for varying lengths of time and rated each job performance individually. The Court noted that should a jury find Defendant liable to some Plaintiffs, it would have to make individualized determinations on compensatory and putative damages. *Id.* at 9. The Court therefore determined that Plaintiffs failed to satisfy predominance. The Court also held that Plaintiffs failed to demonstrate commonality because there was no question of law of fact capable of common resolution that would make the handling of the case on a class-wide basis more efficient. *Id.* at 11. Defendant presented evidence that it made separate employment decisions for every person who was terminated. *Id.* The Court found therefore the individualized proof would preclude any class-wide decision on the reason each Plaintiff lost their job. Accordingly, the Court denied Plaintiffs' motion for class certification.

(xii) District Of Columbia Circuit

***Little, et al. v. Washington Metropolitan Area Transit Authority*, 2017 U.S. Dist. LEXIS 48637 (D.D.C. Mar. 31, 2017).** Plaintiffs, a group of employees, alleged that Defendant's criminal background check policy was discriminatory on the basis of race in violation of Title VII. Defendant, the primary public transit agency for the Washington D.C. metropolitan region, adopted its Policy 7.2.3 to govern how and when individuals with criminal convictions can obtain or continue employment with Defendant and its contractors and sub-contractors. *Id.* at *4-5. Plaintiffs alleged that although the policy was facially neutral, it had a disparate impact on African-Americans. Defendant asserted that the policy was adopted as a business necessity. *Id.* at *6. Further, Defendant argued that the make-up of its employee and contractor workforce, which included 12,000 individuals, was 75% African-American, thus demonstrating that no discrimination occurred. Plaintiffs moved for certification of a hybrid Rule 23(b)(2) and Rule 23(b)(3) class, seeking both injunctive and individual monetary damages for the alleged discriminatory policy. *Id.* at *16. Alternatively, if the Court determined monetary damages were not suitable for class-wide determination, Plaintiffs proposed certification under Rule 23(b)(2) for liability and injunctive relief determinations, and the application for Rule 23(c)(4) to allow the question of liability to be answered on a class-wide basis, with individual hearings on damages owed to each specific class member. The Court held that certification was proper under Rule 23(b)(2) and Rule 23(c)(4) and certified three classes for a determination of liability and injunctive relief under Rule 23(b)(2), but withheld any individual damages determinations. *Id.* at *46. Beginning with its Rule 23(a) analysis, the Court first noted that as Defendant did not dispute Plaintiffs' assertion that the overall class included over 1,000 individuals, and each sub-class included at least 200, the Court found that Plaintiffs satisfied the numerosity requirement. Further, the Court determined that Plaintiffs satisfied the commonality requirement since the policy at issue was mandated for non-discretionary application to all hiring decisions regarding the class members, regardless of whether the candidates applied for positions with different contractors, sub-contractors, or directly with the WMATA. *Id.* at *50. Regarding typicality, the Court concluded that the class representatives' claims were typical of the class as they addressed each part of the policy with the exception of one policy appendix, for which Plaintiffs did not present a class representative. Finally, regarding the adequacy requirement, the Court rejected Defendant's argument that the proposed named Plaintiffs were inadequate because they lacked standing, noting the merits of their allegations were not to be considered as part of the class certification calculus. *Id.* at *56-57. The Court also analyzed Plaintiffs' motion for certification of a hybrid Rule 23(b)(2) and (b)(3) class. Defendant argued that Plaintiffs failed to identify which parts of Policy 7.2.3 produced a disparate impact, and their failure to identify the particular challenged employment practice prohibited certification. Noting that each appendix to the policy constituted a separate employment practice, and that Plaintiffs identified three appendices to the policy that allegedly had a disparate impact on African-Americans, the Court found that Plaintiffs satisfied their burden under Rule 23(b)(2). *Id.* at *59-60. However, the Court held that Plaintiffs failed to meet the predominance requirement under Rule 23(b)(3) and therefore it refused to certify the class for monetary damages. *Id.* at *65-66. Specifically, the Court reasoned that the case involved "more than just the individual determination of damages" – namely, the trier of fact must also determine, for each individual class member, whether that class member was not hired or fired due to the Policy 7.2.3., or for some other reason. *Id.* at *66. Accordingly, the Court granted in part Plaintiffs' motion for class certification and certified three classes under Rule 23(b)(2) and Rule 23(c)(4) with respect to liability and the availability of injunctive relief.

(xiii) U.S. Equal Employment Opportunity Commission

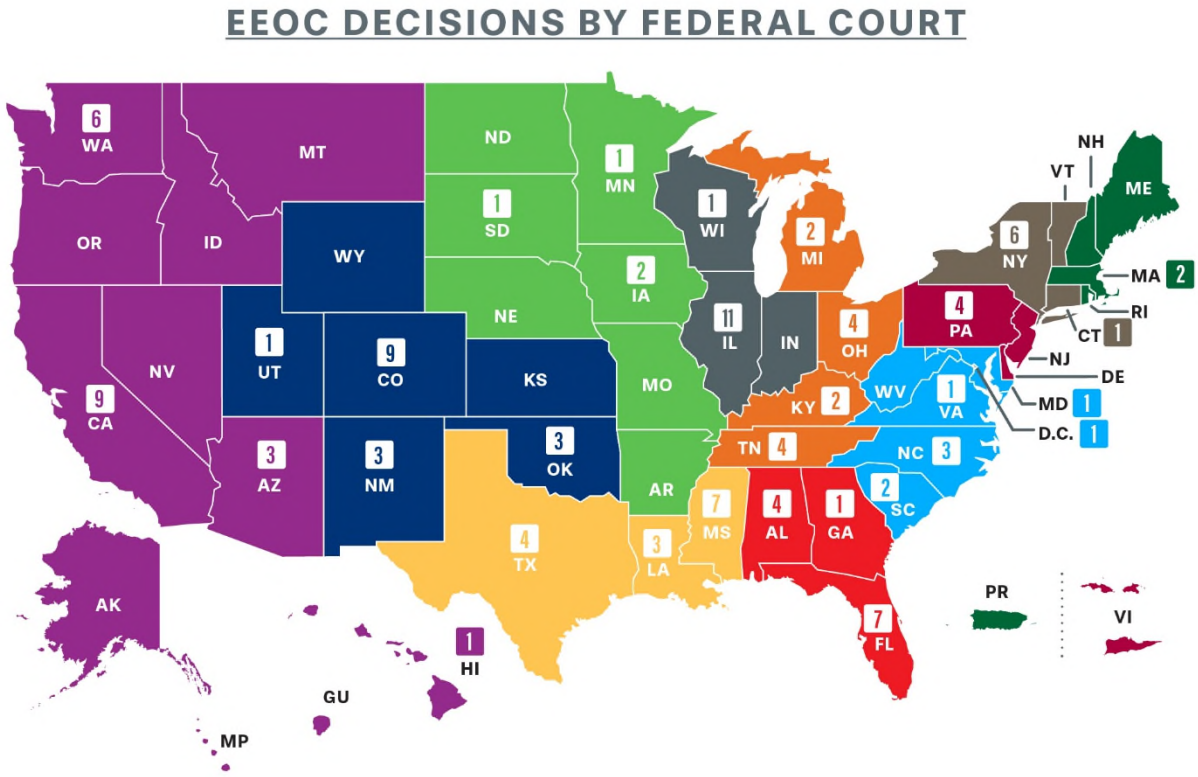
No reported decisions.

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 Rule 23's 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 2016. The 110 rulings over the past year covered a wide gamut of issues.

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



(i) First Circuit

***EEOC v. Baystate Medical Center, Inc.,* 2017 U.S. Dist. LEXIS 179016 (D. Mass. Oct. 30, 2017)**. The EEOC brought an action on behalf of the charging party, Stephanie Clark, alleging that Defendants discriminated against her by terminating her employment after she refused to receive an mandatory influenza shot because of religious beliefs in violation of Title VII of the Civil Rights Act. The EEOC filed a motion to compel answers to interrogatories 3, 4, and 5, and to produce documents in response to its document request numbers 13, 16, 17, 18, 19, 20, 21, 22, 38, 39, 40, 41, and 44. Defendants asserted that they declined to answer the interrogatories and requests to produce documents that sought: (i) so-called comparator information; (ii) material concerning Defendants' affirmative defenses; and (iii) information concerning Defendants' influenza immunization and teleworking policies. *Id.* at *3. The Court found that production of information for all relevant parties would be overly broad as there were over 500 employees for the information sought. The Court therefore instructed the parties to sample 75 employees from whom to produce information relating to the EEOC's requests. *Id.* at *13. The Court ordered Defendants – for the 75 employees and for interrogatory three – to provide the EEOC with name title, department, dates of declination of the vaccine, and reasons given for declining. *Id.* at *14. The Court granted the EEOC's motion to compel a response to interrogatory number four for all personnel who declined influenza immunizations and for whom Defendants had any record of discipline for non-compliance with the policy in effect at the time. *Id.* at *17. The Court also granted the EEOC's motion as to interrogatory number five and ordered Defendants to produce the names of the two individuals who wore masks. *Id.* at *19. The Court denied the EEOC's request for documents number 13, finding it overbroad. The Court allowed the EEOC's

requests for documents 16 through 22, to the extent the EEOC sought disclosure of the documents and electronically-stored information disclosing the facts supporting Defendants' affirmative defenses that were identified in these document requests. *Id.* at *21. The Court allowed request for documents number 38, 39, 40 and 44 only as to paper documents and electronically-stored information that concerned Defendants' influenza immunization policy, including any records related to discipline, in the personnel files of the employees identified previously. *Id.* at *24. Accordingly the Court granted the EEOC's motion in part.

***EEOC v. Texas Roadhouse, Inc.,* Case No. 11-CV-11732 (D. Mass. Mar. 9, 2017).** 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 workers over the age of 40. Defendant moved for a 12-month continuance on the trial set to begin in May of 2017 because of an opinion piece printed in *The Boston Globe*, which it contended misrepresented the facts of the case and thereby would unfairly impact the opinions of potential jurors. Defendant argued that the article raised three specific concerns, including: (i) that it appeared likely that the EEOC provided the columnist with information regarding jurors who she then contacted and interviewed; (ii) the article focused on evidence previously excluded prior to trial regarding the EEOC's enforcement tactics; and (iii) the article insulted male jury members by insinuating that their gender prejudices would render them unable to complete their civic duty impartially. The EEOC asserted that Defendants' request for a continuance should be denied. The EEOC alleged that Defendants have been trying to hold up the case's conclusion since a previous mistrial was declared. The EEOC further argued that Defendants failed to cite any case law precedent supporting the notion that publicity of the type at issue here provided grounds for granting either a significant continuance of trial or a change of venue. The Court agreed with the EEOC, and declined to accept Defendants' argument that it could not receive a fair trial in light of the recent newspaper article. The Court therefore denied Defendant's motion for a continuance. However, the Court stated that it would allow voir dire questioning by Defendants at the time of jury selection about the exposure of potential jurors or prior media coverage.

(ii) Second Circuit

***EEOC v. AZ Metro Distributors*, 2017 U.S. Dist. LEXIS 132447 (E.D.N.Y. Aug. 18, 2017).** The EEOC brought an action on behalf of Defendant's two former employees, Archibald Roberts and Caesar Fernandez, alleging violations of the ADEA. Defendant filed an answer asserting thirty-one affirmative defenses. *Id.* at *4. Thereafter, the EEOC filed a motion to strike the third, fourth, fifth, sixth and eighth affirmative defenses pursuant to Rule 12(f) or Rule 56(a). The Magistrate Judge previously recommended that the EEOC's motion be denied in part and granted in part. The Magistrate Judge recommended that the Court grant the EEOC's motion to strike the third, fifth and sixth affirmative defenses, but deny the motion as to the fourth and eighth affirmative defenses. Defendant's third, fifth and sixth affirmative defenses all purported to be complete defenses to the ADEA claims brought by the EEOC. The third and sixth affirmative defenses contended that the EEOC failed to satisfy statutory prerequisites for commencing its enforcement action. The fifth defense alleged that the EEOC unlawfully retaliated against Defendant. Defendant argued that there were questions of fact and law that, if found in its favor, would allow these affirmative defenses to succeed and that the EEOC would not be prejudiced by the discovery related to them. *Id.* at *5. However, the Court found that the Magistrate Judge's thorough and well-reasoned analysis regarding the third, fifth, and sixth affirmative defenses was not erroneous and it adopted the Magistrate Judge's findings as to those defenses. The Court noted that Defendant's fourth and eighth defenses were best interpreted as requests for attorneys' fees and costs. The EEOC argued that these two defenses must be stricken because they are not affirmative defenses. The Court found that regardless of any ultimate entitlement to them, requests for fees and costs are not affirmative defenses to a substantive claim. *Id.* at *7. In recommending that the fourth and eighth affirmative defenses not be stricken, the Magistrate Judge found it "crucial that the EEOC has not moved to strike the seventh affirmative defense," which also asserted a claim for attorneys' fees, costs, and sanctions, premised, essentially, on the same facts undergirding the EEOC's decision to bring its enforcement action. Therefore, even if the fourth and eighth defenses were stricken, the scope of discovery would not be altered materially. *Id.* at *8. The Magistrate Judge concluded that no prejudice would attach to a decision not to strike the fourth and eighth affirmative defenses because discovery into the EEOC's decision to sue would commence regardless. The Court disagreed and stated that because these so-called affirmative defenses were not affirmative defenses, they generated no right to pretrial

discovery in the first place, and denial of the motion to strike would prejudice the EEOC by denying its right to be free of them in the course of the substantive litigation. *Id.* at *9. The Court further determined that the EEOC's failure to move against the seventh defense was not a barrier to striking the fourth and eighth affirmative defenses. Accordingly, because the EEOC would be burdened by the inclusion of the fourth, seventh and eighth affirmative defenses seeking attorneys' fees, costs, and sanctions, the Court ruled these defenses stricken from Defendant's answer. *Id.* at *10. Accordingly, the Court adopted the report and recommendation in part and ruled on the EEOC's motion to strike.

***EEOC v. Day & Zimmerman NPS, Inc.*, 2017 U.S. Dist. LEXIS 133918 (D. Conn. Aug. 22, 2017).** In the fall of 2012, Defendant hired 147 temporary electricians, including the charging party, who was a member of Local 35 of the International Brotherhood of Electrical Workers ("Local 35"). *Id.* at *4. After the charging party began training for the position, he provided a doctor's note to Defendant indicating that he could not work around radiation. The note requested a reasonable accommodation. After receiving the doctor's note and the request for a reasonable accommodation, Defendant terminated the charging party's employment. In October 2012, the charging party filed a charge of discrimination with the EEOC, alleging that Defendant failed to accommodate his disability reasonably and unlawfully terminated his employment. *Id.* at *5. In March 2014, the EEOC sought information from Defendant as part of its investigation of the employee's charge, including the names and contact information of other electricians who had worked for Defendant at the Millstone Power Station in Waterford, Connecticut in the fall of 2012. In June 2014, before providing the requested information to the EEOC, Defendant sent a letter to approximately 146 individuals, all of whom were members of Local 35 and all of whom had worked or continued to work for Defendant. *Id.* at *6-7. In the June 2014 letter, Defendant identified the allegedly aggrieved employee by name and indicated that he had filed a charge of discrimination on the basis of disability. The letter identified his union local, the medical restrictions on his ability to work, and the accommodation he had requested. It further informed the recipients of their right to refuse to speak to the EEOC investigator, and offered them the option to have counsel present if they chose to speak to the EEOC. The EEOC subsequently sued, and moved for partial summary judgment on its interference claim under the ADA. Defendant moved for summary judgment, arguing that: (i) the EEOC's legal theories would violate Defendant's free speech rights under the First Amendment of the U. S. Constitution; (ii) that the June 2014 letter was protected by the litigation privilege under Connecticut law; (iii) that the EEOC could not, as a matter of law, make out a claim for retaliation under the ADA; (iv) that the EEOC could not, as a matter of law, make out a claim for interference under the ADA; and (v) that the EEOC lacked standing to bring this case under Article III of the U.S. Constitution. The Court denied both parties' motions for summary judgment. First, the Court rejected Defendant's claim that the EEOC lacked Article III standing to bring the case because no punitive or compensatory damages were available to the EEOC. *Id.* at *13-14. The Court noted that Defendant cited to no legal authority supporting that proposition. Defendant argued that if the Court found that its sending of the letter was either retaliation or interference in violation of the ADA, then the Court would be establishing a content and speaker-based restriction on speech that violated the First Amendment. The Court rejected this argument, holding that Defendant identified no authority supporting its argument that the First Amendment protects speech from a Defendant if that speech gives rise to liability under the ADA or other employment discrimination statutes. *Id.* at *16-19. Turning to the ADA retaliation claim, Defendant argued that there was no genuine dispute of material fact that the EEOC would not be able to establish the third and fourth prongs of the *prima facie* case of retaliation under the ADA, *i.e.*, either an adverse employment action or a causal connection between the protected activity and the adverse employment action. *Id.* at *26-28. Defendant also argued that, even if the EEOC showed a genuine dispute of material fact as to the *prima facie* case for retaliation, the EEOC did not rebut Defendant's legitimate non-retaliatory reasons for sending the letter. The Court found that when an employer disseminates an employee's administrative charge of discrimination to an employee's colleagues, a reasonable fact-finder could determine that such conduct constitutes an adverse employment action. In regards to Defendant's legitimate, non-discriminatory reason for sending the letter – to "minimize business disruption" and notify the recipients that Defendant had disclosed their "home telephone numbers and addresses . . . to the EEOC" – the Court found that a reasonable jury also could conclude that Defendant's explanation was pretextual because the letter did not need to explain that recipients need not speak to the EEOC investigator and that counsel for Defendant could be present if the recipient chose to speak to the EEOC. *Id.* at *34. Finally, the Court addressed both parties' motion for summary judgment on the ADA interference claim. *Id.* at *35-39. The EEOC argued that Defendant interfered with the rights under the ADA of all the letter recipients because a

reasonable jury would need to conclude that the letter had a tendency to chill recipients from exercising their rights under the ADA. Citing its previous order denying Defendant's motion to dismiss, where the Court held that the disclosure of sensitive personal information about an individual could well dissuade that individual from making or supporting a charge of discrimination under the ADA, the Court found that a reasonable jury could conclude that the letter could have the effect of interfering with or intimidating the letter's recipients with respect to communicating with the EEOC about possible disability discrimination by Defendant. Accordingly, explaining that because this question should be reserved for the jury, the Court denied both parties' motions for summary judgment.

***EEOC v. Frontier Hot-Dip Galvanizing*, 2017 U.S. Dist. LEXIS 208632 (W.D.N.Y. Dec. 18, 2017).** The EEOC filed an action against on behalf of two employees alleging that Defendant subjected them to discrimination on the basis of their race (African-American) in violation of Title VII of the Civil Rights Act of 1964. The EEOC moved to strike 11 of Defendant Frontier's affirmative defenses. Frontier in turn had sued Coastal Staffing Services of New York ("Coastal Staffing"), who filed a motion for judgment on the pleadings; subsequently, Frontier filed a motion to amend its third-party complaint. *Id.* at *1-2. The Magistrate Judge recommended granting the EEOC's motion in part, granting Costal Staffing's motion, and denying Frontier's motion. Frontier commenced a third-party action against Coastal Staffing on the basis that Coastal Staffing breached its contract to provide the best quality services in providing staff to Frontier, and failed to properly train and/or screen staff to exclude individuals who would engage in misconduct. *Id.* at *2-3. Frontier's proposed amended complaint asserted that Coastal Staffing was an employer and/or joint employer and that Costal Staffing knew or should have known that its employees had a history of engaging in inappropriate and/or unlawful discriminatory harassment. *Id.* at *4. The Magistrate Judge found that Frontier failed to allege any agreement by Coastal Staffing to screen employees for a history of workplace discrimination, let alone an unmistakable intent on the third-party contract that Coastal Staffing would indemnify, contribute, or otherwise incur liability for discrimination or retaliation at Frontier's workplace. Accordingly, the Magistrate Judge recommended that Coastal Staffing's motion for judgment on the pleadings be granted and Frontier's motion to amend its complaint be denied as futile. *Id.* at *9. As to the EEOC's motion to strike, the Magistrate Judge rejected Frontier's second affirmative defense that the employees represented by the EEOC failed to exhaust all available administrative remedies because it failed to articulate which, if any, administrative procedures the EEOC failed to complete before bringing suit. *Id.* at *10. As Title VII "imposes no limitation upon the power of the EEOC to file suit in federal court," the Magistrate Judge recommended striking this affirmative defense with prejudice. *Id.* at *12. The fourth affirmative defense asserted that the complaint exceeded the scope of the administrative charges of discrimination made by the complaining employees. The Magistrate Judge stated that the content of an individual employee's charge does not limit the scope of a lawsuit brought by the EEOC in an enforcement capacity, and therefore recommended that this affirmative defense be stricken with prejudice. The sixth affirmative defense asserted that Frontier was not liable for the acts of its employees. The Magistrate Judge concluded that this affirmative defense was not available when, as here, the supervisor's harassment culminated in a tangible employment action, such as discharge. *Id.* at *14. The Magistrate Judge also recommended striking the defenses asserting that the employees represented by the EEOC were estopped from asserting their claims, due to lache, and unclean hands. The 16th affirmative defense asserted that the EEOC failed to engage in a good faith conciliation and failed to provide Frontier with information that would allow Frontier to investigate the claims, and the 18th affirmative defense asserted that the EEOC failed to endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, or persuasion. *Id.* at *17. The Magistrate Judge held that the EEOC failed to establish that there was no factual or legal issue regarding its compliance with its obligations under 42 U.S.C. § 2000e-5(b) or that discovery with respect to those obligations would be prejudicial. Accordingly, the Magistrate Judge recommended that the motion to dismiss these affirmative defenses be denied. *Id.* at *19.

***EEOC v. Sterling Jewelers Inc.,* 2017 U.S. Dist. LEXIS 3011 (W.D.N.Y. Jan. 4, 2017).** 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. The EEOC filed a motion to compel Defendant to produce four documents in discovery. *Id.* at *1. Defendant had produced hundreds of thousands of documents with respect to the lawsuit and in a parallel arbitration entitled *Jock, et al. v. Sterling Jewelers Inc.* On March 27, 2013, Defendant advised the EEOC that it had inadvertently produced over 1,000 documents labeled "attorney-client privileged" or

"attorney work product," and that the documents should be returned and/or destroyed pursuant to the parties' negotiated protocol and confidentiality order. Defendant sought the return and/or destruction of the documents pursuant to the claw-back provisions of the confidentiality order entered into between Sterling and the EEOC, which provided that a party's inadvertent production of privileged information did not operate as a waiver of the privilege. The EEOC agreed to destroy the documents, but reserved the right to demand production in the future if additional facts came to light that impacted the claim of privilege. Subsequently, in the *Jock* arbitration, a similar issue relative to the four documents was litigated before a Special Master, who ruled that Defendant had waived the privilege by waiting a month to request return of the documents. Claimants in *Jock* then submitted the documents in support of their motion for class certification. On February 2, 2015, the Arbitrator granted their motion and certified Claimants' disparate impact class claims on liability issues only ("Class Determination Award"). *Id.* at *4. In making the award, the Arbitrator quoted directly from three of the four documents at issue. Defendant then filed a motion to vacate the Arbitrator's Class Determination Award in the U.S. District Court for the Southern District of New York. Defendant attached an unredacted copy of the Award to its public filing. Subsequently, in November of 2016, the EEOC requested that Defendant produce the four documents quoted in the Award. Defendant refused on the grounds that the documents were privileged. The EEOC argued that the documents were not privileged and that even if the documents were privileged, Defendant had waived the privilege by publicly disclosing some of the contents of the documents in its motion to vacate the Award. The EEOC further asserted that Defendant was collaterally estopped from asserting the privilege because of a finding of waiver in the parallel arbitration proceeding. In rejecting the EEOC's position, the Magistrate Judge held that all of the documents were privileged. The Magistrate Judge further ruled that Defendant waived the privilege only as to the portions of information that it publicly disclosed in its motion to vacate the Award. Accordingly, Defendant did not waive the privilege as to the entirety of the documents. The Magistrate Judge also found that the doctrine of collateral estoppel did not apply because the issues raised in both cases were not identical. The Magistrate Judge noted that the EEOC did not initially challenge Defendant's claw-back request and agreed to return or destroy the documents pursuant to the confidentiality order. Accordingly, the Magistrate Judge granted the EEOC's motion to compel in part and denied it in part.

EEOC v. Sterling Jewelers Inc., **2017 U.S. Dist. LEXIS 200269 (W.D.N.Y. May 4, 2017).** The EEOC sued Defendant for alleged systemic discrimination relative to the starting pay and promotional opportunities of female sales employees who worked for Defendant in over 1,800 retail jewelry stores in all 50 states. The claimants at issue numbered over 77,000 current and former employees. The EEOC asserted that Defendant engaged in disparate treatment discrimination in violation of Title VII of the Civil Rights Act of 1964, and it sought compensatory and punitive damages on behalf of the claimants. The Commission also asserted that Defendant's pay and promotion practices had a disparate impact on female sales employees. After extensive discovery, Defendant moved for partial summary judgment on the grounds that the EEOC failed to fulfill its statutory prerequisites to filing suit, and that it had falsely plead that it had conducted a nationwide investigation of Defendant's pay and promotional practice prior to filing its lawsuit. Although the EEOC asserted that it had conducted a sufficient investigation of Defendant's pay and promotional practices, Defendant argued that the EEOC's pre-suit investigation involved only 2 stores in Buffalo, New York, and Tampa, Florida. The District Court agreed with Defendant, dismissed the litigation, and granted the motion for partial summary judgment in *EEOC v. Sterling Jewelers*, 3 F. Supp. 3d 57 (W.D.N.Y. 2015). The EEOC appealed, and during the briefing on the appeal, the U.S. Supreme Court ruled in *Mach Mining LLC v. EEOC*, 135 S. Ct. 1645 (2015), that – as to the scope of review when the Commission's efforts at conciliation are in dispute – so long as some effort was made at conciliation, that was sufficient in terms of fulfilling the statutory pre-suit requirements of the EEOC, and no more probing judicial review is appropriate. Subsequently, the Second Circuit reversed the dismissal of the litigation in *EEOC v. Sterling*, 801 F.3d 96 (2d Cir. 2015), on the grounds that the District Court should not have analyzed the degree to which the EEOC had conducted an investigation, as any investigation was sufficient (on the grounds that, similar to the review of the conciliation issues in *Mach Mining*, the EEOC's investigation duties should be construed in a similar fashion). After the U.S. Supreme Court denied Defendant's petition for *certiorari*, the case was remained to the District Court for trial. Subsequently, that parties settled. The consent decree agreed to by the EEOC included no monetary relief for any of the 77,000 claimants. Further, the consent decree did not provide for appointment of an outside monitor relative to oversight of the employer's pay and promotional practices. The consent decree obligated Defendant to train its managers on avoidance of workplace discrimination, and required the employer to engage an outside employment practice expert to review its pay

and promotional practices and to make recommendations for avoiding discrimination if the outside expert found any adverse impact on the pay and promotional practices. Specifically, as part of the consent decree, Defendant maintained all management discretion in terms of its administration of human resources functions, but agreed to retain an employment practices expert to work with Defendant to evaluate and recommend changes, if any, regarding: (i) skills and competencies necessary for certain retail positions; (ii) essential valid criteria for promotion; (iii) factors used to set starting pay: (iv) Defendant's policies or procedures for setting starting wages; (v) procedures that enabled Defendant to monitor compensation of sales associates; (vi) identification of disparities in compensation of female and male retail sales employees; and (vii) Defendant's promotion programs with the goal of increasing participation of eligible qualified women. *Id.* at *12. The Consent Decree also outlined the ways that the employment practices expert would focus on equal employment procedures for compensation and promotion, including: (i) working on job descriptions for positions bases upon job analyses; (ii) evaluating criteria for starting rate of pay and merit pay for positions; and (iii) maintaining a registry for employees to express interest in promotions and other employment-related opportunities. Further, Defendant was required to post a notice of the consent decree in each of its stores. Defendant also was required to bear the costs incurred with implementation of the consent decree and each party agreed to bear their own attorneys' fees and expenses incurred in the litigation. *Id.* at *46.

Editor's Note: The settlement of this lawsuit is precedent-setting insofar as it was the largest EEOC lawsuit ever filed (involving over 77,000 claimants), and was resolved for the payment of no money and without the requirement of an outside monitor.

***EEOC v. United Parcel Service, Inc.,* 2017 U.S. Dist. LEXIS 34929 (E.D.N.Y Mar. 9, 2017).** The EEOC brought an action against Defendant alleging that Defendant violated Title VII of the Civil Rights Act of 1964 and discriminated against the charging parties when it refused to provide religious accommodations to employees. *Id.* at *1, 3. Defendant's appearance policy prohibited male employees from having beards and growing their hair longer than collar length. *Id.* at *3. The EEOC moved to strike seven of Defendant's affirmative defenses pursuant to Rule 12(f). *Id.* at *2. The Magistrate Judge recommended that the EEOC's motion to strike be granted as to the defenses of: (i) failure to conciliate; (ii) failure to exhaust administrative remedies; and (iii) limitations of claims. *Id.* at 58. The Magistrate Judge recommended that the motion be denied as to: (i) waiver and estoppel; (ii) laches and unclean hands; (iii) the statute of limitations; and (iv) failure to make a prompt determination. *Id.* at 58. The Magistrate Judge noted at the outset that motions to strike are generally disfavored. *Id.* at *9. Defendant acknowledged that the EEOC had reached out to resolve and engage in conciliation, but alleged that the EEOC acted in bad faith. *Id.* at *19. The Magistrate Judge recommended that the defense be stricken because the appropriate scope of review was limited to a determination of whether the parties conciliated and not to whether it was in good faith. *Id.* at *20. The Magistrate Judge recommended that the defense of failure to exhaust the administrative procedures also be granted because of the limited nature of the judicial review of the EEOC's pre-suit obligations and Defendant's failure to plead this defense with particularity. *Id.* at *47. The Magistrate Judge also recommended that the affirmative defense of limitation of claims be stricken because the EEOC is permitted to add claimants and charges to a complaint after suit has been filed based on an investigation conducted during the process of litigation. *Id.* at 55. The Magistrate Judge recommended denying the motion as to the defense of waiver and estoppel because it was impossible to state definitively, due to limited discovery, that there were no set of facts that would provide a viable defense of waiver or estoppel. *Id.* at *37. As to unclean hands, because there is no *per se* rule against assertions of the defense of laches and unclean hands against the EEOC and as limited discovery had been conducted, the Magistrate Judge recommended that the motion to strike be denied as premature. *Id.* at *42. Regarding the statute of limitations, because the Court had previously addressed that question and found that factual issues remained as to when Defendant received sufficient notice of the EEOC's investigation for the purposes of triggering the 300-day filing limit, the Magistrate Judge recommended that EEOC's motion to strike Defendant's statute of limitations defense be denied. *Id.* at *46. Because there were still factual issues surrounding whether the EEOC failed to make a prompt determination, the Magistrate Judge recommended denying the motion to strike this defense as well. *Id.* at *58. Accordingly, the Magistrate Judge recommended that the EEOC's motion to strike Defendant's affirmative defenses be granted in part and denied in part. *Id.*

***EEOC v. United Parcel Service, Inc.,* 2017 U.S. Dist. LEXIS 101564 (E.D.N.Y June 29, 2017).** The EEOC brought an action against Defendant alleging that it violated Title VII of the Civil Rights Act of 1964 and discriminated against individuals, as well as a nationwide group of similarly-situated employees when it refused to provide religious accommodations to employees. *Id.* at *2. Defendant's appearance policy prohibited male employees that had customer contact from having beards and growing their hair longer than collar length. *Id.* at *3. The EEOC brought a motion to strike Defendant's affirmative defenses. The Magistrate Judge recommended that the motion be granted as to: (i) failure to conciliate; (ii) failure to exhaust administrative remedies; and (iii) limitations of claims. The Magistrate Judge recommended that the motion be denied as to: (i) waiver/estoppel; (ii) laches and unclean hands; (iii) statute of limitations; and (iv) failure to make a prompt determination. On Rule 72 review, the Court considered the parties' objections and granted the EEOC's motion to strike as to all of Defendant's affirmative defenses except: (i) statute of limitations; (ii) waiver/estoppel; and (iii) limitations of claims as to yet named claimants. *Id.* at *53. Neither party objected to the recommendation that the Court deny the motion to strike the statute of limitations defense; therefore, the Court denied the EEOC's motion to strike as the statute of limitations defense. *Id.* at *18. Defendant objected to the recommendation that the Court strike Defendant's defense of failure to conciliate. *Id.* at *18. The Court ruled that the EEOC had met its obligation to conciliate, as Defendant submitted numerous letters between the parties as part of their conciliation efforts and did not dispute that the EEOC attempted to conciliate the charges. *Id.* at *26. Accordingly, the Court granted the EEOC's motion to strike this defense. The EEOC objected to the recommendation that the Court deny its motion to strike Defendant's affirmative defense of waiver and/or estoppel and argued that where the government undertakes to enforce a public right or protect the public interest, equitable defenses cannot apply. *Id.* at *30. The Court disagreed and denied the motion to strike, reasoning that the law as to the applicability of equitable defenses to government agencies was not well settled. *Id.* at *34. The EEOC also objected to the recommendation that the Court deny its motion to strike as to the affirmative defense of latches. *Id.* at *34. The Court agreed with the EEOC's argument that the Court had already rejected the affirmative defense of laches when it denied Defendant's motion to dismiss on that basis, and therefore it granted the motion. Defendant objected to the recommendation that the Court strike the affirmative defense of failure to exhaust the administrative procedures. *Id.* at *39. The Court agreed with the recommendation and opined that Defendant failed to articulate which procedures the EEOC failed to exhaust. To the extent that Defendant challenged the EEOC's investigatory process, neither party disputed that the EEOC investigated the claim and the Court's review was limited to that determination. *Id.* at *41. Defendant also objected to the recommendation that the Court strike Defendant' affirmative defense of limitation of claims in that the EEOC should not be able to recover any damages or pursue any claim on behalf of any claimant based on conduct outside the scope of the underlying charge of discrimination, or based upon conduct outside the scope of the charging parties' respective charges. *Id.* at *42. The Court adopted the recommendation, but only as to the yet-unnamed claimants. *Id.* at *45. The EEOC also objected to the recommendation that the Court deny its motion to strike Defendant's affirmative defense of failure to make prompt determinations. *Id.* at *50. The Court declined to adopt the recommendation and ruled that this defense was legally insufficient as Title VII does not require the EEOC to complete its investigation and issue a determination within a particular time-frame. *Id.* In sum, the Court granted the EEOC's motion in part and denied it in part.

(iii) Third Circuit

EEOC v. Bob Evans, 2017 U.S. Dist. LEXIS 131015 (W.D. Pa. Aug. 17, 2017). The EEOC brought an action claiming that Defendant discriminated against the charging party because she was pregnant in violation of Title VII. *Id.* at *1. The EEOC moved for partial summary judgment as to liability and as to Defendant's "good faith defense." *Id.* a*t* *2. In turn, Defendant moved for summary judgment as to liability and alternatively summary judgment as to the claims for emotional distress, damages, and injunctive relief. *Id.* at *3. The Court granted the EEOC's motion for summary judgment as to liability, but denied it as to the good faith affirmative defense. *Id.* at *81. In addition, the Court denied Defendant's motion for summary judgment. *Id.* The charging party worked as a food server and Defendant used an automated computer-based scheduling system to create its employees' schedules. *Id.* at *6-7. Servers could change their availability in the system for purposes of the automated generated shift schedule. *Id.* The charging party was due to give birth in September and testified that her manager asked her in mid-July when she would be taking leave at which time she indicated that she would work until she had the baby. *Id.* at *11. She further testified that the manager indicated that she should take her name

out of the automated schedule but that she would still get her hours. *Id.* at *12. Defendant did not dispute that the manager said he was going to set her availability to zero, but disputed that the charging party objected to being taken out of the automated schedule. *Id.* The manager took the charging party out of the automated schedule, and she worked less shifts than she had previously and was required to call to see if there were shifts available for her to work. *Id.* at *19. Defendant asserted that the manager removed the charging party from the automated scheduling system because he believed her due date was imminent and her attendance was unpredictable, and not because of her pregnancy. *Id.* at *23. Defendant argued that manager made the decision to remove the charging party from the automated scheduling system for the predictability of the schedule and to ensure the restaurant's staffing needs. *Id.* Defendant asserted that this was an indirect evidence case and the EEOC could not establish an inference of discriminatory motive under the burden-shifting framework for indirect evidence cases. *Id.* The EEOC argued that there was no genuine issue of fact and that the undisputed direct evidence established intentional discrimination against the charging party based on her pregnancy as a matter of law. *Id.* The Court agreed with the EEOC and ruled that there was direct undisputed evidence that Defendant discriminated against the charging party because of her pregnancy. *Id.* at *51. The Court opined that she suffered an adverse employment action because she went from a regularly scheduled worker to a fill-in worker because she was pregnant. *Id.* at *58. The Court denied the EEOC's argument that because Defendant did not list pregnancy discrimination in its anti-discrimination policy it was not entitled to raise the good faith affirmative defense, as there was evidence from which a reasonable jury could find that the conduct of the manager was contrary to the good faith efforts of Defendant to comply with Title VII. *Id.* at *76. The Court also denied Defendant's motion for summary judgment on punitive damages because there was evidence from which a jury could find that Defendant's violation was willful. *Id.* at *77. The Court further denied Defendant's motion for summary judgment as to injunctive relief, ruling that the parties at trial will present evidence as to whether there is a cognizable danger of recurrent violation. *Id.* at *81. In sum, the Court granted the EEOC's motion for summary judgment on liability, but denied it as to the good faith defense to punitive damages. *Id.* The Court also denied Defendant's motion for summary judgment in all respects. *Id.*

***EEOC v. City Of Long Branch*, 866 F.3d 93 (3d Cir. 2017).** The EEOC investigated a charge filed by Lyndon Johnson, an African-American Lieutenant in the Long Branch Police Department, who alleged that he was discriminated against on the basis of his race in violation of Title VII of the Civil Rights Act of 1964. Johnson alleged that he was subjected to different and harsher disciplinary measures than similarly-situated white colleagues who committed the same or similar infractions. During the investigation, the EEOC requested disciplinary records for Johnson and six white comparators. In response, Defendant notified the EEOC that it was gathering the materials, but would produce them only if the EEOC agreed to certain restrictions in the use and disclosure of the confidential materials. *Id.* at 96. The restrictions included a prohibition against providing any material designated confidential in whole or in part, other than in the form of the EEOC's opinions and conclusions to Johnson, and/or his counsel. *Id.* When the EEOC refused to agree to the restrictions, Defendant advised the EEOC that it would not produce the requested information absent a judicial order. *Id.* at 97. The EEOC subsequently brought a subpoena enforcement action to secure the records, and the Magistrate Judge issued an order to enforce the subpoena in part. The Magistrate Judge compelled Defendant to provide the requested documents, but required the EEOC to avoid disclosure of the comparators' employment and personnel records to Johnson, reasoning that disclosure of the comparators' records to Johnson would be improper. *Id.* Per Rule 72, the EEOC sought review of the order with the District Court. The District Court adopted the Magistrate Judge's order. On appeal, the Third Circuit vacated the District Court's ruling and remanded for further proceedings. The EEOC raised two substantive issues on appeal, the first regarding the exhaustion of administrative remedies and the second regarding the disclosure to the charging party of other employees' disciplinary and related records. Based on its review of the record, the Third Circuit found a significant procedural defect pertaining to the treatment of the motion to enforce under the Federal Magistrates Act, which precluded it from reaching the merits of the EEOC's arguments. The Third Circuit held that the District Court erroneously treated the motion to enforce that the Magistrate Judge had reviewed as a non-dispositive motion instead of a dispositive motion. The Third Circuit explained that there is a meaningful distinction under the Federal Magistrates Act as the categorization of a motion dictates the level of authority with which a Magistrate Judge may act on a motion and the availability and standard of review afforded by the District Court. *Id.* at 98. The Third Circuit stated that it previously had held that because a proceeding to enforce an administrative subpoena "is over regardless of which way the Court rules," a motion to enforce an administrative

subpoena is a dispositive motion. Accordingly, any assignment of the motion by the District Court required the Magistrate Judge "to submit to a judge of the Court proposed findings of fact and recommendations" for the motion. *Id.* at 100. The Third Circuit reasoned that had the motion been so assigned, the parties could have objected to the Magistrate Judge's report and recommendation, in which case the District Court would have reviewed their objections or been silent as to objections, and would have "given some reasoned consideration to the Magistrate Judge's report before adopting it as the decision of the Court." *Id.* Hence, the District Court's erroneous categorization of the motion was compounded by the fact that the EEOC raised the disclosure issue, but not the exhaustion issue, to the District Court. As a result, the Third Circuit found that the District Court – proceeding as if the motion had been referred to the Magistrate Judge as non-dispositive – applied the clearly erroneous or contrary to law standard to the objected-to disclosure issue and apparently did not review the unobjected-to exhaustion issue at all. *Id.* at 101. The Third Circuit thereby vacated the District Court's ruling and remanded for further proceedings. The Third Circuit ruled that the District Court could consider the motion to enforce in the first instance or it could treat the Magistrate Judge's order as a report and recommendation and allow the parties the opportunity to object.

***EEOC v. Commonwealth Of Pennsylvania*, 2017 U.S. Dist. LEXIS 107664 (M.D. Pa. June 12, 2017).** The EEOC filed an action asserting that Defendant violated the Age Discrimination in Employment Act ("ADEA"). The EEOC requested that the Court exclude at trial the testimony of Monique Ericson ("Ericson"), a forensic accountant and expert witness on the subject of back pay damages offered by Defendant based on Ericson's reliance on the "aggregate method" of calculating such damages in her report. The EEOC argued specifically that mitigation of back pay must be calculated periodically by quarter rather than in the aggregate and that Ericson's report and testimony based on an aggregate method were thus inadmissible under Rule 702. *Id.* at *1. Defendant conceded that "it is true that [the] periodic mitigation method of computation for back pay may be the preferred manner of calculation," but asserted that "the aggregate computation method may also be used," and that the periodic mitigation method applies, that mitigation should be calculated annually rather than quarterly. *Id.* at *2. The Court opined that limited decisional law exists on the question of proper calculation of mitigation in cases such as this, and in which the aggrieved individual, Joseph Bednarik ("Bednarik"), over time earned total mitigation income exceeding his total back pay damages. The Court further observed that the Third Circuit has not addressed whether the aggregate mitigation method or the periodic mitigation method applies in such circumstances, but that other case law authorities addressing the question routinely adopt the periodic mitigation method and that the practical implications of the aggregate mitigation method incentivize employers to delay a remedy as long as possible because "every day the employee put[s] in on the better paying job reduce[s] back pay liability." *Id.* The Court agreed with the EEOC to the extent that a periodic mitigation method rather than an aggregate mitigation method should apply to any back pay damages calculation *sub judice*, but disagreed with the EEOC to the extent it recommended quarterly computations. The Court concluded that the weight of authority in the ADEA context supports computation on a yearly basis. Accordingly, the Court granted the EEOC's motion *in limine* to the extent that the aggregate mitigation method for calculating back pay damages was used. *Id.* at *3. The Court further stated that to the extent Bednarik was entitled to back pay damages, they would be calculated pursuant to the periodic mitigation method on a yearly basis.

***EEOC v. Scott Medical Health Center, P.C.*, 2017 U.S. Dist. LEXIS 189577 (W.D. Pa. Nov. 16, 2017).** The EEOC brought an action alleging that Defendant subjected the charging party, Dale Massaro, to harassment on the basis of his sex in violation of Title VII of the Civil Rights Act of 1964. Defendant defaulted, and the Court held a hearing on damages, after which it issued findings of fact and conclusions of law based on the hearing. The Court determined that Massaro was subjected to sex-based harassment in the form of anti-gay slurs and comments directed at him by his supervisor, Robert McClendon, including being repeatedly referred to as "faggot" and having to endure offensive questioning about his sex life and relationships. Massaro reported the harassment to Defendant's owner and chief executive officer, but he refused to take action to stop the harassment. *Id.* at *3. The harassment continued, and eventually Massaro was forced to quit his job. Massaro suffered depression and emotional distress as a result of the harassment and loss of employment. Massaro started receiving counseling for his depression through an employee assistance program and received medical treatment for his emotional distress. *Id.* at *5. The Court noted that although Defendant had an anti-harassment policy, Massaro was never trained on the policy, and was not permitted to read or have a copy of the policy. The Court found that EEOC proved by preponderance of the evidence that Massaro was entitled to a back pay

award and it adopted the EEOC's back pay calculation, including pre-judgment interest, using the adjusted prime rate, in the amount of $5,500.43. *Id.* at *8. The Court further determined that the EEOC proved by a preponderance of the evidence that Massaro was entitled to an award of non-pecuniary compensatory damages. The Court noted that the witness testimony demonstrated that Massaro sustained significant emotional distress caused by McClendon's severe harassment of Massaro and his resulting loss of employment, including depression, anxiety, social isolation, changes to his sleeping patterns, and significant weight gain. *Id.* at *10-11. The Court therefore held that Massaro sustained compensatory damages in excess of the $50,000 statutory damages limit set forth at 42 U.S.C. § 1981a(b)(3)(A). The Court awarded damages to that cap. *Id.* at *11. The Court also granted an award of punitive damages in the amount of $75,000, based on its conclusion that the discrimination for which Defendant had been found liable was intentional and egregious. *Id.* at *16. Finally, the Court determined that injunctive relieve was also warranted in this case. Based on the foregoing, the Court found that the EEOC demonstrated its entitlement to back pay, compensatory and punitive damages on behalf of Mr. Massaro, as well as to injunctive relief.

(iv) Fourth Circuit

***EEOC v. Bojangles Restaurants*, 2017 U.S. Dist. LEXIS 105347 (E.D.N.C. July 6, 2017).** The EEOC filed an action on behalf of Jonathan Wolfe ("Wolfe") alleging that Defendant subjected her to a hostile work environment due to her gender identify in violation of Title VII. The EEOC further stated that Defendant discriminated and retaliated against Wolfe by involuntarily transferring her and terminating her for complaining about the alleged harassment. Defendant served a subpoena on Wolfe's current employer, Worth the Weight, Inc. ("Worth the Weight") requesting production of documents, including all personnel records, documents, files or correspondence relating to Wolfe. *Id.* at *3. The EEOC moved to quash the subpoena served on Worth the Weight on the grounds that it was procedurally defective, sought irrelevant and duplicative information, was overbroad, and imposed an undue burden. *Id.* The EEOC first argued that the subpoena was procedurally defective. The Court held that the subpoena on its face contained procedural defects that required correction. The Court found that in violation of Rule 45(a)(2), the subpoena was issued from the Western District of North Carolina, and not the Eastern District of North Carolina, where the action was pending. *Id.* at *13. Second, the subpoena commanded production of documents from Fayetteville, North Carolina to a location in Charlotte, North Carolina, which exceeded the permissible 100 mile geographical limit imposed by Rule 45 by a distance of approximately 30 miles. *Id.* The Court held that the flaw required quashing or modifying the subpoena. The Court stated that it would allow Defendant to reissue its subpoena to correct the deficiencies, and therefore it addressed the EEOC's substantive objections. On the merits, the EEOC argued that the subpoena to Worth the Weight should be quashed for seeking irrelevant and duplicative information and imposing an undue burden. As noted, the subpoena to Worth the Weight sought any and all personnel records, documents, files, or correspondence relating to Wolfe. *Id.* at *13-14. The EEOC conceded that the pay information sought by this subpoena was relevant, but argued it was unreasonably duplicative because tax transcripts have been provided. The Court disagreed and opined that Defendant is not precluded from seeking pay information from Worth the Weight merely because the EEOC provided similar information from another source. *Id.* at *14. The EEOC also argued that all of the other information contained in Wolfe's personnel file was not even tangentially related to discrimination and retaliation Wolfe experienced while employed by Defendant. The Court again disagreed and found that Defendant offered a credible basis for seeking Wolfe's records bearing on performance evaluations, job applications, and resumes, where one of its defenses concerns Wolfe's public disclosure of her gender identity. However, the Court determined that seeking an entire personnel record could capture "medical information, . . . information about family members, and other documents completely extraneous to this litigation." *Id.* at *15. The Court therefore directed Defendant to provide a more narrow description of the documents sought and specifically exclude any documents relating to medical information, information about family members, or other extraneous materials. *Id.* Accordingly, the Court granted the EEOC's motion to quash in part and directed Defendant to revise and reissue the subpoena.

***EEOC v. Consol Energy, Inc.*, 2017 U.S. App. LEXIS 10385 (4th Cir. June 12, 2017).** The EEOC alleged that Defendant refused to provide an employee with a religious accommodation by subjecting him to a biometric hand scanner for purposes of clocking-in and out of work. The employee believed the hand scanner was used to identify and collect personal information that would be used by the Christian Anti-Christ, as described in the New Testament Book of Revelation, to identify followers with the "mark of the beast." *Id.* at *2. Following a jury verdict

in favor of the EEOC, the District Court denied Defendant's renewed motion for judgment as a matter of law under Rule 50(b), motion for a new trial under Rule 59, and motion to amend the Court's findings and conclusions under Rule 59. On appeal, the Fourth Circuit affirmed the District Court's ruling. In 2012, Defendant implemented a biometric hand-scanner system at the mine where the employee worked in order to better monitor attendance and work hours. *Id.* at *4. The scanner system required each employee clocking-in or out of a shift to scan his or her right hand; the shape of the right hand was then linked to the worker's unique personnel number. While Defendant implemented the scanner to produce more efficient and accurate time reporting, the employee alleged it presented a threat to his core religious commitments. As the employee consistently and unsuccessfully sought an accommodation that would preclude him from having to clock-in with the scanner, Defendant meanwhile allowed employees with injured hands to scan in using a different keypad system. *Id.* at *7. Eventually, the employee decided to retire in lieu of using the hand-scanner, and later found a lower paying job. The EEOC thereafter brought an action against Defendant on behalf of the employee, alleging a failure to accommodate religious beliefs and constructive discharge. *Id.* at *9. After the case ultimately proceeded to trial, the jury found Defendant liable for failing to accommodate the employee's religious beliefs. The jury awarded $150,000 in compensatory damages and $436,860.74 in front pay, back pay, and lost benefits. *Id.* at *10-11. Defendant then filed a renewed motion for judgment as a matter of law under Rule 50(b), a motion for a new trial under Rule 59, and a motion to amend the Court's findings and conclusions under Rule 59. The District Court denied all three post-verdict motions, and Defendant appealed. *Id.* at *11. The Fourth Circuit affirmed the District Court's denial of Defendant's three post-verdict motions. First, Defendant challenged the denial of its renewed motion for a judgment as a matter of law, arguing that the District Court erred in concluding that there was sufficient evidence to support the jury's verdict against it. Defendant argued that it did not fail to reasonably accommodate the employee's religious beliefs because there was in fact no conflict between his beliefs and its requirement that he use the hand scanner system. The Fourth Circuit rejected this argument, noting that in both the employee's request for an accommodation and his trial testimony, the employee laid out his religious objection to use of the scanner system. *Id.* at *13. Regarding the District Court's denial of its motion for a new trial under Rule 59, Defendant raised a handful of objections that primarily related to the District Court's exclusion of evidence and various issues related to jury instructions. *Id.* at *20. The Fourth Circuit noted that it would "respect the [D]istrict [C]ourt's decision absent an abuse of discretion, and will disturb that judgment only in the most exceptional circumstances." *Id.* Further, it opined that, "[w]hen, as here, a new trial is sought based on purported evidentiary errors by the District Court, a verdict may be set aside only if an error is so grievous as to have rendered the entire trial unfair." *Id.* Applying this standard, the Fourth Circuit found that the District Court did not abuse its discretion. Regarding the jury instructions, the Fourth Circuit held that the District Court properly found that Defendant failed to show any prejudice arising from any of the instructions at issue. *Id.* at *26. Finally, both parties cross-appealed the District Court's rulings on lost wages and punitive damages. The Fourth Circuit rejected Defendant's argument that the employee failed to adequately mitigate his damages by accepting a lower paying job, noting that whether a worker acted reasonably in accepting particular employment is preeminently a question of fact, and that it would not second-guess the District Court. The Fourth Circuit also rejected the EEOC's cross-appeal regarding punitive damages, holding that the District Court did not err in concluding that the EEOC's evidence fell short of allowing for a determination that Defendant's Title VII violation was the result of the kind of "reckless indifference" necessary to support an award of punitive damages. *Id.* at *34. Accordingly, the Fourth Circuit affirmed the District Court's denial of Defendant's three post-verdict motions.

***EEOC v. Correct Care Solutions,* 2017 U.S. Dist. LEXIS 105956 (D.S.C. July 10, 2017).** The EEOC brought suit on behalf of charging party Kevicia D. Cody, who was hired by Defendant as a licensed practical nurse. Cody allegedly began experiencing seizures, which were currently controlled by medication. The EEOC asserted that Cody's seizures qualified as a disability under the Americans With Disabilities Act ("ADA"). After Defendant learned about Cody's seizures, the company's director of nursing required Cody to provide medical clearance in order to continue working for the company. Cody provided a note from her treating physician clearing her to return to work with certain restrictions related to her disability. The EEOC alleged that Defendant placed Cody on unpaid medical leave and ultimately discharged her. The EEOC subsequently filed a motion to dismiss and for attorneys' fees, which the Magistrate Judge recommended granting in part. The Magistrate Judge recommending granting the EEOC's motion to dismiss with prejudice and denying the motion for attorneys' fees. Finding no clear error, the Court adopted the findings of the Magistrate Judge, dismissed the complaint, and denied the motion for attorneys' fees.

***EEOC v. McLeod Health, Inc.,* 2017 U.S. Dist. LEXIS 154156 (D.S.C. Sept. 21, 2017).** The EEOC filed an action under the American With Disabilities Act of 1990 ("ADA") alleging that Defendant subjected the charging party to improper medical examinations and terminated her employment in violation of the ADA. *Id.* at *1. Summary judgment was previously granted on the improper medical examination claim and the Court remanded to the Magistrate Judge on the wrongful termination claim and requested that the Magistrate Judge address the EEOC's futile gesture doctrine argument, as well as any potential failure to accommodate claim. *Id.* at *3. The Magistrate Judge recommended summary judgment on the wrongful termination claim and the Court adopted the recommendation. *Id.* at *4. After discovery closed, Defendant filed a motion for summary judgment, and the EEOC introduced a new theory of failure to accommodate, asserting that Defendant's lack of automatic reassignment to a vacant position was evidence in support of a discriminatory discharge. *Id.* at 7. Defendant objected to the EEOC raising a claim of failure to accommodate or failure to reassign, as the EEOC had not pled a claim of failure to accommodate. *Id.* at *44. Accordingly, the Court ruled that the Magistrate Judge correctly determined that no claim of failure to accommodate existed. *Id.* The Magistrate Judge had analyzed the Defendant's alleged failure to accommodate as possible evidence supporting Plaintiff's wrongful discharge claim, and the Court found that this was proper. The Court agreed with the Magistrate Judge's conclusion that the EEOC was unable to meet its burden as to the futile gesture doctrine. *Id.* at *13. The Court ruled that an objectively reasonable person in the charging party's position would not have believed that the interactive process was futile where the charging party was invited on at least six occasions to submit contrary evidence challenging the characterization of her limitations and restrictions and was repeatedly assured that any evidence would receive consideration. *Id.* at *15. Accordingly, the Court rejected the notion that the charging party's failure to obtain an alternative opinion should be excused under the futile gesture doctrine. *Id.* *13. The undisputed evidence showed that the charging party rejected assignment alternatives that arose during the six months that she was on medical leave of absence, because she was dissatisfied with the reduced pay. *Id.* at *26. By the time she communicated with Defendant that she was interested in a position, she had been discharged and the ADA's rules for reassignment of employees no longer applied to her. *Id.* at 27. The Court ruled that the EEOC failed to establish that the discharge occurred under circumstances that raised a reasonable inference of unlawful discrimination and that Defendant's unsuccessful attempts to reassign the charging party did not establish unlawful discrimination. *Id.* at *36. The evidence established that Defendant was willing to consider the charging party for a position that she was "qualified" for only in a generous view of her qualifications. The evidence established that the charging party declined to pursue the position due to her objection to the rate of pay. *Id.* at *41. The Court noted that it would be an absurd interpretation of the statute to require an employer to reassign a displaced employee to a vacant position without regard to the employee specifically declining to be considered for the position. *Id.* at *42. The Court opined that it need not decide this case on a determination of an employer's duty to reassign a displaced employee in contravention of the employer's facially neutral hiring policy, for the EEOC failed to demonstrate a genuine issue of material fact as to the discriminatory nature of the charging party's termination. *Id.* at *43. Accordingly, the Court granted summary judgment in Defendant's favor.

***EEOC v. Mission Hospital, Inc.,* 2017 U.S. Dist. LEXIS 124183 (W.D.N.C. Aug. 7, 2017).** The EEOC brought an action alleging that Defendant's policy requiring all employees to get a flu vaccination was discriminatory on the basis of religion in violation of Title VII. Defendant filed a motion for summary judgment, which the Court denied. The EEOC also filed motions to strike Defendant's expert testimony and certain individual declarations. Thee EEOC alleged that employees had requested religious exemptions to the flu vaccine requirement, but were not provided exemptions and were subsequently terminated when they failed to comply with the vaccination requirement. Defendant asserted that the workers failed to make the request for accommodation by its required deadline and the requests were thereby denied. *Id.* at *5. Defendant had staggered dates to request exemptions to the flu vaccine requirement, such that exemption requests were due September 1 and employees must be vaccinated by December 1. *Id.* at *6. The Court stated that this was not a case where Defendant did or did not believe the workers' religious beliefs; instead, it rejected requests for religious accommodations because they did not meet a prescribed deadline. *Id.* At this stage in the proceedings, the Court found that the EEOC presented a *prima facie* case of religious discrimination. The Court noted that workers had sincerely held beliefs, communicated those beliefs to Defendant, and adverse employment action was then taken for that reason. *Id.* at *7. The Court explained however, that assuming a *prima facie* case was established, the burden would then on Defendant to prove either that: (i) it provided the workers with a reasonable accommodation for their religious

observances; or (ii) that such accommodation was not provided because it would have caused an undue hardship. *Id.* at *7-8. The Court found that with regard to the first prong, the EEOC's own facts noted that since 2012, 89 religious exemptions had been filed, with 23 denied. *Id.* at *8. Therefore, 74% of religious exemption requests (66/89) had been approved. The Court opined that a jury could reasonably find that a reasonable accommodation to the religious observances would be to timely file an exemption request. Further, with regard to the second prong, the Court noted that Defendant operated a large hospital and that these employees were interacting with vulnerable populations, and therefore a jury could reasonably find that strictly-enforced exemption procedures to vaccination requirements protected the hospital patients. *Id.* Accordingly, the Court found that genuine issues of material fact existed so that summary judgment was inappropriate. As to the EEOC's motions to strike, it requested that the Court strike certain paragraphs of Dr. Westle's expert testimony, including facts about the prevalence and virulence of the flu virus. The EEOC also asserted that Defendant did not properly designate Dr. Westle as an expert. *Id.* at *10. The Court held that if the EEOC thought Dr. Westle was a non-expert in the field of medicine, it would have the opportunity, at trial, to challenge his credentials if and when he was offered as an expert witness. *Id.* The EEOC also sought to strike several individual declarations, arguing that Defendant did not properly disclose them. *Id.* Defendant claimed that the declarations were covered under the attorney work product privilege, but the EEOC claimed that Defendant did not produce a privilege log. *Id.* at *11. The Court found that even if the declarations were privileged, Defendant had now introduced them. The Court stated that if the individuals were to testify at trial or if their declarations were used, Defendant must have the opportunity to develop the record. *Id.* Therefore, the Court held that the EEOC would have the opportunity to depose any of the declarants if: (i) their declarations were to be used at trial; or (ii) the declarants were to be called to testify at trial.

***EEOC v. Performance Food Group Co., LLC*, 2017 U.S. Dist. LEXIS 87131 (D. Md. June 6, 2017).** The EEOC brought an action alleging that Defendant engaged in gender discrimination by failing to hire a class of female applicants for certain positions at its warehouses. The EEOC served a subpoena on Charlotte Perkins, Defendant's former Chief Human Resources Officer ("CHRO") for a deposition and production of documents. *Id.* at *5. Perkins previously filed a charge of discrimination with the EEOC and later filed a related action in Virginia state court, which Defendant settled. Perkins did not file a motion to quash or otherwise object to the subpoena until she appeared for her deposition, at which time she refused to answer any questions pertaining to the Virginia action or her EEOC charge, among other topics. *Id.* at *6. Regarding the subpoena's command to produce documents, Perkins initially claimed that they were in the possession of her former attorneys, but after her deposition, she served written objections through her then-current attorney claiming that the documents were "protected from disclosure pursuant to a protective order or a settlement agreement absent a court order." *Id.* at *6-7. The EEOC subsequently sought an order compelling Perkins to comply with the subpoena and to: (i) order Perkins to answer the questions she refused to answer during her deposition; (ii) order her to produce the documents commanded by the subpoena; and (iii) order the continuance of her deposition. *Id.* at *7. The EEOC argued that private parties cannot contract to prohibit a person from complying with compulsory process, and that the sealing of any such agreement in Virginia state court had no effect on the enforceability of the subpoena in the EEOC's lawsuit. *Id.* at *7-8. Defendant opposed the scope and continuance of the deposition, arguing that the EEOC unduly delayed and that Perkins already answered all relevant questions. *Id.* at *8. The Court found that even if the Virginia action and resulting settlement made no mention of any allegations of discrimination, the documents and testimony in that matter would have concerned Perkins' role as CHRO, where she was uniquely positioned to acquire information relevant to the allegations of "systemic" sex discrimination in this case. The Court found that the EEOC's deposition questions were specifically directed to the nature of Perkins' employment with Defendant and the circumstances of her termination, as well as her statements to EEOC investigators concerning her own allegations of sex discrimination. *Id.* at *9. Defendant further objected to the continuance of Perkins' deposition on the basis of undue delay, arguing that the EEOC waited nearly nine months to file its motion. The EEOC asserted that any delay was due to a lack of cooperation by Perkins and her counsel, which Defendant could have easily facilitated. *Id.* at *11. The Court determined that there was ample time left in the current schedule for the parties to prepare for and conduct a continuance of Perkins' deposition. Accordingly, the Court ordered the continuance of Perkins' deposition, but limited the length of the deposition to a maximum of two hours, and required that it be scheduled within 30 days of the date of the Court's order. *Id.* at *11-12. Turning to Perkins' confidentiality objections, the Court noted that it was well established that the Fourth Circuit does not recognize a settlement privilege, and that confidential settlement

materials are not automatically shielded from discovery. Rather, the parties could address confidentiality and privacy concerns through the Court's stipulated confidentiality order. *Id.* at *12. As to Perkins' written responses, the Court found there was no showing of burden or expense related to the subpoena. The Court therefore ordered Perkins to fully comply with the subpoena's command to produce by no later than seven days prior to the date of her deposition.

***EEOC v. Triangle Catering, LLC*, 2017 U.S. Dist. LEXIS 28476 (E.D.N.C. Mar. 1, 2017).** The EEOC brought an action against Defendant on behalf of Michael Reddick, Jr. ("Reddick"), alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964. The EEOC alleged that Defendant failed to accommodate Reddick's religious belief of wearing a head covering ("crown") and that Defendant unlawfully discharged Reddick on the basis of his religion, Rastafarian. The parties filed cross-motions for summary judgment, and the Court granted in part and denied in part the motions. Defendant is a catering company and Reddick applied to be a delivery driver. During his interview, Reddick did not wear religious headwear or discuss a need to wear religious headwear. Following the interview, Defendant hired Reddick as a delivery driver. Reddick began working at Defendant and spent his first day shadowing another employee. The following day, Reddick encountered Defendant's co-owner and executive director, Melissa Aldred, who told Reddick to remove his hat. *Id.* at *5. Reddick informed Aldred that he wore the hat for religious purposes and indicated that he was Rastafarian. Aldred sent Reddick home from work early and told Reddick that she and another manager needed to discuss how to proceed. Reddick returned to work the next day and was ultimately terminated. Reddick filed a charge of discrimination with the EEOC and it subsequently brought suit. As a threshold matter, Defendant asserted that it was entitled to summary judgment on the basis that Reddick was not Defendant's employee. The EEOC also moved for summary judgment on this affirmative defense. *Id.* at *15. The Court found that given the materiality of the disputed facts, summary judgment was not proper on the discrete issue of whether or not Reddick was Defendant's employee. The Court therefore ruled that summary judgment was not proper on this basis, and denied the parties' motions. Turning to the EEOC's failure to accommodate claim, the Court determined that it was reasonably related to the charge Reddick filed with the EEOC. Reddick's EEOC charge alleged that he was discharged on a religious basis. The Court stated that the EEOC's investigation of the charge established probable cause that Defendant also failed to accommodate Reddick's religious practices. Defendant contended that because Reddick's actions were inconsistent with his purported beliefs, he did not hold a *bona fide* religious belief. For example, Defendant noted that despite claiming to need to wear a crown at all times, Reddick did not wear a crown to his interview. *Id.* at *22. The Court found that while Reddick's purported inconsistences were insufficient to warrant entry of summary judgment in Defendant's favor, they would be relevant to determining whether Reddick's beliefs were sincere. However, the Court determined that viewed in the light most favorable to the EEOC, the temporal proximity between Reddick's interaction with Aldred and his termination, together with the termination notice's reference to the "hat" situation, created a reasonable inference that Reddick's need for a religious accommodation was a motivating factor in Defendant's termination decision. *Id.* at *23. Therefore, the Court found that the EEOC adduced sufficient evidence to establish a *prima facie* case for failure to accommodate. Defendant also moved for summary judgment on the EEOC's discriminatory discharge claim. The Court held that the EEOC failed to provide sufficient evidence to establish a *prima facie* case for discriminatory discharge. The Court found that the EEOC failed to produce evidence establishing that Reddick was performing his job at a level that met his employer's legitimate expectations. The Court explained that the EEOC could not satisfy the element of the *prima facie* case merely by providing Reddick's self-serving assessment of his work; rather, the EEOC must provide some objective evidence that Reddick's performance met his employer's legitimate expectations. *Id.* at *29. The Court reasoned that since the EEOC was lacking an essential element of a discriminatory discharge claim, it need not consider the parties' additional arguments. Accordingly, the Court granted Defendant's motion for summary judgment on the EEOC's discriminatory discharge claim. Finally, the Court considered, *sua sponte*, whether Defendant was entitled to summary judgment on the issue of punitive damages. The Court found that a reasonable juror could conclude that Defendant engaged in good faith efforts to comply with Title VII by viewing pass accommodations granted and that Defendant did not act with malice or reckless indifference to Reddick's federally protected rights. Accordingly, the Court granted summary judgment to Defendant on the issue of punitive damages.

(v) Fifth Circuit

***EEOC v. Accentcare Inc.,* 2017 U.S. Dist. LEXIS 152472 (N.D. Tex. Sept. 22, 2017).** The EEOC brought an alleging that Defendant refused to reasonably accommodate Alisia Beasley's ("Beasley's") disability (bipolar disorder) and discriminated against her by terminating her employment because of her disability in violation of the Americans With Disabilities Act. The Court entered a scheduling order that set February 29, 2016 as the deadline for a party to file a motion for leave to amend the pleadings. Defendant moved for summary judgment, which the Court granted in part and denied in part. The EEOC filed a motion for leave to file an amended complaint past the deadline to file. The EEOC sought to amend paragraph 15, which alleged, in relevant part, that "Beasley informed her supervisor that she had seen her psychiatrist who took her off for an indefinite period of time." *Id.* at *2. The EEOC sought to clarify its use of the term "indefinite" to summarize Beasley's email communication. *Id.* The Court previously held that, "unless and until the EEOC amends its complaint to change this allegation, the EEOC may not contradict its judicial admission that Beasley informed her supervisor that she had seen her psychiatrist, who took her off for an indefinite period of time." Accordingly, the EEOC now sought to amend the complaint to reflect that "Beasley informed Nelson that as a result of her medical condition, she would be out for an 'extended amount of time.'" *Id.* at *4. Defendant argued that the EEOC failed to explain the unreasonable delay in seeking to modify the scheduling order, and that Defendant would be significantly prejudiced by the proposed amendment. At the outset, the Court noted that four factors are assessed when deciding whether to grant an untimely motion for leave to amend under Rule 16(b)(4), including: (i) the explanation for the failure to timely move for leave to amend; (ii) the importance of the amendment; (iii) potential prejudice in allowing the amendment; and (iv) the availability of a continuance to cure such prejudice. The EEOC contended that it did not realize until the Court filed its prior opinion that use of the term "indefinite" to summarize Beasley's email communication may have created confusion for the Court and Defendant. *Id.* at *7. As a result, the Court held that the EEOC provided a sufficient explanation for its failure to move for leave to amend by the Court-ordered deadline. The EEOC further asserted that it is important to amend to ensure that the factual allegations were correct. The Court agreed that the amendment was important and stated that factor also favored amendment. Further, the Court noted that the EEOC presented evidence that would enable a reasonable jury to find that, in Beasley's communications with Defendant, she was actually requesting a few days of leave rather than indefinite leave, and that Defendant terminated her employment before acting on her leave request. The Court found that unless it granted the EEOC leave to amend, the EEOC would will be saddled at trial with the judicial admission that Beasley informed her supervisor that she had seen her psychiatrist, who had taken her off for an indefinite period of time. As to the third factor, Defendant maintained that allowing the EEOC to amend would prejudice it because discovery had already closed and the EEOC had been aware of Defendant's reliance on the admission made in paragraph 15 for more than one year. However, the Court concluded that the amended pleading would not likely cause Defendant to suffer prejudice because no new facts were alleged. Finally, as to the fourth factor, the Court opined that no additional discovery appeared to be necessary given the presence in the current record of supporting evidence for the EEOC's amended allegation, and any prejudice caused by the need for additional trial preparation time arising from allowing this amendment could be accommodated by a trial continuance. Accordingly, the Court held that the EEOC met the good cause standard for modifying the scheduling order, and granted the motion to amend.

***EEOC v. Bass Pro Outdoor World, LLC,* 2017 U.S. Dist. LEXIS 495 (S.D. Tex. Jan. 3, 2017).** The EEOC brought an enforcement action alleging a pattern or practice of race discrimination in Defendant's stores on a nationwide basis. The EEOC brought claims under §§ 706 and 707 of Title VII. The Court had previously issued several rulings regarding whether the EEOC had satisfied Title VII's administrative requirements, including: (i) that it must undertake distinct analyses of the EEOC's § 706 and § 707 claims on the issue of conciliation; (ii) that the EEOC had satisfied Title VII's conciliation requirements with regard to its § 707 claim; (iii) that the EEOC had not satisfied Title VII's conciliation requirements with regard to its § 706 claim; and (iv) that individuals who had not yet applied to work for Bass Pro by April 26, 2010, the date on which the EEOC issued its letter of determination ("post-LOD applicants") should be dismissed from the case. *Id.* at *2. The Court reasoned that the EEOC could not possibly have conciliated the claims of these individuals, since they had not yet applied to work for Defendant at the time the conciliation took place. *Id.* The Court subsequently ruled that the EEOC could prove its § 706 claims using the framework established in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), and *Teamsters v. United States*, 431 U.S. 324 (1977). The Court also subsequently opined that the

EEOC had satisfied Title VII's administrative prerequisites with regard to its § 706 claims even for individuals not specifically identified during the investigation, although it did not rule on the issue of post-LOD applicants. *Id.* at *3. The Fifth Circuit then affirmed both that the *Franks/Teamsters* framework may be applied in § 706 cases and that the EEOC may engage in the investigation and conciliation process without naming specific victims. *Id.* On remand, the EEOC argued that, in light of the Court's subsequent rulings, as well as the Fifth Circuit's affirmation, the post-LOD applicants should be restored to eligibility for the § 706 claims. The EEOC further argued that the Court's dismissal of the claims of the post-LOD applicants was fundamentally tied to the two rulings that were subsequently overturned. *Id.* at *3-4. The Court did not address the EEOC's arguments and instead focused on the proper sequencing of the EEOC's enforcement powers under Title VII. *Id.* at *4. The Court noted that, because the post-LOD applicants by definition applied for work after the investigation was completed, "the Commission could not possibly have learned about these individuals during its investigation and could not possibly have conciliated their claims." *Id.* Therefore, the Court reasoned that its reversal of course on the issues of separate conciliation analysis and the *Franks/Teamsters* model had no effect on the dismissal of the post-LOD applicants, and those applicants remained ineligible for the § 706 claims. *Id.* The Court thereby denied the EEOC's motion.

***EEOC v. Bass Pro Outdoor World, LLC,* 2017 U.S. App. LEXIS 7628 (5th Cir. April 28, 2017).** The EEOC brought an enforcement action alleging a pattern or practice of race discrimination in Defendant's stores on a nationwide basis. The EEOC brought claims under §§ 706 and 707 of Title VII. Following the Fifth Circuit's ruling affirming the District Court's decision allowing the EEOC to seek compensatory and punitive damages under §§ 706 and 707, Defendant filed a petition for a rehearing *en banc*. The Fifth Circuit panel of judges deadlocked in a 7-7 split on whether to grant the rehearing, thus resulting in Defendant's petition being denied. The Dissent initially summarized its argument by matter-of-factly noting "this 'pattern or practice' case cannot be brought under § 706 or § 707 as to provide individualized compensatory and punitive damages for a mass of 50,000 persons." *Id.* at *6. In support of this assertion, the Dissent argued that the plain language and legislative history of the Title VII forbids § 706 "pattern or practice" suits, and the Panel's contrary holding rendered § 707 of the Act a meaningless appendage to Title VII and hence superfluous. *Id.* at *7. The Dissent also opined that allowing pattern or practice suits for individualized compensatory and punitive damages poses insurmountable manageability concerns, which the Supreme Court has addressed before and rejected. Finally, the Dissent asserted that allowing pattern or practice suits for individualized compensatory and punitive damages for the 50,000 allegedly aggrieved individuals necessarily ran afoul of the Seventh Amendment. Asserting that Defendant ignored "the independent role of the EEOC when it sues on behalf of the United States government . . . [and] asks us to hold as a matter of law that damages authorized by the 1991 amendments to the Civil Rights Act can only be recovered in individual suits," the Panel rejected these positions. *Id.* at *20-21. After clarifying the role of the EEOC in light of the 1991 amendments of the Civil Right Act of 1964, the Panel opined that Defendant's "argument rests upon a fundamental premise: that the EEOC's enforcement authority and choice of remedies is tethered to the individuals for whose benefit it seeks relief. That premise is false." *Id.* at *23. The Panel reasoned that because the EEOC brought suit under both § 706 and 707, Defendant's argument that the EEOC was not entitled to punitive damages failed because it "would be truly perverse to withhold the remedy of punitive damages from the EEOC when it targets discrimination in its most virulent and damaging form: polices intentionally calculated to exclude protected minorities and perpetrated on a large scale." *Id.* at *35. Finally, the Panel addressed Defendant's argument that even if Congress did grant the EEOC the authority to seek compensatory and punitive damages via the pattern or practice model, this grant of authority was unconstitutional. Noting that Defendant's argument appeared to implicate due process concerns under the Seventh Amendment, the Panel held that Defendant's reliance on *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), was misplaced as that case involved Rule 23 class actions, which have "no force" in EEOC litigation. *Id.* at *36. After providing a hypothetical analysis as to how a jury may award various types of damages, the Panel concluded that Defendant's manageability concerns were unfounded, and its "claim that this suit cannot be tried is not a statement of fact but an advocate's prayer. Seeking to limit its exposure to liability, Defendant asks us to shut down this lawsuit before it even gets off the ground." *Id.* at *41-42. The Dissent noted "[l]est there be any mistake, the [P]anel's 'response' must not be confused with a *binding opinion* on the denial of an *en banc* petition, because no authority authorizes any such opinion." *Id.* at *42. As such, the Dissent concluded by asserting that in no way should the Panel's response be treated as precedential. Accordingly, the Fifth Circuit denied Defendant's motion for rehearing.

***EEOC v. BDO USA LLP,* 2017 U.S. App. LEXIS 7965 (5th Cir. May 4, 2017).** The EEOC brought an enforcement action against Defendant after it sought production of information relating to an administrative investigation and asserted that Defendant's privilege log failed to establish that the attorney-client privilege protected the company's withheld documents. *Id.* at *4. The District Court held that the log was sufficient and granted Defendant's request for a protective order. *Id.* at *6. On appeal, the Fifth Circuit vacated and remanded the District Court's ruling. *Id.* at *7. The EEOC argued that the District Court erred when it concluded that all communications between a corporation's employees and its counsel are *per se* privileged and inverted the burden of proof, requiring that the EEOC prove that Defendant improperly asserted the attorney-client privilege as to the withheld documents. *Id.* at *8. The Fifth Circuit agreed and ruled that Defendant did not make *prima facie* showing of attorney-client privilege because the log possessed three types of deficiencies that prevented a determination of the applicability of the privilege because the entries: (i) were vague and/or incomplete; (ii) failed to distinguish between legal advice and business advice, and (iii) failed to establish that the communications were made in confidence and that confidentiality was not breached. *Id.* at *9. The Fifth Circuit noted that a privilege log's description of each document must provide sufficient information to permit the District Court to test the merits of the privilege claim. *Id.* at 7. The attorney-client privilege limits the normally broad disclosure requirements of Rule 26. *Id.* The Fifth Circuit agreed with the EEOC that many of Defendant's log entries lacked sufficient detail to permit a determination as to whether the entire document or just portions were protected from disclosure. *Id.* at *10. Some of the 278 logs referenced "confidential" emails and documents, including communications between employees and in-house counsel, yet failed to provide a description of the subject matter and stated only that "legal advice" was sought without indicating whether the communications were made in confidence. *Id.* at *11. The Fifth Circuit rejected Defendant's assertion that its position statements provided the necessary details for its privilege log as they are not facts and Defendant failed to present any evidence that would allow the District Court to assess whether attorney-client privilege applied to each entry on the log. *Id.* at *12. The Fifth Circuit noted there is no presumption that a company's communications with in-house counsel are privileged. *Id.* at *13. The Fifth Circuit ruled that the District Court erred when it determined: (i) that the entries were sufficient to establish a *prima facie* case of privilege, and (ii) the burden was on the EEOC to show that Defendant's communications were not privileged. *Id.* at *15. The EEOC also argued that the basis of the protective order grounded on an "overly broad" legal standard of non-disclosure of all communications involving an attorney. *Id.* at *20. While the Fifth Circuit agreed that the District Court may have applied an incorrect standard, it did not find that the protective order unwarranted. *Id.* at *21. Accordingly, the Fifth Circuit vacated and remanded the District Court's ruling. *Id.*

***EEOC v. Dolgencorp, LLC*, 2017 U.S. Dist. LEXIS 181061 (N.D. Miss. Nov. 1, 2017).** The EEOC requested that the Court modify its case management order by setting a date by which the EEOC must identify all allegedly injured individuals. The EEOC stated neither party raised the issue of identification of allegedly injured individuals with the Court at the case management conference, and that when the EEOC subsequently contacted the Court to inquire about setting a deadline for such, a law clerk advised the EEOC to contact Defendant to discuss a mutually agreeable date. The parties did not agree on a date, and the EEOC then filed a motion with a proposed a deadline of November 30, 2017. Defendant opposed the EEOC's motion, arguing that the EEOC failed to show good cause to modify the schedule as is required under Rule 16(b). Defendant pointed out that EEOC did not previously request a deadline for identifying additional aggrieved individuals that was separate and distinct from the deadline for joinder of parties and amendments to the pleadings, and as such, the July 7, 2017 joinder/amendments deadline was the operative deadline. *Id.* at *1. Defendant argued that EEOC should be required to move to add allegedly aggrieved parties, and must show good cause for being permitted to do so subsequent to the joinder/amendments deadline. *Id.* at *2. The Fifth Circuit has articulated four factors to consider when determining whether good cause exists to amend the scheduling order, including: (i) the explanation for the failure to timely move for leave to amend; (ii) the importance of the amendment; (iii) potential prejudice in allowing the amendment; and (iv) the availability of a continuance to cure such prejudice. *Id.* at *3. The Court noted that the EEOC presented information just over a week after the case management conference regarding establishing a deadline for EEOC to identify allegedly injured individuals. *Id.* at *4. The Court therefore determined that it was clear that the EEOC made efforts to address the issue soon after the scheduling deadlines were set. *Id.* As to the importance of the amendment, the Court reasoned that allowing EEOC to name additional claimants would be vitally important to those claimants. *Id.* As to potential prejudice in allowing the amendment, the Court opined that the EEOC's proposed deadline of November 30, 2017 would leave

almost two months afterwards for Defendant to conduct discovery regarding any additional claimants before expiration of the discovery period. *Id.* at *5. The Court further stated that should Defendant request additional time to complete its discovery, the Court could order an extension of the discovery and dispositive motion deadlines without jeopardizing the trial date. *Id.* at *6. Therefore, the Court granted the EEOC's motion to modify the Rule 16(b) scheduling order and specified that the EEOC must identify all claimants on whose behalf it seeks relief in an amended complaint to be filed no later than November 30, 2017.

***EEOC v. Emcare, Inc.,* 857 F.3d 678 (5th Cir. 2017).** The EEOC brought suit on behalf of three employees alleging that Defendant terminated them in retaliation for complaining of sexual harassment. Following a trial, a jury found that Defendant terminated the three employees in retaliation for complaining of sexual harassment in the workplace. The District Court then denied Defendant's motion for judgment as a matter of law. Defendant appealed the judgment with respect to Luke Trahan, one of the employees. Specifically, Defendant contended that the EEOC failed to present sufficient evidence of a causal link between Trahan's protected activity and termination because there was no evidence that the individual who decided to terminate Trahan was aware he had engaged in protected activity. The Fifth Circuit found there was sufficient evidence to support the jury's verdict, and therefore it affirmed the District Court's ruling. Defendant contended that there was no evidence that Sean Richardson, the person who decided to terminate Trahan, was aware of Trahan's complaints of sexual harassment. Thus, Defendant claimed: (i) there was no evidence that Richardson knew about Trahan's complaints; and (ii) there was no evidence that anyone other than Richardson decided to fire Trahan. The Fifth Circuit noted that as an initial matter, there was an abundance of conflicting testimony over critical issues, thereby entitling the jury to discredit the versions of events of Richardson and another co-worker, Ken Thornton, and find their testimony not credible. For example, the jury heard conflicting accounts regarding whether Thornton and Richardson ever personally observed CEO Jim McKinney make sexually offensive comments, whether Trahan and Shaw ever complained to HR about McKinney's behavior, and whether the audit of Trahan's unit produced any legitimate grounds to fire him. *Id.* at 682. Accordingly, the Fifth Circuit found that the jury was entitled to determine that Richardson and Thornton had both witnessed inappropriate behavior in the workplace and had taken no action, that Trahan and other employees complained to HR numerous times, and that the justification for firing Trahan was pretextual. In light of these contradictory statements, as well as the circumstances surrounding Trahan's termination, the Fifth Circuit held that the evidence was sufficient for the jury to find that Richardson was aware of Trahan's complaints. *Id.* at 683. More specifically, Trahan testified that McKinney would criticize Trahan whenever he complained, allowing the jury to infer, at the very least, that McKinney knew about the complaints. The Fifth Circuit also concluded that the jury could also have logically inferred that Thornton told Richardson about the complaints when they discussed Trahan's performance and subsequent termination. In addition, the Fifth Circuit found that there was sufficient evidence for the jury to find that Thornton and Richardson both made the decision to fire Trahan. Accordingly, the Fifth Circuit determined that the District Court did not err in denying Defendant's motion for judgment as a matter of law.

***EEOC v. Faurecia Automotive Seating,* 2017 U.S. Dist. LEXIS 19222 (N.D. Miss. Feb. 10, 2017).** The EEOC filed a complaint on behalf of a group of individuals alleging that Defendant violated the Americans With Disabilities Act by failing to hire them on the basis of their disabilities. Defendant filed a motion to transfer venue to the Southern District of Mississippi, and stated that every claimant resided in that district. *Id.* at *2. In support, Defendant produced an exhibit listing the names and addresses of approximately twenty-five individuals it identified as charging parties. Defendant then filed an unopposed motion to seal the exhibit it produced with its motion to transfer venue, which the Court granted. Defendant sought to seal the exhibit in order "to protect against the public disclosure of personal information." *Id.* at *3. The Court found that Defendant's motion failed to follow Local Rule 79, which required Defendant to file its motion with a non-confidential supporting memorandum or a proposed order. However, the Court stated that since the document to be sealed was already filed on the docket and because Defendant's motion stated sufficient grounds for sealing, the Court excused the procedural deficiencies in the interest of judicial efficiency. *Id.* The Court opined that as a general matter, personal information triggered a privacy right that created good cause for sealing." *Id.* at *4. The Court determined that the interest in protecting the private information of these individuals far outweighed the public's interest in the document and the Court's role in deciding Defendant's non-dispositive motion. Accordingly, the Court concluded that good cause existed to seal the exhibit and thereby granted Defendant's motion to seal.

***EEOC v. Faurecia Automobile Seating,* 2017 U.S. Dist. LEXIS 15193 (N.D. Miss. Sept. 19, 2017)**. The EEOC brought an action claiming that Defendant discriminated against a group of workers in violation of the Americans With Disabilities Act ("ADA") by failing to retain the employees *Id.* at *2. Defendant filed a motion to transfer venue to the U.S. District Court for the Southern District of Mississippi on the grounds that all claimants resided in the Southern District. *Id.* The Court granted Defendant's motion to transfer, ruling that Defendant met its burden under 28 U.S.C. § 1404(a) to establish that a transfer to the Southern District would be more convenient. The Court noted that while case law authorities have traditionally considered § 1404(a)'s reference to convenience and the interest of justice to mandate separate inquiries, the Fifth Circuit has collapsed the two inquiries such that a motion to transfer venue pursuant to § 1404(a) should be granted if the movant demonstrates that the transferee venue is clearly more convenient taking into consideration several factors. *Id.* at *5. The Court considered eight factors, including: (i) the relative ease of access to sources of proof; (ii) the availability of compulsory process to secure the attendance of witnesses; (iii) the cost of attendance for willing witnesses; (iv) all other practical problems that make trial of a case expeditious and inexpensive; (v) the administrative difficulties flowing from docket congestion; (vi) the local interest in having localized interests decided at home; (vii) the familiarity of the forum with the law that will govern the case; and (viii) the avoidance of unnecessary problems of conflict of laws. *Id.* at *6. In addition, the Court ruled that where an action, such as the one at hand, is subject to the special venue provision of 42 U.S. C. § 2000e-5, the inquiry should also consider the four venue factors in the special venue statute, including: (i) where the wrongful employment action was committed; (ii) the location of the relevant employment records; (iii) where the aggrieved person would have worked but for the wrongful employment action: and (iv) the location of the employer's principal office. *Id.* at *6. The Court found that various factors weighed in favor of transfer, including: (i) access to relevant documents; (ii) the cost of attendance of witnesses; and (iii) having a localized interest, as the alleged discriminatory acts occurred in the Southern District. When balancing the factors, the Court noted that three of the four venue factors in the special venue statute weighed in favor of transfer to the Southern District. Accordingly, the Court granted Defendant's motion. *Id.* at *11.

***EEOC v. Methodist Hospitals Of Dallas,* 2017 U.S. Dist. LEXIS 33970 (N.D. Tex. Mar. 9, 2016).** The EEOC brought an action alleging that Defendant, a Dallas medical center, failed to accommodate an injured employee, Adrianna Cook, by refusing her request to take a different job in violation of the ADA. Defendant hired Cook in 2008 as a patient care technician ("PCT"). In early 2012, Cook injured her back and was diagnosed with an annular tear and degenerative disk condition. Defendant ultimately terminated Cook's employment in September 2012, after she failed to respond to a letter offering her additional unpaid leave and asking that she speak to a human resources representative about her employment. The EEOC claimed that Defendant failed to reasonably accommodate Cook by refusing to assign her to a scheduling coordinator position in violation of the ADA. Defendant moved for summary judgment, contending that it accommodated Cook by placing her on light duty, granting her FMLA leave for three months, and offering her numerous opportunities to take additional unpaid personal leave, an accommodation for which Cook never responded. The Court granted Defendant's motion on the grounds that the EEOC failed to establish a genuine issue of material fact regarding any of its claims. The EEOC subsequently requested reconsideration of the Court's order, which the Court denied. The EEOC contended that while the Court addressed Defendant's reassignment policy as applied to Cook, the Court did not address the EEOC's broader pattern or practice claim. *Id.* at *2. Defendant stated that the EEOC did not sufficiently allege a "pattern or practice" claim in its complaint, and therefore the Court did not err in not addressing it. *Id.* The Court found that while the EEOC's pattern or practice claim could have been alleged more clearly, its broader policy claim should be decided. *Id.* at *3. In its response to Defendant's motion for summary judgment, the EEOC stated that under the ADA, a "reasonable accommodation" included "a reassignment to a vacant position." *Id.* at *4. Defendant disagreed with the EEOC that it was "required to reassign a disabled employee to a vacant position for which that employee meets the minimum qualifications, regardless of whether that employee is the most qualified applicant." *Id.* Defendant maintained that this would amount to affirmative action, which was not required by the ADA. *Id.* Defendant further contended that the ADA permitted it to require a disabled employee to compete with non-disabled applicants and hire the most qualified candidate for a position. The Court noted that the Fifth Circuit had not directly addressed the issue of whether the ADA requires an employer to reassign a disabled employee as a reasonable accommodation. *Id.* at *5-6. Nonetheless, the Court concluded that Defendant was correct that the weight of Fifth Circuit authority provided that the ADA does not entitle a disabled employee to preferential treatment. *Id.* at *6. The Court thus held that the EEOC did not

demonstrate that Defendant's policy of requiring disabled employees to compete with non-disabled applicants to hire the best candidate ran afoul of the ADA. *Id.* Thus, the Court granted Defendant's motion for summary judgment as to the EEOC's pattern or practice claim and denied the EEOC's request for reconsideration.

***EEOC v. Oncor Electric Delivery Co*., 2017 U.S. Dist. LEXIS 189584 (N.D. Tex. Nov. 16, 2017).** The EEOC brought an action alleging that Defendant's policy of requiring employees to fill out a return to work memorandum ("memorandum") after returning from medical leave violated the Americans With Disabilities Act. The EEOC sought enforcement of a subpoena requiring Defendant to produce information needed as part of the EEOC's investigation of charges of unlawful employment practices. *Id.* at *2. The Court granted the EEOC's motion. Delores McCraney worked for Defendant and took a medical leave of absence due to treatment of carpal tunnel surgery. *Id.* at *4. Defendant requested that McCraney fill out the memorandum, which required that she agree to inform her supervisor of all medications she was on that could affect her "ability to safely perform your essential job functions and possible side effects that could affect your job performance." *Id.* at *5. McCraney refused to sign the memorandum and Defendant placed her on unpaid leave. Defendant admitted that that it maintained a company-wide policy regarding mandatory employee disclosure of medications, which the EEOC contended was contrary to the ADA's prohibition against medical inquiries of employees under 42 U.S.C. Sec. 12112(d)(4)(A). *Id.* at *6. The EEOC sent Defendant a subpoena which sought identifying information as to employees who suffered discipline or discharge because of Defendant's medical inquiry policy, including: (i) a document listing the following for each employee who has been disciplined and/or discharged pursuant to the prescription medication disclosure policy between February 1, 2015 to the present: name, last known address and telephone number, dates of employment, job title, department, supervisor's name and job title; (ii) the employee's written disciplinary record; and (iii) his/her medical file. *Id.* at *7-8. The Court noted that "to enable the [EEOC] to make informed decisions at each stage of the enforcement process," Title VII "confers a broad right of access to relevant evidence." *Id.* at *10-11. The Court indicated that if the charge is proper and the material requested is relevant, the Court should enforce the subpoena unless the employer establishes that the subpoena is "too indefinite," has been issued for an "illegitimate purpose," or is unduly burdensome. *Id.* at *11-12. The Court agreed with the EEOC's position that the charge in this matter was proper, and that Defendant had not asserted that the subpoena was indefinite in its terms, had been issued for some kind of illegitimate purpose, or that compliance would be unduly burdensome. *Id.* at *12. The Court determined that the information that the subpoena sought related to unlawful employment practices covered by Title VII and was therefore relevant to the charge under investigation. *Id.* at *13. Accordingly, the Court granted the EEOC's motion to enforce the subpoena.

***EEOC v. Pioneer Health Services, Inc.,* 2017 U.S. Dist. LEXIS 83237 (N.D. Miss. May 30, 2015).** The EEOC brought an action alleging that Defendant violated the Americans With Disabilities Act ("ADA") with respect to alleged unlawful employment practices and sought relief for a former employee who was allegedly discriminated against due to her disability. Defendant's responsive pleadings were due on April 20, 2017. On April 21, 2017, the EEOC filed a motion for entry of default against Defendant for failure to timely file the responsive pleadings. On April 24, 2017, the Court filed an entry of default as to Defendant. On May 2, 2017, Defendant filed a motion to set aside the Court's entry of default, contending that Defendant's default was not willful and that setting aside the default would not prejudice the EEOC. *Id.* at *2. Defendant maintained that it tendered the defense of the action to its insurer, who retained counsel to represent the Defendant's interests, and that Defendant had been investigating the matter and preparing responsive pleadings. *Id.* at *2-3. Defendant also filed its answer contemporaneously with its motion to set aside the entry of default. The EEOC argued that the Court should not set aside the entry of default against Defendant, as Defendant did not articulate good cause as required by Rule 55(c) and did not demonstrate that the delay in filing the responsive pleading was due to mistake, inadvertence, or excusable neglect. *Id.* at *3. The Court noted that under Rule 55, a Court "may set aside an entry of default for good cause." *Id.* at *3-4. The Court further explained that case law authorities generally grant motions to set aside a default unless the default was willful, Plaintiff will be prejudiced, or Defendant has no meritorious defense. Accordingly, the Court found that Defendant's motion to set aside the entry of default should be granted, because Defendant indicated its delay in filing a responsive pleading was due to inadvertence, not willfulness; that the EEOC would not be prejudiced by setting aside the entry of default, and that Defendant's filing of its answer demonstrated good faith in pursuing a meritorious defense. Therefore, the Court granted Defendant's motion.

***EEOC v. Stone Pony Pizza, Inc.,* 2017 U.S. Dist. LEXIS 49328 (N.D. Miss. Mar. 31, 2017).** The EEOC brought an action alleging that Defendant, a restaurant company, failed to hire job applicants on the basis of their race in violation of Title VII. The EEOC also contended that Defendant maintained a racially segregated workforce, and failed to retain records as required by Title VII. After four years of litigation and shortly after the Court denied Defendant's motion for summary judgment, Defendant stopped participating in the defense of its case. *Id.* at *1. The Court noted that Defendant allowed its attorneys to be dismissed, failed to respond to pleadings in the case, and failed to respond to direct orders of the Court. *Id.* at *2. Defendant also failed to respond to a Report and Recommendation issued by the Magistrate Judge, failed to respond to the Court's order directing it to inform the Court of its intention to proceed in this matter and of its representation, and to appear at the final pre-trial conference. *Id.* Defendant also failed to respond to any of the several pending motions *in limine*, and failed to return any of the acknowledgments that the Court mailed it. *Id.* Defendant also failed to appear at the final pre-trial conference. The Court stated that it has not had any substantive contact or response from Defendant since summary judgment was denied, over a year prior. The Court found that Defendant's conduct presented a clear record of delay and contumacious conduct. *Id.* The Court held that Defendant repeatedly refused to comply with the Court's orders and attempted to frustrate the progress of the case by refusing to comply and participate in the proceedings. Based on the record in the case, the Court determined that it was clear that sanctions were warranted under Rule 16(f). *Id.* at *3. The Court reasoned that since none of the previous orders or requests had any effect on Defendant, it found that imposing a fine or levying costs against Defendant was unlikely to compel Defendant to comply with Court's orders. *Id.* at *4. The Court therefore found that that a default judgment was warranted to serve the interests of justice. *Id.* at *4-5. Therefore, because Defendant exhibited a pattern of willful, deliberate, contumacious conduct, refused to participate in the case, and failed to appear at the final pretrial conference, the Court entered a default judgment against the Defendant on all of the EEOC's claims pursuant to Rule 16(f). *Id.* at *5.

***EEOC v. Stone Pony Pizza, Inc.,* 2017 U.S. Dist. LEXIS 189491 (N.D. Miss. Nov. 16, 2017).** The EEOC brought an action alleging that Defendant, a restaurant company, failed to hire job applicants on the basis of their race in violation of Title VII of the Civil Rights Act of 1964. The EEOC also contended that Defendant maintained a racially segregated workforce, and failed to retain records as required by Title VII. After four years of litigation and shortly after the Court denied Defendant's motion for summary judgment, Defendant stopped participating in the defense of its case. The Court ultimately entered a default judgment against Defendant on all of the EEOC's claims pursuant to Rule 16(f). Subsequently, the EEOC filed briefs and affidavits calculating damages. The Court found that the EEOC provided ample evidence to support an award of compensatory damages for each of the claimants. The Court stated that the claimants suffered inconvenience and emotional pain as a result of the openly discriminatory policies and actions of Defendant, and Defendant openly taunted and refused interviews to some Plaintiffs, while others were subjected to irrational and unreasonable application requirements. Based on all of the evidence in the record, and looking at all of the circumstances of the case, the Court awarded the compensatory damages requested by the EEOC for a total award of $164,000. *Id.* at *2-3. The EEOC also requested back pay, which the Court also found was warranted based on all of the evidence in the record. The Court accordingly awarded back pay in the amount of $308,641.59. *Id.* at *3. The EEOC further requested that the Court award punitive damages. The Court noted that Defendant intentionally discriminated against African-American employees and applicants in addition to intentionally maintaining a segregated workforce with minority employees relegated to back of house jobs and white employees exclusively staffing the front of house positions. *Id.* at *4-5. The Court reasoned that there was also ample evidence, in both corporate deposition testimony and Defendant's corporate documents, that Defendant's management was fully aware of the relevant federal anti-discrimination statutes and knowingly violated them. The Court therefore awarded punitive damages in the amount of $25,000 per charging party for a total punitive damages award of $350,000. *Id.* at *5. Finally, the EEOC sought injunctive relief against Defendant as authorized under 42 U.S.C. § 2000e-5 when an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." *Id.* Specifically, the EEOC asked that Defendant be enjoined from engaging in racial discrimination against African-American job applicants, maintaining a segregated workforce on the basis of race, and discarding personnel or employment records, including employment applications, resumes, and any other documents submitted by job applicants for a period of one year. *Id.* The Court held that the EEOC's request for injunctive relief was warranted and necessary to ensure that Defendant did not engage in these prohibited discriminatory practices in the future. *Id.* at *6.

***EEOC v. Vicksburg Healthcare, LLC*, 2017 U.S. Dist. LEXIS 6821 (S.D. Miss. Jan. 18, 2017).** 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 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 that stated that Chambers had a "temporary total disability." *Id.* at *4. Chambers reviewed the form and sent it to her insurer. The EEOC subsequently 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. After discovery, Defendant moved for summary judgment. The District Court granted Defendant's motion for summary judgment, and on appeal, the Fifth Circuit reversed and remanded for further proceedings. The Fifth Circuit held that the employee's claim to temporary total disability, made the day after she was terminated from her job because of a disability, did not prevent her from contending that she was able to work if granted a reasonable accommodation. *Id.* at *3. After remand, the District Court then subsequently ruled on the parties' motions *in limine.* As to the first motion, Defendant requested that the District Court exclude from evidence the fact that Chambers requested and was denied leave under the FMLA because there were no FMLA claims, and as such, the evidence would pose the risk of unfair prejudice and jury confusion. *Id.* The EEOC asserted that Chambers requested leave and was immediately denied leave, and those facts were relevant to whether lifting and pushing heavier weights was an essential function of her job and whether it supported a pattern of similar conduct by Chambers' supervisor. *Id.* The District Court agreed that this request for leave and its subsequent denial were relevant to the EEOC's case. The District Court also found that the risk of confusion and prejudice was minimal, as the jury would be instructed on which issues to decide, while the request and the denial were substantially probative on two of the key issues in the EEOC's case. *Id.* at *4. For these reasons, it denied Defendant's motion. Defendant further requested that the District Court exclude as hearsay any statements Ron Ella allegedly made to Chambers as to the reasons Defendant fired him. *Id.* at *5. The EEOC did not respond to this motion, and therefore the District Court held that the statement should be excluded as hearsay and it granted Defendant's motion. The District Court also determined that the parties had reached an agreement as to Defendant's motion to exclude the EEOC's letter of determination, and accordingly, the District Court denied the motion as moot. As to the EEOC's motion *in limine*, the District Court granted the motion as to several items to which Defendant agreed to exclude. As to the remaining portions, the District Court granted the EEOC's motion with respect to Chambers' receipt of retirement and unemployment benefits, the EEOC's investigation, responses to discovery requests, and Chambers' prior medical condition. However, the District Court denied the EEOC's motion with respect to Chambers' application for benefits. *Id.* at *10-14.

(vi) Sixth Circuit

***EEOC v. Autozone, Inc.*, Case No. 14-2760 (6th Cir. June 9, 2017).** The EEOC alleged that Defendant was liable under Title VII for a store manager's alleged sexual harassment of three female employees. In May 2012, Defendant transferred a store manager to its Cordova, Tennessee location. *Id.* at 2. The store manager could hire new hourly employees and write up employees at the store for misbehaving, but could not fire, demote, promote, or transfer employees. Authority over firing, promoting, and transferring rested with the district manager for the store. After an employee claimed that the store manager made lewd comments to her, Defendant internally investigated the allegations. As part of Defendant's internal investigation, two other female employees who worked at the Cordova location confirmed that the store manager made lewd sexual comments. Defendant ultimately transferred and terminated the store manager. Subsequently, the EEOC brought a lawsuit alleging that Defendant subjected the three female employees to sexual harassment. Following discovery, Defendant moved for summary judgment, which the District Court granted, finding that the store manager was not a supervisor under Title VII and therefore Defendant was not vicariously liable for his actions. On appeal, the Sixth Circuit affirmed the District Court's grant of Defendant's motion for summary judgment. First, the Sixth Circuit instructed that under Title VII, if the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling the working conditions, or in other words, if the employer knew or should have known of the harassment yet failed to take prompt and appropriate corrective action. *Id.* at 4. However, if the harasser is the victim's supervisor, a non-negligent employer may become vicariously liable if the agency

relationship aids the victim's supervisor in his harassment. *Id.* The Sixth Circuit further elucidated that an employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim. *Id.* Applied here, the Sixth Circuit found that Defendant did not empower the store manager to take any tangible employment action against his victims since he could not fire, demote, promote, or transfer any employees. *Id.* at 5. Further, the Sixth Circuit held that the store manager's ability to direct the victims' work at the store and his title as store manager did not make him the victims' supervisor for purposes of Title VII. The Sixth Circuit also noted that while the store manager could initiate the disciplinary process and recommend demotion or promotion, his recommendations were not binding, and his ability to influence the district manager did not suffice to turn him into his victims' supervisor. *Id.* at 5-7. Finally, the Sixth Circuit held that the store manager's ability to hire other hourly employees was irrelevant since he did not hire the employees he harassed. *Id.* at 7. After finding that the store manager was not a supervisor for purposes of Title VII, the Sixth Circuit further concluded that even if the storage manager was found to be a supervisor, Defendant had established an affirmative defense to liability. The defense has two elements, including: (i) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (ii) that the harassed employees unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* The Sixth Circuit held that Defendant met the first element by utilizing an appropriate anti-harassment policy to prevent harassment, and by transferring and later terminating the store manager promptly after it investigated the allegations. Regarding the second element, the Sixth Circuit held that Defendant satisfied this prong since the victims failed to report the store manager's behavior for several months. The Sixth Circuit thus held that Defendant established an affirmative defense to liability. Accordingly, the Sixth Circuit affirmed the District Court's grant of Defendant's motion for summary judgment. *Id.* at 10.

***EEOC v. Dolgencorp, LLC,* 2017 U.S. Dist. LEXIS 163739 (E.D. Tenn. Aug. 7, 2017)**. The EEOC brought an action claiming that Defendant discriminated against the charging party, Linda Adams, in violation of the American With Disabilities Act ("ADA"). *Id.* at *5. After the EEOC filed suit, Adams intervened alleging discrimination, failure to accommodate, and retaliation based on her Type II diabetes. *Id.* The Court granted summary judgment in favor of Defendant as to the retaliation claim, but denied the motion as to reasonable accommodations and discriminatory discharge claims. *Id.* At trial, a jury determined that Defendant discriminated against Plaintiff because of her disability by failing to provide her with a reasonable accommodation and terminating her because of her disability. *Id.* at *6. Adams requested attorneys' fees in the amount of $528,425 and costs. *Id.* At the outset, the Court noted that it was undisputed that as a prevailing party, Adams was entitled to attorneys' fees. *Id.* at *11. The Defendant objected to the amount sought, arguing that this case was a routine ADA case and that it was co-prosecuted by a total of seven attorneys for the EEOC. *Id.* at *8. The Court opined that the only determination was whether the requested amount of attorneys' fees was reasonable. *Id.* The Court employed the "lodestar method," which is the proven number of hours reasonably expended on the case by the attorney, multiplied by a reasonable hourly rate. *Id.* The Court noted the most critical factor in determining the reasonableness of a fee award is the degree of success obtained. *Id.* Defendant asserted that the hourly rates of the attorneys and legal assistant should be lowered. The Court lowered the rates, but not as much as Defendant asked for, noting that the appropriate rate is not necessarily the rate of the firm, but the market rate in a venue sufficient to encourage competent lawyers to undertake representation. *Id.* at *13. The Defendant also asserted that the overall hours requested were excessive and must be reduced. *Id.* at *22. The Court rejected Defendant's argument that counsel's time spent on extensive pre-litigation activities should be reduced because Adams was joining a lawsuit already in progress, and refused to reduce the time billed for pre-litigation activities. *Id.* The Court ruled that Adams was required to exhaust the EEOC process and her counsel's time spent pursuing the EEOC charge and communicating and consulting with the EEOC was necessary. Defendant also asserted that travel time should be reduced by 50%. *Id.* The Court denied this request because counsel was local and the only travel was to a mediation and the attorneys submitted that they used the travel time to prepare. *Id.* at *26. Defendant also contended that the time spent on Adams' unsuccessful retaliation claim was not recoverable. *Id.* at *28. The Court rejected this argument because the retaliation claims arose out of the same common set of facts as the other claims. *Id.* at *29. Further, Defendant objected to fees for any time spent on clerical work. *Id.* at *30. The Court deducted billing entries for work performed by the attorneys that were truly clerical. *Id.* at *32. Defendant argued that the lodestar amount should be lowered for attorneys' duplicative work with the EEOC. *Id.* at *34. The Court declined, noting a strong

presumption that exists in awarding a prevailing party's attorney their loadstar fee. *Id.* at *35. Finally, Defendant claimed that Adams' request for "fees for fees" – an award of attorneys' fees for preparing and litigating the fee petition – was excessive and unwarranted. *Id.* at *42. The Court agreed and reduced the hours under a reasonableness standard. *Id.* at *42 The Court recommended that Adams be awarded litigation expenses, as there was no objection. *Id.* at *43. In sum, the Court granted Adams' motion in part and denied it in part, and awarded a total amount of $445,322.25 in attorneys' fees and $1,676.95 in litigation expenses. *Id.* at *44.

***EEOC v. G4s Secure Solutions USA, Inc.*, 2017 U.S. Dist. LEXIS 206969 (E.D. Mich. Dec. 18, 2017).** The EEOC filed an enforcement action on behalf of charging party Christina Ross alleging that Defendant violated the Americans With Disabilities Act ("ADA") when it terminated her employment. Defendant removed Ross from her seated security officer position and placed in her in a foot-patrol position. *Id.* at *1. Ross struggled with this new position because of her connective tissue disorder and lupus, and therefore requested to return to her seated-security position. *Id.* Defendant subsequently terminated her employment. *Id.* at *2. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) on the basis that: (i) the Court lacked subject-matter jurisdiction because the EEOC did not attach its charge of discrimination to the complaint; (ii) Ross' condition did not constitute a disability within the meaning of the ADA; and (iii) the EEOC did not exhaust its administrative remedies. *Id.* at *2. The Court found that it had subject-matter jurisdiction, because under 28 U.S.C. § 1331, the Court has subject-matter jurisdiction over all civil actions arising under the laws of the United States, including EEOC enforcement actions. Further, no authority supported Defendant's proposition that the Court only has subject-matter jurisdiction when the EEOC attaches its charge of discrimination to the complaint. *Id.* at *2-3. The Court also determined that the EEOC alleged that "Ross has a mixed connective tissue disorder and lupus," both of which are musculoskeletal, neurological, and skin-related, and accordingly physical impairments under 45 C.F.R. § 84.3(j)(2)(i). *Id.* at *3. As the EEOC alleged that Ross' conditions interfered with her foot-patrol assignment, the Court reasoned that it could infer that these conditions substantially limited her walking, which is a major life activity under § 12102(2)(A). Accordingly, the Court held that the EEOC sufficiently alleged that Ross had a disability under the ADA. *Id.* at *4. Finally, Defendant argued that because Ross had not yet initiated arbitration proceedings, the EEOC has not exhausted its administrative remedies and could not pursue an enforcement action. The Court disagreed, and stated that the EEOC may pursue this action regardless of whether Ross signed an arbitration agreement or pursued arbitration. *Id.* Accordingly, the Court denied Defendant's motion to dismiss.

***EEOC v. Indi's Fast Food Restaurant, Inc.,* 2017 U.S. Dist. LEXIS 65748 (W.D. Ky. May 1, 2017).** The EEOC brought an action alleging the Defendants violated Title VII. The EEOC alleged that Defendants failed to timely respond to requests for admission that it propounded on December 20, 2016 and December 30, 2016. The EEOC requested the Court to deem admitted all of the requests for admission pursuant to Rule 36(b). The EEOC asserted that Defendants demonstrated an unwillingness or inability to adhere to Court-imposed deadlines and that they had not shown that they failed to meet the discovery deadlines sufficient to satisfy the excusable neglect standard set forth in Rule 6(b). *Id.* at *4. On February 13, 2017, Defendants filed a motion for an extension asking the Court to accept as timely their responses to the EEOC's December 30, 2016 requests for admission which they also filed on that day. The Court stated that the first requests for admission were served on Defendants on December 20, 2016. The Court found that, absent an extension of time, Defendants were required to respond to that set of discovery requests no later than January 19, 2017. *Id.* at *7. Defendants responded to the December 20 discovery requests on January 31, 2017, 12 days after the deadline passed. The second requests for admission were served on Defendants on December 30, 2016. The Court again found that, absent an extension of time, Defendants were required to respond to that set of discovery requests no later than January 30, 2017. Defendants responded to the December 30 discovery requests on February 13, which was 14 days after the deadline passed. The Court explained that it would apply the five-factor standard for excusable neglect. Looking to that standard, the Court held that the reason for the delay was firmly within the control of Defendants and their counsel. *Id.* at *9. The Court rejected Defendants' argument that its counsel reasonably believed that the second set of discovery requests was a supplement to the first set, and that therefore a later deadline attached to both sets. *Id.* at *10. Additionally, Defendants' assertions regarding the untimely completion of responses were unpersuasive, as vacations and not knowing the answer to a request were not valid defenses for not responding. The Court opined that Defendants were free to assert objections to any of the discovery requests served by the EEOC, but a failure to respond was impermissible. *Id.* at *11. The Court also found that

defense counsel's conduct was indicative of acting in bad faith. *Id.* Accordingly, the Court concluded that the factors of the excusable neglect balancing test weighed in favor of the EEOC. The Court further determined that there was little or no danger of prejudice to the EEOC, as Defendants admitted every request for admission posed by the EEOC in both sets of discovery requests, and they answered, without objection, the two interrogatories posed therein. *Id.* The Court explained that the consequences of denying the motions for extension and granting the motions for extension were identical: (i) if the motions are denied, the requests for admission would be deemed admitted and any objections to the interrogatories will be deemed waived; and (ii) if the motions are granted, the responses, which admit everything asked by the EEOC and do not contain objections to the interrogatories, would be deemed timely. *Id.* at *12. In either case, the EEOC would achieve its desired result and was not prejudiced. Finally, the Court found that the length of delay was insignificant. The Court opined that granting Defendants' motions for an extension and deeming the two sets of discovery responses timely would ensure a more complete record. The Court therefore granted Defendants' motions for an extension and deemed Defendants' discovery responses as timely.

***EEOC v. Indi's Fast Food Restaurant, Inc.*, 2017 U.S. Dist. LEXIS 177363 (W.D. Ky. Oct. 26, 2017).** The EEOC brought an action alleging the Defendants violated Title VII. The parties filed cross-motions for partial summary judgment based on whether the sexual harassment experienced by Plaintiffs created a hostile work environment. The EEOC requested the Court to grant judgment on its claims as to 10 claimants. Defendants requested the Court to enter summary judgment in its favor dismissing the claims of 11 claimants. The Court addressed the allegations of the claimants for whom only the EEOC requested summary judgment. The Court found that that summary judgment was inappropriate as there were issues of fact surrounding these claims, including credibility of their stories and the fact their declarations contained what Defendants called "irreconcilable differences" from the testimony given in depositions. *Id.* at *11. Defendants also suggested that several claimants may have had ulterior motives to fabricate stories and make the harassment they experienced seem more severe as the alleged harasser terminated their employment. *Id.* at *12. The Court held that in order to determine what harassment the claimants experienced and whether any harassment created a hostile work environment, the claims must be resolved by a jury. *Id.* at *12-13. Defendants also sought summary judgment as to six claimants, asserting that the EEOC had not met its burden of proving harassment on account of the severity required for a hostile work environment claim. The EEOC argued that there were disputes of material fact in each of these claims. After considering the totality of the circumstances, the Court found that as to claimant Williams, the alleged inappropriate comments did not give rise to a Title VII claim for sexual harassment. Accordingly, the Court determined that Defendants were entitled to summary judgment as to the claims for harassment of Williams. *Id.* at *15. However, as to the other five claimants, the Court found genuine issues of material fact regarding whether management was aware of the alleged sexual harassment. Further, the Court found that core facts of the claimant's complaints were in dispute. Lastly, with respect to the claimants that both parties sought summary judgment for in their motion, the Court found that none of them had claims that strongly favored one party or the other. *Id.* at *19. The Court opined that each woman had shared a story of harassment that a jury may or may not find severe and pervasive, as the analysis for finding a hostile work environment is not a mathematically precise test. *Id.* Further, the Court noted that the stories of harassment told by claimants were discredited by managers for Defendants who claimed that they were not aware any of these claimants were harassed. *Id.* at *20. The Court therefore determined that these considerations, along with the reliability and subjective experiences of the claimants, were best left to the jury. Therefore, finding that a reasonable jury could find for either the EEOC or for Defendants, the Court held that summary judgment for either party on these claims was inappropriate.

***EEOC v. MGH Family Health*, 230 F. Supp. 3d 796 (W.D. Mich. Jan. 27, 2017).** The EEOC brought an action on behalf of Avis Lane, a community outreach coordinator, alleging that Defendant discriminated against Lane based upon a perceived disability in violation of the Americans With Disabilities Act ("ADA"). Defendant hired Lane and required her to undergo a post-offer physical with a third-party medical evaluator prior to commencing employment. However, Lane began her employment duties before undergoing the exam. After undergoing the physical exam, the medical provider recommended Lane be placed on "medical hold" even though she had passed the physical exam. *Id.* at 799. The medical provider recommended that Lane not begin employment until a functional capacity evaluation ("FCE") was performed because her medical records indicated that she took prescription medicine for migraines and thoracic outlet syndrome, raising the possibility of "a cognitive problem

at work." *Id.* at 802. After Lane worked for 14 days, Defendant told Lane that she was going to be put on medical hold and that she must undergo another FCE. Defendant also told Lane that it would not pay for the FCE. Lane indicated that she would pay for the exam herself. Defendant then encouraged Lane to get medical clearance from her own provider. Lane obtained a letter from her medical provider clearing her to work without restrictions. Lane thereafter continued to work in her position for five weeks without incident. However, Defendant terminated Lane. Defendant also failed to follow up on Lane's offer to pay for the FCE or conduct an individualized inquiry. After terminating her, Defendant then offered Lane her job back without any further medical examinations requested. The EEOC moved for summary judgment, and Defendant cross-moved for summary judgment. Defendant asserted that the EEOC's motion should be denied because the EEOC had not alleged that Lane had a disability that substantially limited one or more life activities. The Court rejected this argument, ruling that a "regarded as" claim under the ADA only requires the EEOC to plead that Lane was regarded as having a physical or mental impairment. Defendant also asserted that it did not know about Lane's medical condition and that the third-party medical provider's knowledge could not be imputed to Defendant. The Court rejected this argument as well, noting that employers are unable to escape their responsibilities under the ADA by "contracting out" personnel decisions to third-parties. *Id.* at 810. The Court ruled that Defendant perceived Lane as having an impairment, and therefore Defendant regarded her as disabled. The Defendant also asserted that Plaintiff was not otherwise qualified under the ADA . The Court held that Defendant was estopped from arguing that Lane was "not otherwise qualified" because the Defendant terminated Lane without completing an individualized inquiry. *Id.* at 813. The Court granted summary judgment in favor of the EEOC on the issue of liability and denied Defendant's cross-motion for summary judgment.

***EEOC v. R&L Carriers Shared Services,* 2017 U.S. Dist. LEXIS 172424 (S.D. Ohio Oct. 18, 2017)**. The EEOC brought an action alleging that Defendants refused to hire female job applicants as loaders or dockworkers on the basis of their sex in violation of Title VII of the Civil Rights Act of 1964. Defendants filed a motion to dismiss on the grounds that the EEOC failed to state a plausible claim for relief. The EEOC asserted that its pleading was sufficient, but requested leave to amend if the Court determined it was insufficient. *Id.* at *5. Defendants argued that the complaint failed to contain sufficient factual allegations to raise the right to relief above the speculative level to the required plausibility level. The EEOC asserted that it alleged multiple incidents of discrimination relative to the refusal to hire women as dockworkers or loaders since at least January 1, 2010, at Defendants' Wilmington, Ohio facility. *Id.* at *6. Upon consideration, the Court was not convinced that the EEOC stated a plausible claim for relief, because the EEOC failed to allege facts about which women, or how many women, if any, applied for positions as dockworkers or loaders at the Wilmington, Ohio facility. *Id.* Likewise, the Court found that the EEOC failed to alleged facts suggesting that Defendants instead hired men as dockworkers or loaders during the same time period. *Id.* The Court stated that without these facts, it could only speculate as to whether Defendants violated Title VII by refusing to hire women for the dockworkers and loaders positions. *Id.* The Court opined that it had reason to believe the EEOC knows more facts about the alleged discriminatory conduct than it pleaded in the complaint, because: (i) the EEOC had sufficient knowledge to have issued an amended letter of determination "finding reasonable cause to believe that Title VII was violated;" and (ii) in its memorandum in opposition to Defendant's motion to dismiss, the EEOC informally requested leave to amend the complaint. *Id.* The Court determined that the EEOC would not request leave to amend if it did not have additional facts to plead. *Id.* The Court stated that it has the authority to deny leave to amend when, as here, the EEOC failed to submit the proposed amended pleading for review. However, the Court held that in this case, which was at the earliest stage of litigation, the equities favored granting the EEOC leave to amend the complaint, because amendment would not unduly delay these proceedings nor prejudice Defendants. *Id.* at *7. Accordingly, the Court ordered the EEOC to file an amended complaint.

***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* Case No. 16-2424 (6th Cir. Mar. 23, 2017).** The EEOC sued Defendant, a closely-held for-profit corporation operating three funeral homes in Michigan. Defendant had a strict employee dress code policy with several requirements, including that men must wear suits and women must wear jackets and skirts/dresses. Charging party Aimee Stephens transitioned from male to female during her employment and filed a charge with the EEOC asserting that Defendant subjected her to discrimination on the basis of her sex. The EEOC subsequently filed suit, which the District Court dismissed. On the EEOC's appeal, Stephens moved to intervene as a matter of right, or in the alternative, permissively. The Sixth Circuit stated that to intervene as a matter of right, the party must satisfy four elements, including: (i) that the request

was timely; (ii) the party has a substantial legal interest in the case; (iii) that the party's interest will be impaired absent intervention; and (iv) that the parties already before the Court cannot adequately represent the interest. *Id.* at 2. The Sixth Circuit noted that timeliness should be evaluated in the context of all relevant circumstances. *Id.* Given that Stephens knew or should have known about the case at the outset, the Sixth Circuit found that her delay in seeking to intervene suggested that the request was untimely. *Id.* However, the Sixth Circuit reasoned that until recently, Stephens had no reason to question whether the EEOC would continue to adequately represent her interests. The Sixth Circuit determined that the EEOC's actions post-appeal, implied that the new Trump Administration would be less aggressive in pursuing transgender rights. The Sixth Circuit also opined that Defendant would not be prejudiced in Stephens were to intervene, as she indicated that she did not intend to raise any new issues. *Id.* The Sixth Circuit held that Stephens' intervention would serve judicial economy, because should the EEOC withdraw from the case, it would not require delaying the case. *Id.* at 3. The Sixth Circuit also ruled that Stephens unquestionably possessed a substantial legal interest in the case. Therefore, the Sixth Circuit granted Stephens' motion to intervene.

***EEOC v. Roark-Whitten Hospitality,* 2017 U.S. Dist. LEXIS 132026 (E.D. Tenn. Aug. 7, 2017)**. The EEOC brought an action claiming that Defendant discriminated against a group of minority hotel workers, in violation of Title VII of the Civil Rights Act of 1964. *Id.* at *2. The Magistrate Judge granted the EEOC's motion to compel discovery of Defendants' financial information, and agreed that the EEOC's requests from Defendants and other non-party hotels were relevant to the EEOC's claims for punitive damages and successor employer liability. *Id.* at *4. Defendants maintained that the production requests were unnecessary and immaterial. That Magistrate Judge found that information requested was relevant and proportional to the needs of the case pursuant to Rule 26 (b)(1) and granted the motion. *Id.* Defendants argued that the EEOC was not entitled to financial information of the non-party entities. *Id.* at *15. The EEOC alleged that each hotel for which it sought information was managed by the same corporation, as the hotels shared the same business office, which was responsible for accounting for all hotels. *Id. at* *12. The EEOC argued that the financial documents that it sought, such as financial statements and profit-and-loss statements, could demonstrate whether the hotels had interrelated operations, and were under common management and financial control. *Id.* Additionally, financial information from all hotels was relevant for the purposes of establishing the appropriate statutory damages cap. *Id.* at *13. The Magistrate Judge noted that the EEOC could have subpoenaed the information and Defendant did not object to the production of the non-parties' financial information on the basis that it did not have possession or control of the information. *Id.* at *15. The Magistrate Judge also ruled that the financial information for all four hotels was relevant to the EEOC's claim for successor employer liability. *Id.* at *16. Third, the information was also relevant to the EEOC's claim for punitive damages. *Id.* at *14. Defendants also objected to the production of financial information, asserting that the EEOC failed to establish a *prima facie* showing that it was entitled to punitive damages. *Id.* at *18. However, the Magistrate Judge ruled that because the EEOC had alleged sufficient facts to claim punitive damages against the Defendant, information of Defendant's net worth or financial condition was relevant because it could be considered in determining punitive damages. *Id.* at *19. Accordingly, the Magistrate Judge granted the EEOC's motion to compel.

***EEOC v. Southeast Food Services Co. d/b/a Wendy's*, 2017 U.S. Dist. LEXIS 44266 (E.D. Tenn. Mar. 27, 2017).** The EEOC brought an action alleging that Defendant violated Title VII by denying the charging party, Christine Cordero, a promotion because she refused to sign a release form. Defendant hired Cordero as a crew member at one of its restaurant locations. *Id.* at *2. Shortly thereafter, Defendant promoted Cordero to crew leader. *Id.* As part of her promotion, Defendant requested that Cordero sign a general release of all claims she may have against Wendy's up to that point, but not including future claims. *Id.* For the past 20 years, Defendant had conditioned promotions on signing this type of release. *Id.* Despite not having any claims against Defendant, Cordero refused to sign the release. *Id.* As a result of her refusal, Defendant did not receive the promotion, but still received training for the position and a small raise that would have accompanied the promotion. *Id.* at *3. Cordero continued to work for Defendant, and filed a charge of discrimination with the EEOC in December 2014. *Id.* In the charge, Cordero alleged that Defendant retaliated against her by not promoting her due to her refusal to sign the release. *Id.* In the course of its investigation of Cordero's charge of discrimination, the EEOC learned of Defendant's longtime practice of requiring employees to sign a release of claims as a condition of promotion, and thereafter sent Defendant a letter indicating it intended to expand the investigation. *Id.* In this letter, the EEOC also requested information from Defendant regarding current and former employees who had worked for

the company since December 2012. *Id.* Defendant, however, refused to provide this additional information, and the EEOC then issued a subpoena seeking the same information. *Id.* at *4. The EEOC's subpoena sought the identity and contact information of all current and former employees since December 2012, including employees who signed the release of claims and who had been promoted. *Id.* In addition, the subpoena sought the employees' dates of hire, promotion, termination, reasons for termination, and titles, as well as copies of all releases that Defendant had employees sign during that period, among other things. *Id.* Defendant again objected and refused to provide the information and documentation that had been subpoenaed. *Id.* The EEOC filed a motion to enforce the subpoena, and the Court denied the motion. The EEOC argued that it "require[d] the contact information for [Wendy's] employees to mail questionnaires in order to determine if those employees gave up any claim in order to receive promotions." *Id.* at *5-6. In response, Defendant asserted that the sole issue with regard to the charge was whether its uniform policy regarding a signed release as a condition of promotion was sufficient to sustain Cordero's Title VII retaliation claim, and that the information sought for the questionnaires was neither relevant nor necessary to the EEOC's investigation. *Id.* at *6. The Court rejected the EEOC's argument, finding that "whether other 'employees gave up any claim in order to receive promotions' [was] irrelevant to resolving Ms. Cordero's charge." *Id.* at *7. The EEOC further argued that sending the questionnaires to other employees was the only way to verify Defendant's contention that no other employees aside from Cordero refused to sign the release. *Id.* at *8. The Court again rejected the EEOC's position, noting it was "unclear how another employee's refusal to sign a release 'might cast light' on the instant charge, particularly where there is no dispute that for the past 20 years, all employees have been required to sign a general release of all claims as a condition of promotion." *Id.* at *8-9. The Court further reasoned that the potential unlawfulness of Defendant's employment practice was not dependent on how many other employees signed a release. *Id.* at *9. Accordingly, the Court held that the EEOC did not meet its burden in demonstrating that the information subpoenaed was relevant to Cordero's charge, and it declined to enforce the subpoena.

***EEOC v. Southeast Food Services Co. d/b/a Wendy's,* 2017 U.S. Dist. LEXIS 97340 (E.D. Tenn. June 23, 2017).** The EEOC brought an action alleging that Defendant violated Title VII by denying charging party Christine Cordero a promotion because she refused to sign a release form. Defendant hired Cordero as a crew member at one of its restaurant locations, and promoted her to crew leader shortly after her hire. As part of her promotion, Defendant requested that Cordero sign a general release of all claims she may have against Defendant up to that point, but not including future claims. *Id.* at *2. Despite not having any claims against Defendant, Cordero refused to sign the release. *Id.* As a result of her refusal, Defendant did not receive the promotion, but still received training for the position and a small raise that accompanied the promotion. *Id.* at *3. Cordero continued to work for Defendant, and filed a charge of discrimination with the EEOC in December 2014. *Id.* In the charge, Cordero alleged that Defendant retaliated against her by not promoting her due to her refusal to sign the release. *Id.* During the EEOC's investigation into Cordero's claims, the EEOC requested information from Defendant regarding current and former employees who had worked for it since December 2012. *Id.* at *3. Defendant, however, refused to provide this additional information, and the EEOC then issued a subpoena seeking the same information. *Id.* at *4. The EEOC's subpoena sought the identity and contact information of all current and former employees since December 2012, including employees who signed the release of claims and who had been promoted. *Id.* In addition, the subpoena sought the employees' dates of hire, promotion and termination, reasons for termination, and titles, as well as copies of all releases that Defendant had employees sign during that period, among other things. *Id.* The EEOC filed a motion to enforce the subpoena, and the Magistrate Judge recommended denial of the motion. The Magistrate Judge held that the EEOC did not meet its burden in demonstrating that the information subpoenaed was relevant to Cordero's charge, and recommended the Court deny enforcement of the subpoena. The EEOC objected, and the Court ultimately found that the information sought by the EEOC was not relevant to Cordero's charge. First, the Court was not convinced that Cordero's charge alleged a pattern or practice of discrimination, as argued by the EEOC. *Id.* at *15. The Court explained that nothing in the language of Cordero's charge indicated her desire to bring a claim on behalf of another employee or to allege a pattern of discriminatory behavior. *Id.* Second, the Court found that other employees' information would not provide context for, or shed light on, Cordero's retaliation charge. *Id.* at *15-16. The Court reasoned that Defendant had admitted that it required all employees seeking a promotion to sign the release for the past 20 years and that anyone who refused to sign the release was denied a promotion. Thus, the Court opined that the EEOC need not evaluate broader employment information in order to determine whether Defendant refused to promote Cordero because of her refusal to sign the waiver. *Id.* at *16. Second,

although the EEOC need not prove "probable cause or reasonable cause to believe that the charge of discrimination is true," the Court reasoned that the Commission may not "use an enforcement proceeding as an opportunity to test the strength of the underlying complaint." *Id.* at *17-18. Finally, the EEOC argued that Defendant admitted to a failure to preserve its employee records, which is required under Title VII. The EEOC contended, therefore, that it has a duty to investigate this record-keeping violation and that the subpoenaed information will aid in this investigation. *Id.* at *18. The EEOC argued that it was not required to amend the charge or to file a separate charge in order to investigate the alleged record-keeping violation. The Court noted that the EEOC did not bring a charge of record-keeping violation, and the Commission failed to demonstrate how the subpoenaed information at issue was relevant to the EEOC's investigation into Cordero's charge. *Id.* at *20. Accordingly, the Court accepted the Magistrate Judge's recommendation to deny the EEOC's motion to enforce its subpoena.

***EEOC v. UPS*, 2017 U.S. App. LEXIS 10280 (6th Cir. June 9, 2017).** The EEOC brought an action on behalf of Sinisa Matovski, an operations manager who has a disability, claiming that Defendant discriminated and retaliated against him in violation of the Americans With Disabilities Act of 1990 ("ADA"). In particular, the EEOC asserted that Defendant published confidential medical information about him and other employees on its intranet page. The EEOC issued Defendant a subpoena requesting information about how it stored and disclosed employee medical information. *Id.* at *1-2. Defendant opposed the subpoena, claiming that the requested information was irrelevant to Matovski's charge. As a result, the EEOC filing an application to enforce the subpoena. In his charge, Matovski claimed that Defendant violated the ADA by publishing a medical leave request on its Health and Safety intranet site. Matovski requested that his information be removed from the site; however, it remained accessible, and that others had their information compromised in the same manner. *Id.* at *3. As part of its investigation into the allegations, the EEOC issued a subpoena for a report containing information about employee injuries and accidents, a copy of the privacy criteria used by Defendant, and a copy of Defendant's 'RiskConsul' Oracle Database. *Id.* at *4. Defendant petitioned the EEOC to modify the subpoena, arguing that some of the requested information was irrelevant and burdensome. The EEOC then filed an application for an order to show cause why an administrative subpoena should not be enforced. The District Court granted the application, and Defendant appealed. On appeal, the Sixth Circuit affirmed the District Court's decision because the information that the EEOC requested "relates to unlawful employment practices" covered by the ADA. *Id.* at *2. The Sixth Circuit explained that it has held in the Title VII context that "the EEOC is entitled to . . . evidence [that] focuses on the existence of patterns of racial discrimination in job classifications or hiring situations other than those that the EEOC's charge specifically targeted." *Id.* at *5. Defendant argued that "[t]he EEOC is only entitled to information regarding similarly-situated employees." *Id.* at *7. The Sixth Circuit stated that there was no such restriction under § 2000e-8(a), as it had previously deemed evidence to be relevant despite the fact that it concerned employees who were decidedly not similarly-situated to the employee who was the subject of the EEOC charge. *Id.* at *7-8. The Sixth Circuit determined that the true test of relevance was not whether the information was about similarly-situated employees, but whether the evidence "provides context for determining whether discrimination has taken place." *Id.* at *8. The Sixth Circuit stated that the EEOC's first and third requests, which were for the databases that stored and allegedly disclosed employee medical information, were relevant to Matovski's charge. Matovski's charge directly implicated the databases that Defendant uses to store and potentially disclose employee medical information. The Sixth Circuit therefore found that the District Court did not abuse its discretion in finding such reports relevant to Matovski's charge. The Sixth Circuit also held that the District Court did not abuse its discretion in finding that Defendant's privacy criteria were relevant to Matovski's charge. *Id.* at *10-11. The EEOC provided that the privacy criteria might reveal an acknowledgment on the part of Defendant that some information in the databases was "confidential information that shouldn't be shared with all managerial employees throughout the country." *Id.* at *11. The Sixth Circuit found that it was not an abuse of discretion for the District Court to deem evidence regarding such knowledge to be relevant. Finally, Defendant also argued that the EEOC's requests were unduly burdensome. The Sixth Circuit, however, opined that Defendant failed to identify how producing the requested pieces of evidence would be unduly burdensome. Because Defendant did not show that the subpoena was burdensome in any material way, the Sixth Circuit ruled that the District Court did not abuse its discretion in ordering Defendant to comply with the subpoena. *Id.* at *12. Accordingly, the Sixth Circuit affirmed the ruling of the District Court.

(vii) Seventh Circuit

***EEOC v. Amsted Rail Co.,* 2017 U.S. Dist. LEXIS 189713 (S.D. Ill. Nov. 16, 2017).** The EEOC brought an action alleging that Defendant discriminated against Anthony Montrell Ingram and a group of other applicants in violation of the Americans With Disabilities Act ("ADA"). Ingram and the other claimants alleged that Defendant discriminated against them when they applied for the job position of "chipper," which required the use of a hammer because Defendant regarded them as disabled due to having carpel tunnel syndrome and/or a record of CTS. Defendant offered employment to claimants, but the offers were contingent on passing a medical examination, which included a nerve conductive test ("NCT") to identify applicants at greater risk of developing CTS. *Id.* at *4. Defendant made conditional job offers to the claimants, but placed them on medical hold because of an abnormal NCT result. *Id.* at *7. Ingram did not have an abnormal NCT, but Defendant placed him on hold because of his history of being previously diagnosed with CTS. Ingram had undergone surgery to relieve it and had been released to return to work previously. Despite this, Defendant's medical examiner believed that Ingram was at increased risk of developing CTS again. *Id.* at *9. Both parties agreed that an abnormal NCT did not indicate that an individual had CTS and did not render the individual incapable of performing the chipper job. *Id.* at *8. Defendant asserted that it believed that all claimants could have performed the job of chipper, but could not have done so safely. The EEOC moved for partial summary judgment on the issue of liability and Defendant's direct threat affirmative defense. Defendant also moved for summary judgment and argued that claimants were not qualified under the ADA because they posed a direct threat to their health and safety of others. *Id.* at *13. The Court granted summary judgment in favor of Defendant as to claimants Cashmen and Welch, because both previously declared in applications for Social Security benefits that they were disabled and were awarded benefits. The EEOC offered nothing to explain this contradictory position of the claimants and therefore, the Court ruled that Defendant was entitled to summary judgment. *Id.* at *25. As to all other claimants, the Court granted the EEOC's motion on the issue of liability and the direct threat affirmative defense. The Court also granted the EEOC's motion as to Ingram because the evidence established that Ingram did not have CTS, and was physically capable of performing the chipper job when Defendant placed him on medical hold. The only evidence that suggested otherwise was Defendant's medical examiner's beliefs that in the future Ingram might pose a danger to himself. The Court opined that no reasonable jury could find that Defendant's medical examiner's speculation about Ingram's future safety spoke to his current ability to do the job absent CTS or any symptoms, and determined that the EEOC was therefore entitled to summary judgment on his claim. The Court applied the same analysis to the other applicants and determined that whether the claimants were qualified focused only on the claimants' condition at the time of Defendant's employment decision. Accordingly, there was no genuine issue of material fact regarding whether Ingram and the other claimants were qualified to be chippers at the time of their applications. Further, the Court granted the EEOC's motion for summary judgment on Defendant's direct threat affirmative defense for similar reasons. Defendant's medical examiner relied solely on the statistic that those with abnormal NCT results were three to four times more likely to develop CTS than someone with a normal NCT result. The Court concluded that this risk was small and not the type of significant risk that the direct threat defense contemplated. *Id.* at *39. Accordingly, the Court concluded that the EEOC was entitled to summary judgment on Defendant's direct threat affirmative defense. *Id.* at *42.

***EEOC v. Autozone, Inc.*, 860 F.3d 564 (7th Cir. 2017).** The EEOC filed an action on behalf of Kevin Stuckey, an African-American sales manager, alleging that his transfers between Chicago-area stores constituted discrimination on the basis of his race in violation of Title VII of the Civil Rights Act of 1964. Stuckey asserted that he was transferred numerous times. However, none of these transfers entailed any loss in pay, benefits, or job responsibilities. *Id.* at *565. Defendant then transferred Stuckey to a store that served a largely Hispanic population. This transfer also involved no reduction in his pay or responsibilities. Following discovery, Defendant moved for summary judgment, arguing that the record conclusively established that the transfer: (i) was not an act of intentional segregation of its workforce by race; and (ii) did not adversely affect Stuckey's employment status. The District Court agreed that the undisputed evidence showed that Stuckey did not suffer an adverse employment action. *Id.* at *568. The District Court granted Defendant's motion for summary judgment. *Id.* at *566. The EEOC appealed, arguing that Title VII does not require it to prove that the challenged action adversely affected a claimant's employment opportunities or status. *Id.* at *567. On appeal, the Seventh Circuit affirmed, finding that the EEOC's reading could not be squared with the plain statutory text of Title VII. The Seventh Circuit held that the evidence was undisputed that the July 2012 transfer – and all other transfers – were purely lateral, and entailed no reduction in pay, benefits, or job responsibilities. Further, the transfers did

not otherwise alter Stuckey's conditions of employment in a detrimental way. The Seventh Circuit explained that it was well established that a purely lateral job transfer does not normally give rise to Title VII liability because it does not constitute a materially adverse employment action. *Id.* at *569. The Seventh Circuit therefore determined that the evidence would not permit a reasonable jury to find that Stuckey's lateral transfer deprived or even tended to deprive him of any employment opportunity or otherwise adversely affected his employment status. *Id.* at *570. Accordingly, the Seventh Circuit affirmed the District Court's ruling granting summary judgment to Defendant.

***EEOC v. Autozone, Inc.*, 2017 U.S. App. LEXIS 23704 (7th Cir. Nov. 21, 2017).** The EEOC filed an action on behalf of Kevin Stuckey, an African-American sales manager, alleging that his transfers between Chicago-area stores constituted discrimination on the basis of his race in violation of Title VII of the Civil Rights Act of 1964. The District Court previously granted Defendant's motion for summary judgment. The EEOC appealed, arguing that Title VII did not require it to prove that the challenged action adversely affected a claimant's employment opportunities or status. On appeal, the Seventh Circuit affirmed, finding that the EEOC's reading of the statute could not be squared with the plain statutory text of Title VII. The EEOC filed a motion for rehearing, and the Seventh Circuit panel voted unanimously to deny rehearing. A judge in active service subsequently called for a vote on the request for rehearing *en banc*. *Id.* at *2. The majority of the Seventh Circuit judges voted to deny rehearing *en banc*. The Seventh Circuit therefore denied the EEOC's petition for rehearing and for rehearing *en banc*. The chief judge and two circuit judges issued a dissenting option objecting to the majority's refusal to reconsider its ruling. The dissent argued that the case is "worth the attention of the full" Seventh Circuit because of the "importance of the question and the seriousness with which we must approach all racial classifications." *Id.* at *3. The dissent stated that deliberate racial segregation "by its very nature has an adverse effect on the people subjected to it." *Id.* The dissent argued that the assertion that an employer could maintain intentional "separate-but-equal" work arrangements if the EEOC cannot show an adverse action "is contrary to the position that the Supreme Court has taken in analogous equal protection cases as far back as *Brown v. Board of Education*." *Id.* at *5. The dissent also maintained that this case presented a plausible allegation, backed up with evidence, that an employer was deliberately maintaining racially segregated workplaces. *Id.* at *7. The dissent opined that such a practice is one that, at a minimum, tends to deprive a person of employment opportunities, and adversely affects their status as an employee by telling the employee that his job opportunities are limited by race. *Id.* The dissent reasoned that the Seventh Circuit's decision endorsed the erroneous view that "separate-but-equal" workplaces are consistent with Title VII, and therefore the three circuit judges dissented from the denial of rehearing *en banc*. *Id.*

***EEOC v. CVS Pharmacy*, 2017 U.S. Dist. LEXIS 7337 (N.D. Ill. Jan. 18, 2017).** The EEOC brought an action alleging that Defendant engaged in a pattern or practice of discrimination in violation of Title VII. After the Court granted Defendant's motion for summary judgment, it also granted Defendant's motion to stay the deadlines for submission of any motion for attorneys' fees. *Id.* at *2. Subsequently, the summary judgment order was affirmed on appeal, and the EEOC petitioned for an appellate rehearing *en banc*. Defendant filed a motion to lift the stay and set a schedule for briefing its motion for attorneys' fees, which the Court granted. Defendant then filed a motion for attorneys' fees pursuant to Rule 54(d), which the Court granted in part. Defendant's motion sought compensation for 249.2 hours for the motion to dismiss and for summary judgment and 574.3 hours for the appeal. First, the EEOC argued that Defendant's billing records were insufficient and lacked detail, which precluded an accurate determination of what hours were spent on frivolous claims and what hours were spent on non-frivolous claims. *Id.* at *4. The Court noted that it must only award fees requested that would not have accrued but for the EEOC's frivolous claim. *Id.* at *7. The Court determined that there was only one such claim, *i.e.*, that Defendant engaged in a pattern or practice of resistance to the rights secured by Title VII by conditioning certain employees' severance pay on the signing of a separation agreement. *Id.* The Court found that the claim was legally frivolous because the EEOC did not follow its obligation to engage in good faith conciliation before filing suit. The EEOC then challenged the amount of time that Defendant spent on each component of the trial and appellate court litigation. *Id.* at *7-8. Defendant responded that the nature of the issues required an in-depth understanding of Title VII's text, structure, and history. The Court determined that the amount of hours claimed for the motion to dismiss or, in the alternative, for summary judgment, was reasonable. However, the Court found that Defendant claimed to spend more than twice the number of hours spent on the appeal. The Court held that the amount of hours spent on the appeal was excessive in light of the

fact that the legal issues were the same as those presented in the original motion practice, and there was no need to develop a factual record at the appellate stage. *Id.* at *8. The Court reasoned that other case law authorities have similarly reduced the hours claimed on appeal where there was no apparent reason for the disparity given the similarity of the issues raised in the initial action and those presented during the subsequent appeal. *Id.* Therefore the Court reduced the number of requested hours for the appeal from 574.3 hours to 300 hours. Accordingly, the Court granted in part Defendant's motion for attorneys' fees.

***EEOC v. Dolgencorp, LLC,* 2017 U.S. Dist. LEXIS 54634 (N.D. Ill. April 10, 2017).** The EEOC brought suit alleging that Defendant's criminal conviction background check policy had a disparate impact on African-Americans in violation of Title VII. Amongst its defenses, Defendant asserted that the EEOC's claims were barred as beyond the scope of the charges of discrimination and agency investigation (its 7th enumerated defense), and that the EEOC failed to satisfy the statutory pre-conditions for bringing suit when it failed to conciliate with Defendant (its 8th enumerated defense). The EEOC moved for partial summary judgment as to Defendant's two enumerated defenses. *Id.* at *2. The EEOC contended that, on the undisputed facts, these two defenses failed as a matter of law. The Court granted the EEOC's motion for partial summary judgment regarding Defendant's two enumerated defenses. Defendant's seventh enumerated defense relied upon two separate propositions, including: (i) the EEOC's claims were barred because they went beyond the claims delineated in the charges of discrimination that generated the EEOC's lawsuit; and (ii) the EEOC's claims were barred because the EEOC failed to investigate those claims adequately prior to bringing suit. *Id.* at *5. The Court rejected the first proposition, holding that when the EEOC files suit, it is not confined to claims asserted by the charging party, and further, that any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. *Id.* As to the second proposition, the Court similarly opined that the Seventh Circuit has held that EEOC lawsuits are not limited to claims made in the administrative charge, or claims that are found to be supported by the evidence obtained in the Commission's investigation. *Id.* at *6. Accordingly, the Court rejected Defendant's defenses insofar as it sought to dismiss the EEOC's claims because they went beyond the charges of discrimination or because they were not subject to an adequate pre-suit investigation. *Id.* at *6-7. In addition, the Court addressed Defendant's eighth enumerated defense, which contended that the suit could not go forward because the EEOC did not satisfy its pre-suit statutory obligation to conciliate. *Id.* at *7. The EEOC sent two letters of determination to Defendant that stated that the EEOC found reasonable cause to believe that Defendant engaged in discrimination in violation of Title VII because, through application of its background check policy, a class of African-American applicants and employees were not hired, not considered for employment, or discharged. Defendant argued that the notice of the charge was not specific enough because it failed to identify the persons allegedly harmed or to identify the allegedly discriminatory practice. *Id.* at *8. Rejecting Defendant's argument regarding the specificity of notice, the Court held that the EEOC's letters clearly set forth that there were African-American applicants and employees who were harmed by the allegedly discriminatory practice. *Id.* at *9. Further, the Court opined that as the Seventh Circuit has explained, the sufficiency of the EEOC's investigation was not a matter to be second-guessed. *Id.* Defendant also argued that the EEOC failed to describe the allegedly discriminatory practice with specificity, and that merely pointing to the background check policy was not sufficient. The Court rejected this argument, holding that the EEOC's notice was sufficient since it identified the two complainants and further put Defendant on notice that the EEOC's allegations related to African-American applicants and employees that were not hired, not considered for employment, or discharged due to failing a background check. *Id.* at *10. Finally, Defendant contended that the EEOC's conciliation discussions were inadequate because the EEOC did not provide Defendant with an opportunity to remedy the allegedly discriminatory practice. *Id.* at *12 Citing *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1655-56 (2015), the Court refused to examine the sufficiency of the EEOC's investigation, noting it was beyond the scope of its review. *Id.* The Court thus rejected Defendant's argument that the EEOC did not adequately engage the employer in conciliation discussions. Accordingly, the Court granted the EEOC's motion for partial summary judgment on Defendant's seventh and eighth enumerated defenses.

***EEOC v. Dolgencorp, LLC*, 2017 U.S. Dist. LEXIS 211498 (N.D. Ill. Dec. 11, 2017).** The EEOC filed a lawsuit alleging that Defendant used a criminal background check policy that had a disparate impact on African-American job applications in violation of Title VII of the Civil Rights Act. *Id.* at *1. Defendant filed a motion to compel discovery and to stay the expert report deadline. *Id.* Specifically, Defendant sought to compel the EEOC

to: (i) identify specific job positions where African-American applicants experienced disparate impact due to the criminal background check policy and the portions of the policy that were responsible for the disparate impact; (ii) identify the less discriminatory policies and practices it believed Defendant should implement; and (iii) explain how the policies and practices would be consistent with Defendant's business needs. Defendant also sought any responsive documents the EEOC intended to rely upon at trial and admissions or denials to certain requests for admissions. *Id.* at *1-2. The Court granted in part and denied in part the motion to compel and denied the motion to stay. The EEOC argued that a position-by-position disparate impact analysis was not required because Defendant applied the same background check policy to all applicants. *Id.* at *3. The Court agreed with the EEOC and stated that since Defendant applied the criminal background check policy to all positions, the Court lacked the authority to relieve Defendant of its obligation of demonstrating the business necessity for each position for which the policy applied. Assuming the EEOC presented sufficient evidence that the application of the policy caused a disparate impact on African-American applicants, the Court reasoned that it would fall to Defendant to try and refute the claim and show that its decision was based on legitimate business needs. *Id.* at *6. The Court therefore denied Defendant's request as to the position-by-position analysis. The Court also denied Defendant's request as to less discriminatory policies, finding that that identification of specific procedures Defendant should implement to remedy any disparate impact fell within the province of the experts. *Id.* at *7-8. The Court stated that it therefore followed that the experts were in the best position to assess whether each particular less discriminatory alternative procedure met Defendant's business needs. *Id.* at *10. Defendant also moved to compel the EEOC's responses where it identified "other (unspecified) documents." *Id.* at *11. The Court determined that the time for allowing open-ended responses that contemplated additional investigation had long passed, and therefore it ordered the EEOC to produce any "other documents" on which it intended to rely. *Id.* at *11-12. Finally, the Court denied Defendant's motion to stay since the majority of Defendant's motion to compel was denied.

***EEOC v. Flambeau, Inc.*, 846 F.3d 941 (7th Cir. 2017).** The EEOC filed suit against Defendant on behalf of a former employee. Defendant had terminated the employee's health insurance because he failed to complete a "health risk assessment" and biometric testing, which Defendant required of employees to participate in its employer-subsidized health plan. The parties cross-moved for summary judgment. The District Court granted summary judgment for Defendant and denied summary judgment for the EEOC. The District Court found that Defendant's program was exempted from liability for involuntary medical examinations under the ADA's safe harbor provision for the administration of a *bona fide* benefits plan. On appeal, the Seventh Circuit declined to decide the case on the merits, but nonetheless affirmed on the grounds that the relief sought by the EEOC was unavailable or moot. The Seventh Circuit found that the EEOC's claim was moot because Article III of the Constitution limits federal jurisdiction to "live controvers[ies]." *Id.* at 946. Accordingly, a case is moot if a party "lacks a personal stake" in the outcome. *Id.* The EEOC argued that: (i) the former employee had a personal stake in the outcome because he had both compensatory and punitive damages; and (ii) the EEOC had a stake because voluntary cessation of illegal conduct – here, Defendant's wellness program – typically does not moot a case. The Seventh Circuit rejected both arguments. First, the Seventh Circuit ruled that the former employee failed to establish compensatory damages because he did not actually pay the $82.02 in medical expenses he incurred while without Flambeau's insurance. *Id.* The former employee also failed to establish any damages for emotional distress. *Id.* at 946-47. Furthermore, the Seventh Circuit held that Arnold was not entitled to punitive damages. Punitive damages are recoverable under the ADA where an employer acts "with malice or reckless indifference to the federally protected rights of an aggrieved individual." *Id.* at 947. The Seventh Circuit explained that Defendant did not act with reckless indifference to the former employee's federally protected rights because whether or not the ADA's safe harbor covered Defendant's wellness plan was an unsettled question when Defendant utilized it. *Id.* at 948. Punitive damages are not available under the ADA where a Plaintiff's theory of liability is "novel or otherwise poorly recognized." *Id.* at 947. Importantly, the Seventh Circuit noted that the fact that Defendant's program potentially contravened the EEOC's guideline on wellness programs did not amount to reckless indifference. *Id.* at 948. Second, the Seventh Circuit found that Defendant's voluntary cessation of its wellness program mooted the case because there was no reasonable expectation Defendant would reinstate the program. *Id.* at 949. The record showed that Defendant dropped the program because, based on two years of experience, its economic costs outweighed its benefits. *Id.* Moreover, Defendant's pre-suit cessation of the program evidenced that it was a genuine business decision and not a mere litigation tactic. *Id.* This distinguished it from cases wherein an employer stopped its illegal activity abruptly in

relation to litigation and without a sufficient alternative explanation. *Id.* at 950. Finally, the Seventh Circuit noted that prudential concerns also weighed against deciding the case on the merits. *Id.* Given the prevalence of wellness programs among employers, such a decision would have wide-ranging implications. *Id.* Moreover, the EEOC had promulgated further regulations on the issue after this case's events. As such, the Seventh Circuit reasoned that the "issues should be decided . . . in a case where the answers will matter to the parties." *Id.* at 950-51. Accordingly, the Seventh Circuit upheld the decision of the District Court.

***EEOC v. GGNSC Holdings, LLC,* 2017 U.S. Dist. LEXIS 45488 (E.D. Wis. Mar. 28, 2017).** The EEOC brought an action on behalf of Juanette Roberts, a former stocking employee, alleging that Defendants discriminated against her in violation of the ADA when her employment was terminated after she requested an accommodation of indefinite leave because she was unable to use her right arm. Defendants GGNSC Administrative Services LLC ("Administrative Services") and GGNSC Holdings LLC ("Holdings") moved for summary judgment on the ground that they did not employ Roberts, nor were they named as respondents in her charge of discrimination. *Id.* at *1-2. All Defendants also moved for summary judgment on several grounds, including that Roberts was not a qualified individual within the meaning of the ADA. The EEOC moved for partial summary judgment, seeking dismissal of several affirmative defenses in Defendants' answer. *Id.* at *2. The Court stated that given its conclusion on the merits of the summary judgment motion filed by all Defendants, resolution of the motion filed by Holdings and Administrative Services was unnecessary. *Id.* at *6. The Court found that all the EEOC offered in support of its position that Roberts was able to perform her duties with accommodations were conclusory statements in her declaration. The Court held that there was no evidence (medical or otherwise) showing how Roberts could perform her stocking duties without the use of her right arm. Further, the Court noted that the only accommodation she requested was indefinite leave. *Id.* at *22. Lastly, Roberts' declaration also conflicted with her deposition testimony in which she conceded that she needed to use both of her arms to perform her lifting and stocking responsibilities. *Id.* at *23. Without more, the Court found that Roberts' declaration was insufficient to permit a jury to conclude that she would have been able to perform the essential functions of her job with a reasonable accommodation. *Id.* at *24. In sum, the Court held that the EEOC failed to meet its threshold burden of demonstrating that Roberts was a qualified individual who could have performed the essential functions of her job with reasonable accommodations. Thus, the Court found that summary judgment was appropriate as to the EEOC's failure to accommodate claim. *Id.* at *25. Because the EEOC failed to present sufficient evidence for a jury to conclude that Roberts was qualified to perform her essential job functions with or without reasonable accommodations, the Court held that summary judgment for Defendants also was warranted on the EEOC's disparate impact claim. Accordingly, the Court granted Defendants' motion for summary judgment and dismissed the action.

***EEOC v. Mach Mining, LLC*, 2017 U.S. Dist. LEXIS 10353 (S.D. Ill. Jan. 25, 2017).** The EEOC filed an action on behalf a group of female job applicants who had applied for non-office jobs. The EEOC asserted that Defendant engaged in a pattern or practice of unlawful employment practices in violation of Title VII by engaging in sex discrimination. Following remand from the U.S. Supreme Court's ruling rejecting the EEOC's position that its conciliation activities were beyond judicial review, the parties entered into extensive settlement negotiations, and agreed on a consent decree. The EEOC filed a motion for approval of the consent decree. The Court stated that in reviewing a consent decree, it pays deference to the expertise of the agency and the policy encouraging settlement, and as such, there is a presumption in favor of approval. *Id.* at *3-4. The Court opined that a consent decree is procedurally fair if the negotiations in reaching it were open and at arms-length. The Court found that all parties were represented by experienced counsel, and there was no evidence suggesting the consent decree was reached through anything but a procedurally fair negotiation process. As such, the Court held that the consent decree was the result of a procedurally fair process. *Id.* at *4. The Court reasoned that a consent decree is substantively fair if it involves "corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *Id.* at *4. The Court found that the consent decree was substantively fair because it obtained a civil penalty for the alleged non-compliance and required Defendants to comply with EEOC regulations and an injunctive protocol on future hiring. The Court also held that the consent decree was reasonable because it would compensate the individuals harmed by Defendant's hiring practices and set forth procedures for future hiring. Finally, the Court reasoned that the proposed consent decree was consistent with the EEOC's goals because it provided for corrective practices in Defendant's hiring practices, compensation for

those individuals harmed by Defendant's previous hiring policies, and also injunctive relief. *Id.* at *5-6. Accordingly, the Court granted the EEOC's motion for approval of the consent decree.

***EEOC v. Rent-A-Center East,* 2017 U.S. Dist. LEXIS 147695 (C.D. Ill. Sept. 8, 2017).** The EEOC brought an action on behalf of Meagan Kerr, a transgendered employee, alleging that Defendant terminated her employment after learning that she was transitioning from male to female in violation of Title VII. Defendant filed a motion for summary judgement and argued that Kerr's materially inconsistent and objectively unprovable statements could not lead a reasonable fact-finder to find in favor of the EEOC. *Id.* at *2. The EEOC filed a motion for partial summary judgment on Defendant's affirmative defense of failure to mitigate. The EEOC argued that the evidence demonstrated that Kerr made substantial efforts to obtain employment after her termination by Defendant, and eventually succeeded in finding a job. The EEOC argued that Defendant could not demonstrate that Kerr failed to engage in a reasonable search for comparable employment. According to the complaint, Kerr informed her manager that she was transitioning from male to female. Kerr then used a company delivery vehicle to move some furniture for another employee, and was subsequently terminated. Defendant stated that it had a policy that prohibits store employees from "using Company property (including company vehicles) for personal use." *Id.* at *4. Kerr asserted that she was terminated on the basis of her transgender status and that she had permission to use the vehicle. The Court concluded that considering the evidence as a whole, there was evidence from which a reasonable fact-finder could conclude that Kerr's sex, specifically, her transgender status, caused her discharge. *Id.* at *7. The Court agreed with the EEOC that discharging Kerr because she is transgender, or because she transitioned from male to female, is a form of sex discrimination and thus prohibited by Title VII. Accordingly, the Court denied Defendant's motion for summary judgement. The Court also agreed with Defendant that the EEOC was not entitled to summary judgment on Defendant's affirmative defense of failure to mitigate damages. First, the Court noted that to establish the affirmative defense of failure to mitigate damages, an employer must show that: (i) the worker failed to exercise reasonable diligence to mitigate her damages; and (ii) there was a reasonable likelihood that the worker might have found comparable work by exercising reasonable diligence. *Id.* at *8. As part of its response to the EEOC's motion for partial summary judgment, Defendant provided copies of resumes Kerr used in her job search. The Court stated that the resumes contain numerous spelling errors and grammatical errors. In addition, the Court found that some of the resumes include qualifications that were blatantly untrue. *Id.* at *9. The Court therefore found that the resumes prepared by Kerr were sufficient to raise a genuine dispute of material fact regarding whether Kerr failed to exercise reasonable diligence to mitigate her damages. *Id.* at *10-11. Accordingly, the Court also denied the EEOC's motion for partial summary judgment.

***EEOC v. Union Pacific Railroad Co.,* 2017 U.S. App. LEXIS 15228 (7th Cir. Aug. 15, 2017).** Defendant's former employees, Frank Burks and Cornelius Jones, filed administrative charges of race discrimination and retaliation under Title VII alleging that Defendant denied them the opportunity to take a test for an "assistant signal person" position. Burks and Jones asserted that they were discriminated against on the basis of their race and were discharged in retaliation for having engaged in protected activity. In March of 2012, the EEOC sent Defendant a request for information that sought, among other things, company-wide information about persons who sought the assistant position during the relevant period. Defendant refused that request, and the EEOC issued an administrative subpoena in May of 2012, and then brought suit to enforce the subpoena in March of 2013. This first subpoena enforcement action was resolved when Defendant agreed to provide some of the requested information. Meanwhile, in July of 2012, the EEOC issued a right-to-sue letter to the charging parties so they could pursue their claims individually. They filed a joint complaint, asserting discrimination claims in *Burks v. Union Pacific R.R. Co.*, No. 12-CV-8164 (N.D. Ill.). The case was dismissed in July of 2014 after the District Court found insufficient evidence to support the claims of discrimination, and on appeal, the Seventh Circuit affirmed the decision. In January of 2014, while the charging parties were still litigating in District Court, the EEOC continued its administrative investigation and issued a second request for information that sought information about Defendant's electronic storage systems, additional testing and computer information, and details about signal helpers across the company who were similarly-situated to the charging parties. Defendant refused to provide this information, and the EEOC brought a second action to enforce the new subpoena. Defendant requested that the District Court dismiss the enforcement action, and argued that the EEOC lost its investigatory authority when it issued the right to sue notice to the charging parties, or, alternatively, when the District Court dismissed the charging parties' claims in the civil action. The District Court rejected those

arguments and enforced the subpoena. On Defendant's appeal, the Seventh Circuit affirmed the District Court's order. The question for the Seventh Circuit was whether the EEOC could continue its investigation even after it issued a notice of right-to-sue letter to Burks and Jones, and after the District Court dismissed the charging parties' civil lawsuit on the merits. This was a matter of first impression in the Seventh Circuit, and one that has produced a split among the other federal circuits that have considered the issue. The Fifth Circuit held in *EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997), that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter. More recently, in *EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009), the Ninth Circuit came to the opposite conclusion. The Seventh Circuit analyzed this split of authority in light of the history and purpose of Title VII. According to the Seventh Circuit, the Fifth Circuit based its opinion on the fact that Title VII sets forth an integrated, multi-step enforcement procedure that is divided into distinct stages, including the charge phase, investigation phase, conciliation phase, and enforcement through litigation. The Seventh Circuit stated that it did not see how this reasoning necessarily restricted the EEOC's investigative authority to the pre-enforcement phase. The Seventh Circuit sided with the Ninth Circuit, which had rejected the Fifth Circuit's concept of distinct, linear stages of enforcement by the EEOC, and it held that the beginning of a new stage does not necessarily end the prior stage. The Seventh Circuit noted that Title VII was just as much about the public interest as the enforcement of private rights. Therefore, even when the EEOC is acting for the benefit of specific aggrieved individuals, it is also acting to vindicate the public interest in preventing employment discrimination. Moreover, the limitations that Title VII imposes on the EEOC are minimal. In order to commence an investigation, the statute merely requires that a charge be filed. The statute is silent as to when the investigation must end. In particular, the Seventh Circuit found no support for the notion that the EEOC's authority is limited by the 180-day window within which it must issue a right-to-sue letter, or the actions of the charging party. The Seventh Circuit also relied on the Supreme Court's more recent holding in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), which held that the charging party's agreement to arbitrate with his or her employer did not bar the EEOC from pursuing relief on her behalf. The Supreme Court held in *EEOC v. Waffle House* that the EEOC is the master of its case, which it prosecutes upon its own evaluation of the strength of the public interest at stake, independent of the charging party. Finally, the Seventh Circuit rejected Defendant's argument that Title VII provides other avenues for the EEOC to continue its involvement in the charging parties' claims, *i.e.*, specifically, that it could serve a Commissioner's charge or intervene in the charging individual's lawsuit. According to the Seventh Circuit, the fact that these other avenues were available to the EEOC did not support a limitation on the EEOC's most effective avenue, or otherwise undermine support for the broad investigatory authority of the EEOC.

***EEOC v. WestRock Co.,* 2017 U.S. Dist. LEXIS 21858 (N.D. Ill. Feb. 16, 2017).** The EEOC investigated claims on behalf of a group of individuals alleging that Defendant subjected them to sex discrimination in violation of Title VII. The EEOC served an administrative subpoena on Defendant requesting documents and data, which Defendant declined to honor. The EEOC then brought an enforcement action as to the subpoena. The Magistrate Judge issued a Report and Recommendation to enforce an administrative subpoena issued to Defendant. The subpoena required Defendant to produce an electronic database with the name, date of hire, position and title, current employment status, date and reason for separation if not currently employed, last known home address, and all known telephone numbers for "each female individual under the age of 50 employed at any time at the Hillsdale, Illinois facility," for the period from January 1, 2011 to June 30, 2015. *Id.* at *1-2. The Magistrate Judge found the investigation into charges of sex discrimination was within the scope of the EEOC's statutory authority, and the EEOC had met its burden of showing the information sought by the subpoena is reasonably relevant and not too indefinite. Therefore, the Magistrate Judge recommended that Defendant should be ordered to produce the requested information, except, by agreement of the parties, Defendant "need only provide termination codes (and the keys to those codes), and not information regarding the specific reasons for each employee's separation." *Id.* at *2. On Rule 72 review, the Court adopted the findings of the Magistrate Judge and granted the EEOC's application to enforce the administrative subpoena. The Court ordered that Defendant produce the information as requested by the subpoena, except it need only provide termination codes (and the keys to those codes), and not information regarding the specific reasons for each employee's separation. *Id.* at *3.

(viii) Eighth Circuit

***EEOC v. CRST Van Expedited, Inc.,* 2017 LEXIS 155134 (N.D. Iowa Sept. 22, 2017).** In August of 2013, after the District Court imposed the nearly $4.7 million fee sanction award to Defendant against the EEOC, the EEOC appealed, and the Eighth Circuit reversed and remanded several fee issues for further proceedings. *Id.* at *2. Following Defendant's appeal, the U.S. Supreme Court reversed and remanded the Eighth Circuit's ruling. On remand, the Eighth Circuit vacated its prior judgment and remanded back to the District Court. Thereafter, Defendant moved for a supplemental fee award in the amount of approximately $975,000, consisting of attorneys' fees for work performed in the case following the District Court's order of August 1, 2013. The District Court subsequently ordered the EEOC to pay approximately $1.9 million in attorneys' fees, out-of-pocket expenses, and taxable costs to Defendant, but denied Defendant's motion for a supplemental fee award. Section 706(k) authorizes District Courts to award attorneys' fees to the "prevailing party" in a Title VII case. After Defendant successfully obtained the dismissal of the EEOC's Title VII claims for sexual harassment, the District Court granted Defendant's motion for an award of attorneys' fees and costs and directed the EEOC to pay Defendant nearly $4.7 million, finding that the EEOC's actions in pursuing its lawsuit were unreasonable, contrary to the procedure outlined by Title VII, and imposed an unnecessary burden on both CRST and the District Court. After the EEOC appealed, the Eighth Circuit reversed and held that the District Court "did not make particularized findings of frivolousness, unreasonableness, or groundlessness as to each individual claim" and remanded these claims to the District Court to make such individualized determinations. *Id.* at *3-4. Further, the Eighth Circuit found that the District Court's dismissal of 67 claims based on the EEOC's failure to satisfy Title VII's pre-suit obligations did not constitute a ruling on the merits, and that therefore, Defendant was not a prevailing party as to these claims. *Id.* at *4. Thereafter, following Defendant's petition for *certiorari*, the U.S. Supreme Court accepted the case for review. The Supreme Court reversed the Eighth Circuit and remanded the case for further proceedings. *Id.* at *5. The Eighth Circuit then entered a judgment vacating its prior panel opinion and remanding to the District Court for further proceedings. As a result, the District Court ordered briefing on the issues remanded by the U.S. Supreme Court, where Defendant requested an additional supplemental fee award in the amount of approximately $975,000, consisting of attorneys' fees for work performed in the case following the District Court's order of August 1, 2013. In awarding nearly $1.9 million in attorneys' fees, out-of-pocket expenses and taxable costs to Defendant, the District Court also denied Defendant's motion for a supplemental fee award. In ordering the $1.9 million award, the District Court found that Defendant was the prevailing party as to the 67 claims at issue and made individualized findings as to 78 of the individual claimants for which it had granted summary judgment. *Id.* at *5-6. Defendant had moved for a supplemental fee award of $975,000 for the following work it performed: (i) briefs, oral argument, and rehearing petition in the EEOC's appeal to the Eighth Circuit from the August 1, 2013 order; (ii) the petition for *certiorari*, briefs, and oral argument in the Supreme Court resulting in reversal of the Eighth Circuit's opinion vacating the August 1, 2013 fee award; (iii) the brief resisting the Rule 60(b) motion; and (iv) the briefs on remand as required by the Eighth Circuit's vacated decision with respect to the fees awarded for claims dismissed on summary judgment. *Id.* at *6-7. The EEOC argued that Defendant's application for fees was untimely and that Defendant could not demonstrate that any of the actions that the EEOC took with respect to the requested categories of fees were frivolous, unreasonable, or groundless. The EEOC further argued that the fees sought by CRST were unreasonable. Regarding timeliness, the Court accepted the EEOC's argument and held that Defendant's motion for a supplemental fee award was filed more than 120 days after the latest final judgment for which it requested attorneys' fees. *Id.* at *7. Regarding the EEOC's argument that the fees sought by Defendant were unreasonable, the District Court similarly found in favor of the EEOC, noting that neither its appeal of the fee award to the Eighth Circuit nor Defendant's appeal to the Supreme Court were amenable to fees. *Id.* at *12-13. Accordingly, the District Court denied Defendant's motion for a supplemental fee award.

***EEOC v. CRST Van Expedited, Inc.*, 2017 U.S. Dist. LEXIS 178382 (N.D. Iowa Oct. 27, 2017)**. In August 2013, after the District Court imposed a nearly $4.7 million fee sanction award against the EEOC, the EEOC appealed and the Eighth Circuit reversed and remanded several fee issues for further proceedings. *Id.* at *2. Following Defendant's subsequent appeal, the U.S. Supreme Court reversed and remanded the Eighth Circuit's ruling. On remand, the Eighth Circuit vacated its prior judgment and remanded back to the District Court. On remand, the District Court entered an order finding that the claims dismissed for the EEOC's failure to comply with statutory presuit requirements were amenable to an award of attorneys' fees. The District Court ultimately

awarded nearly $1.9 million in attorneys' fees and costs, which included $128,414.50 in fees "representing the claims dismissed for failure to comply with pre-suit requirements." *Id.* at *3. Defendant argued that an additional award of $1,726,330.32 was proper with respect to the claims dismissed for the EEOC's failure to comply with its pre-suit requirements, representing 72 claims ultimately dismissed on those grounds multiplied by Defendant's calculated per-claimant average of $23,976.81. *Id.* The EEOC asserted that Defendant could not recover fees incurred after the time that Defendant should have moved for dismissal of the claims for which it sought additional fees. *Id.* at *4. The EEOC also argued that Defendant's work on the pre-suit requirements issue began after it conducted written discovery, depositions, and briefing on Defendant's various motions for summary judgment. *Id.* Thus, the EEOC contended that Defendant expended the fees it sought on discovery and motion practice unrelated to the basis for dismissing the claims that were dismissed for failure to comply with pre-suit requirements. *Id.* at *5. Defendant asserted that none of its fees and costs incurred in defending against the pre-suit requirements dismissed claims would have been incurred but for the EEOC's filing and litigation of these claims despite having failed to comply with Title VII's statutory requirements. *Id.* Defendant asserted that it should not be barred from seeking additional fees for the discovery work performed with respect to the claims dismissed for failure to comply with pre-suit requirements because the District Court only permitted the EEOC to proceed on such claims after it represented that there was a good faith basis for the claims. *Id.* at *6. The District Court found that additional fees associated with the claims dismissed for the EEOC's failure to comply with its statutory pre-suit requirements were appropriate. *Id.* at *10. The District Court held that Defendant's per-claimant method was appropriate and reasonable. However, the District Court agreed with the EEOC that the substance of the fees that Defendant now sought appeared to be beyond the scope of what should be awarded. *Id.* at *11. The District Court stated that its original fee award, less the fees associated with the failure to comply with pre-suit requirements and the pattern or practice claim, still contained work performed on briefing and argument of Defendant's various motions for summary judgment. *Id.* at *11-12. Because the per-claimant average appeared to contain fees associated with CRST's motions for summary judgment, the District Court stated that it was over-inclusive and declined to rely on such figure to determine a corrected fee award. *Id.* at *12. Accordingly, the District Court directed Defendant to file a supplemental filing detailing, with specificity, the work that it believed was encompassed by the $23,976.81 per-claimant average and/or, if appropriate, provide the District Court with an alternate per-claimant average for work performed solely because of the claims dismissed for failure to comply with pre-suit requirements without inclusion of fees generated for work performed on Defendant's motions for summary judgment. *Id.* at *13.

***EEOC v. M.G. Oil Co.,* 2017 U.S. Dist. LEXIS 126757 (D.S.D. Aug. 10, 2017).** The EEOC brought an action on behalf of the charging party, Kim Mullaney, alleging that Defendant violated the Americans With Disabilities Act when it rescinded her job offer on the basis of a non-negative drug test result. Mullaney applied for a job with Defendant and subsequently failed the drug test she took as a condition of an employment offer. Mullaney asserted that she took prescription drug medication for a back injury, which resulted in the non-negative test result. Defendant had a contract with TestPoint to have TestPoint analyze its drug tests of prospective new employees. Defendant asserted that if a sample analysis yielded a non-negative result, then TestPoint was obligated to send the drug test to a medical review officer to determine whether the non-negative result was a consequence of the test subject taking a legal prescription drug. If the non-negative result was due to a legal prescription drug, TestPoint would report the test results as negative to Defendant. *Id.* at *2. Defendant alleged there was no indication that there was a valid legal reason for Mullaney's non-negative result and based on this assumption, it rescinded its employment offer to Mullaney. The EEOC subsequently filed suit against Defendant claiming that it discriminated against Mullaney in violation of Title I of the ADA. Defendant filed a third-party complaint against TestPoint, claiming that if it were found liable to Mullaney for discrimination, then TestPoint was liable to it for all (on the basis indemnification) or part (on the basis of contribution) of the judgment because TestPoint breached its contract with Defendant and was negligent. *Id.* at *4. The EEOC moved to strike Defendant's third-party complaint. TestPoint also moved to dismiss Defendant's third-party complaint for failure to state a claim upon which relief can be granted. The EEOC and TestPoint both argued that Defendant's claims for indemnity and contribution from TestPoint are not permitted under Title I of the ADA. *Id.* at *6. The EEOC and TestPoint relied on the Supreme Court's holding in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), to support their arguments. In *Northwest Airlines*, the airline was previously found to be liable to its female employees under Title VII and the Equal Pay Act for failing to provide back pay to a class of female employees. After the previous litigation concluded, *Northwest Airlines* filed a claim seeking contribution from the

Transport Workers Union. The issue in *Northwest Airlines* was whether a claim for contribution could be pursued by employers under Title VII or the Equal Pay Act. *Id. Northwest Airlines* established that the right to contribution under a federal statute may be created in two ways, including: (i) by express or implied language in the statute; and (ii) by federal common law "through the exercise of judicial power to fashion appropriate remedies for unlawful conduct." *Id.* at *7. The Court concluded that the holding in *Northwest Airlines* barring claims for contribution applied equally to bar claims for indemnification. *Id.* at *10. The EEOC and TestPoint also argued that, through analogy, the holding in *Northwest Airlines* applied to ADA claims because of the similarities between the relevant federal anti-discrimination statutes. *Id.* The Court agreed, and opined that the ADA adopted the same enforcement provisions as Title VII. The Court stated that "[g]iven that Congress enacted the ADA well after the Supreme Court decided *Northwest Airlines*, Congress presumably chose to incorporate into the ADA the construction of Title VII remedies set forth in *Northwest Airlines*." *Id.* at *11. Further, the Court noted that the enforcement provisions of the ADA and Title VII do not exist to protect employers, nor did they provide employers with the option to transfer liability by indemnification or contribution to others. Thus, given that the ADA contained the same enforcement provisions as Title VII, the Court concluded that the holding in *Northwest Airlines* applied to claims brought under the ADA. The Court therefore determined that that Defendant's third-party claims for contribution and indemnification were impermissible under the ADA. *Id.* at *11-12.

***EEOC v. North Memorial Health Care,* 2017 U.S. Dist. LEXIS 104482 (D. Minn. July 6, 2017).** The EEOC brought suit on behalf of charging party Emily Sure-Ondara alleging that Defendant retaliated against her for requesting a religious accommodation in violation of Title VII. Defendant filed a motion to dismiss, which the Court granted. Defendant gave Sure-Ondara a conditional offer of employment as a nurse. As part of the nurses' union contract, all nurses were required to work a night shift every other weekend. Sure-Ondara was a Seventh Day Adventist and asserted that due to her religion she was unable to work Friday nights, and she requested an accommodation for the requirement that she work every other weekend. Defendant ultimately determined that it could not grant Sure-Ondara's request, rescinded her job offer, and encouraged her to apply to other positions within the company. *Id.* at *3. Sure-Ondara filed a charge with the EEOC and subsequently the EEOC filed suit. Defendant argued that the EEOC's claim should be dismissed because requesting a religious accommodation is not a protected activity under Title VII. At the outset, the Court noted that to establish a *prima facie* case of retaliation, the EEOC must show that: (i) Sure-Ondara engaged in protected conduct; (ii) she suffered an employment action that would dissuade a reasonable employee from making a charge of discrimination; and (iii) that there is a causal connection between the two. *Id.* at *6. In answering the question of whether requesting a religious accommodation is protected activity under Title VII, the Court reasoned that it must interpret Title VII according to its "plain language." *Id.* Under Title VII, an employee engages in protected activity when she either: (i) opposes any practice made an unlawful employment practice by Title VII (the opposition clause); or (ii) makes a charge, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under Title VII (the participation clause). *Id.* Applying the plain language of the statute, the Court concluded that requesting a religious accommodation is not a protected activity. *Id.* The Court stated that under the opposition clause, a Plaintiff must communicate her opposition to a practice that she believes, in good faith, is unlawful. The Court found that there was no evidence that Sure-Ondara believed that Defendant's denial of her religious accommodation request was unlawful. *Id.* at *7. The Court determined that merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation. *Id.* Therefore, the Court held that Sure-Ondara's accommodation request was not protected activity under the opposition clause. The Court also found that Sure-Ondara's accommodation request also was not protected activity under the participation clause. *Id.* at *8. The Court noted that there was no evidence that Sure-Ondara "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" prior to her termination. *Id.* As a result, the Court concluded that requesting a religious accommodation is not protected activity under Title VII, and therefore granted Defendant's motion for summary judgement.

(ix) Ninth Circuit

***EEOC v. Dash Dream Plant, Inc.*, 2017 U.S. Dist. LEXIS 169984 (E.D. Cal. Oct. 13, 2017)**. The EEOC brought an action claiming that Defendant discriminated against Yanet Perez on the basis of her pregnancy by transferring her to a different department in violation of Title VII of the Civil Rights Act of 1964. Perez informed

Defendant's general manager that she was pregnant and the next day she was transferred to a different position, even though she had not requested any modifications to her job. *Id.* at *1-2. Defendant subsequently held a staff meeting, at which both the general manager and president told female employees not to get pregnant, that there should be "no more babies," and that there were "too many babies coming." *Id.* at *2. Defendant subsequently forced Perez to go on leave, and refused to allow her to return to work following the birth of her child. *Id.* The EEOC sought a permanent injunction, an order that Defendant institute new policies to ensure it would not engage in further unlawful employment discrimination, and monetary relief for back pay, pecuniary and non-pecuniary losses, and punitive damages. The parties ultimately settled the matter. Thereafter, the parties sought approval of a proposed consent decree. The consent decree provided $110,000 in monetary relief for Perez and any other claimants. *Id.* at *3. The consent decree further provided general injunctive relief preventing Defendant and its agents from engaging in discrimination on the basis of sex in the future, as well as from retaliating against employees who oppose or report such practices. *Id.* at *3-4. The consent decree also required Defendant to retain a third-party "Equal Employment Opportunity Monitor" to ensure compliance with the consent decree and applicable law. *Id.* at *4. Additionally, Defendant was required to review and revise its written employment policies prohibiting sex discrimination in the workplace and its handling of complaints, as well as post a notice of the consent decree. *Id.* The consent decree also contained additional training, record-keeping, and reporting requirements and would remain in effect for five years. *Id.* The Court concluded that the consent decree provided substantial relief to claimants and Defendants' current and future employees, and was the product of a fair arms-length negotiation process. *Id.* The Court ruled that the consent decree as proposed was fair, reasonable, and adequate, and not illegal, collusive, or against the public interest and was reached following a settlement conference presided over by a judge of the Court. Accordingly, the Court granted the parties' joint motion for approval of the consent decree.

***EEOC v. Discovering Hidden Hawaii Tours, Inc*., 2017 U.S. Dist. LEXIS 154576 (D. Haw. Sept. 21, 2017)**. The EEOC brought an action on behalf of five former male employees alleging sexual harassment, constructive discharge, and retaliation claims in violation of Title VII of the Civil Rights Act of 1964 against three Defendants, including Discovering Hidden Hawaii Tours ("DHHT"), Hawaii Tours and Transportation, and Big Kahuna. The EEOC specifically asserted that the owner and President of DHHT, Leopoldo Malagon III, subjected the male employees to unwelcome sexual comments and touching. Defendants filed a motion to dismiss on several grounds, including: (i) claims of claimants 1 and 2 as untimely because the events associated with their claims occurred more than 300 days before the charging parties filed their discrimination charges with the EEOC; (ii) the retaliation claim brought by claimant 1 due to the absence of an adverse employment action; (iii) the constructive discharge allegations of claimants 1, 3, and 4 as insufficiently pled; (iv) claimant 4's sexual harassment claim because the harassment, as alleged, was neither severe nor pervasive; and (v) any claims against Hawaii Tours and Transportation Inc. and Big Kahuna because they were not the employers of any claimant. *Id.* at *2. The Court granted Defendants' motion with leave to amend. The Court found that any claims that accrued before January 14, 2015 – which was 300 days prior to the filing of the initial charge on November 10, 2015 – were time-barred. The claims of claimants 1 and 2 occurred well-before this date, and therefore the Court determined that their claims were untimely. *Id.* at *9. Further, the Court stated there were no allegations that either claimant 3 or 4 provided notice of Malagon's alleged conduct to anyone in order to allow Defendants the opportunity to address the harassment. *Id.* at *18. The Court opined that even assuming that claimants 3 and 4 could not be "expected to remain on the job while seeking redress," the EEOC's complaint did not allege that they resigned specifically as a result of intolerable working conditions. *Id.* at *20. Accordingly, because the EEOC failed to sufficiently allege constructive discharge on behalf of claimants 3 and 4, the Court granted Defendants' motion to dismiss as to these claims. Defendants further moved to dismiss the sexual harassment claim brought on behalf of claimant 4, arguing that the EEOC failed to allege that he was subjected to unwelcome conduct that was severe or pervasive. The Court noted that the EEOC's complaint alleged that Malagon subjected claimant 4 to "unwelcome sexual comments during the recruitment for employment with Defendants and continued to make comments of a sexual nature during his employment" as a bartender between July 2015 and August 2015. *Id.* at *24. In analyzing the totality of the circumstances alleged, the Court held that the EEOC failed to demonstrate either the severity or pervasiveness required in order for the conduct to have altered the conditions of claimant 4's employment and create an abusive working environment. *Id.* at *25. The Court accordingly granted Defendants' motion as to this claim. Defendants further sought dismissal of Hawaii Tours and Transportation and Big Kahuna because neither was allegedly an employer of the charging

parties or any claimant. *Id.* at *26-27. The Court held that the complaint failed to allege plausible facts showing that Big Kahuna could have been an employer (or joint employer) of any of the claimants because Kahuna did not even exist at the time of any of the incidents of harassment described in the complaint. *Id.* at *27. Further, to the extent the EEOC sought to hold Hawaii Tours and Transportation liable as a joint employer, the complaint did not allege facts showing that such a joint employment relationship actually existed. *Id.* at *30-31. Accordingly, the Court also granted Defendants' motion to dismiss Hawaii Tours and Transportation and Big Kahuna. However, the Court granted the EEOC leave to amend the complaint, and stated that should it choose to amend the dismissed causes of action as to any claimant and/or Defendant, the EEOC must allege additional facts as to each element required to state a claim.

***EEOC v. Goodwill Industries Of The Greater East Bay, Inc*., 2017 U.S. Dist. LEXIS 178706 (N.D. Cal. Oct. 27, 2017).** The EEOC brought an action alleging that Defendants subjected a group of nightshift janitors to sexual harassment and disability discrimination in violation of Title VII of the Civil Right Act of 1964. The EEOC moved to quash the deposition subpoena served by Defendants on the EEOC's investigator, Christopher Green. The EEOC asserted that that the deposition of Green would be burdensome, duplicative of information contained in the investigate file already produced to Defendants, and likely would invade the governmental deliberative process privilege. The Court explained that the deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." *Id.* at *2. In order to be protected by the deliberative process privilege, a document must be both "pre-decisional" and "deliberative." *Id.* A "pre-decisional" document is one "prepared in order to assist an agency decision-maker in arriving at his decision" and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* A pre-decisional document is part of the "deliberative process" if "the disclosure of the materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Id.* Defendants stated that their line of questioning at Green's deposition would focus on the interviews he conducted, in order to clarify information obtained and the responses of those interviewed. *Id.* at *2-3. Moreover, Defendants sought clarification on Green's handwritten notes and typewritten interview summaries. *Id.* at *3. Based on relevant case law authorities, the Court found that depositions of EEOC investigators taken for clarification purposes are routinely permitted. The Court therefore held that because revealing the information sought by Defendants would not expose the EEOC's deliberative process, the deposition of Green was warranted. Accordingly, the Court denied the EEOC's motion to quash the subpoena of Green.

***EEOC v. La Louisanne, Inc.*, 2017 U.S. Dist. LEXIS 200135 (C.D. Cal. Dec. 5, 2017).** The EEOC brought an action alleging that Defendant violated Title VII of the Civil Rights Act when it terminated an employee due to her pregnancy. The Court explained that absent a showing of good cause, an action must be dismissed without prejudice if the summons and complaint were not served on the Defendant within 90 days after the complaint is filed. The Court also could dismiss the action prior to the 90 days if the EEOC had not diligently prosecuted the action. The Court noted that in this case, it appeared that one or more of the time periods was not met. Accordingly, the Court ordered the EEOC to show cause why this action should not be dismissed for lack of prosecution. *Id.* at *2. The Court held that an order to show cause would stand submitted upon the filing of the EEOC's response when there was proof of service of the summons and complaint on Defendant and a subsequent answer by Defendant. *Id.* The Court ruled that if the EEOC did not file timely responses to the order to show cause, the action may be dismissed for lack of prosecution and for failure to comply with the orders of the Court, pursuant to Local Rule 41.

***EEOC v. LXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 200184 (N.D. Cal. Dec. 4, 2017).** The EEOC brought an action alleging that Defendant retaliated against charging party Adrian Scott Duane. Duane sought to intervene in the EEOC's lawsuit. The parties previously stipulated to dismiss a prior lawsuit with prejudice, which would typically bar Duane's intervention, and would preclude the EEOC from seeking damages on Duane's behalf. *Id.* at *1. However, concurrent with the voluntary dismissal of the prior lawsuit, Duane and Defendant agreed that Duane would be permitted to intervene in the EEOC's lawsuit notwithstanding dismissal of the prior lawsuit with prejudice. The Court noted that by agreeing to Duane's intervention, Defendant was agreeing that Duane could

engage in "claim-splitting," and that a *res judicata* defense would not apply to Duane's participation as a party in the EEOC's lawsuit. *Id.* at *1-2. Duane also sought to add a state law claim not asserted in the prior lawsuit and sought to assert a different factual theory in support of the Title VII claim. *Id.* at *2. Defendant argued that the dismissal of Duane's prior lawsuit with prejudice barred him from asserting any claims or theories in this case beyond what the EEOC has included in its complaint. Duane asserted that the dismissal and the parties' claim-splitting agreement only barred claims he actually brought in the prior lawsuit, meaning that he may intervene now to pursue not only the claims brought by the EEOC, but also any other claims he did not assert previously. *Id.* The Court agreed with Defendant and opined that although there was a statutory right to intervene to assert Title VII claims, there was not a statutory right to intervene to bring other claims, such as the state law claim Duane attempted to add. *Id.* The Court thereby found that the state law claim Duane sought to bring was barred, under *res judicata* principles, by the dismissal of the prior lawsuit with prejudice. However, the Court held that the record with respect to the agreement between Duane and Defendant regarding the preclusive effect of the prior dismissal was messy and potentially incomplete. *Id.* at *5. The email exchange among counsel about intervention was ambiguous and the briefing submitted by Duane and Defendant in connection with the issue has been of poor quality, which raised questions with the Court. *Id.* at *6. The Court therefore determined that these failures meant that it would be premature, in the context of the motion to intervene, to definitively adjudicate Defendant's *res judicata* defense. Therefore, the Court granted Duane's motion to intervene, with the understanding that Defendant could further pursue its *res judicata* defense in discovery, and raise it again (with a properly developed record) at the summary judgment stage of the case, with the likely result being that Duane will be precluded from asserting his state law claim and any factual theories in support of the Title VII claim not asserted by the EEOC. *Id.*

***EEOC v. Magnolia Health Corp.,* 2017 U.S. Dist. LEXIS 32472 (E.D. Cal. Mar. 7, 2017).** The EEOC brought pattern or practice action alleging that Defendants unlawfully discriminated against a group of individuals due to their actual, record of, or perceived disability in violation of the Americans With Disabilities Act ("ADA"). The EEOC also alleged that Defendants used qualification standards that screened out or tended to screen out individuals with disabilities. After a series of settlement conferences, the parties reached a settlement on monetary and injunctive terms. The EEOC subsequently sought approval of a proposed consent decree reflecting the parties' agreement. *Id.* at *2. The proposed consent decree provided monetary relief to claimants of $325,000, to be allocated at the sole discretion of the EEOC. The proposed consent decree also provided procedures for reinstatement of eligible and qualified claimants, as well as other victim-specific relief. In addition, the proposed consent decree set forth injunctive relief, including that Defendants will: (i) retain a third-party equal employment opportunity monitor to ensure compliance with the decree and the ADA; (ii) assign an internal ADA coordinator to review and process requests for accommodation, changes in the terms and conditions of employment, and complaints regarding disability discrimination and retaliation; (iii) review and, if necessary, revise Defendants' policies and procedures regarding disability discrimination, reasonable accommodation, and retaliation; and (iv) provide training on employer obligations and employee rights under the ADA. *Id.* at *3-4. The Court concluded that the proposed consent decree provided substantial relief to the claimants and Defendants' employees, and that it was the product of a fair, arms-length negotiation process. *Id.* at *4. Accordingly, the Court found that the proposed consent decree was fundamentally fair, reasonable, and adequate, and that was is not illegal, a product of collusion, or against the public interest. *Id.* The Court thereby granted the EEOC's motion for approval of the parties' proposed consent decree.

***EEOC v. Marquez Brothers,* 2017 U.S. Dist. LEXIS 153339 (E.D. Cal. Sept. 18, 2017).** The EEOC brought an action claiming that Defendants maintained a pattern or practice of using hiring preferences for Hispanic and Spanish-speaking applicants in violation of Title VII of the Civil Rights Act of 1964. *Id.* at *2. Defendants moved to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. The Court denied the motion. *Id.* at *2. Defendants argued that because the EEOC failed to meet several conditions precedent necessary to file a Title VII action, its complaint should be dismissed for lack of subject-matter jurisdiction. *Id.* at *5. The Court rejected Defendants' argument, denying the motion to dismiss for lack of subject-matter jurisdiction and ruling that the requirements of § 2000e-5(f)(1) were not jurisdictional conditions precedent to suit. *Id.* at *11. The Court also held that the EEOC adequately alleged in its complaint that it satisfied the conditions precedent. *Id.* at *11. Defendants also contended that the EEOC failed to place Defendants' affiliate companies on adequate notice of the nationwide scope of the EEOC's investigation. Defendants argued that as a result, the claims of

discrimination regarding all facilities, except one, should be dismissed. *Id.* at *12. The Court opined that even if the EEOC was restricted to bringing claims only against Defendants that charging parties name, the Ninth Circuit has articulated exceptions to the general rule. *Id.* at *17**.** The Court determined that the EEOC alleged sufficient factual material to suggest that Defendants were substantially identical, which was an exception to the rule. *Id.* Furthermore, the Court also found important that Defendants had notice, as the EEOC's determination of reasonable cause was directed to all Defendants. *Id.* at *18. As such, Defendants' motion to dismiss for lack of notice or failure to be named was denied. *Id.* Defendants also argued that the EEOC inadequately investigated the alleged pattern or practice of discrimination at Defendants' other facilities. *Id.* The Court ruled that its review of the sufficiency of such an investigation is limited to a determination of whether the EEOC attempted to confer about a charge. Because the Court would not delve into the substance of the EEOC's investigation, and the EEOC represented that it investigated, the Court reasoned that the EEOC had adequately alleged that it conducted an investigation that related to all Defendants. *Id.* at *19. The Court denied the motion to dismiss on that basis as well. *Id.*

***EEOC v. McLane Co.*, 857 F.3d 813 (9th Cir. 2017).** The EEOC issued an administrative subpoena as part of its investigation into a charge of discrimination filed by a former employee of subsidiary of Defendant. *Id.* at 815. The employee alleged that Defendant discriminated against her on the basis of sex when it fired her after she failed to pass a physical capability strength test. The EEOC's subpoena requested "pedigree information" (*i.e.,* name, Social Security number, last known address, and telephone number) for employees or prospective employees who took the test. Following its precedent at the time, the Ninth Circuit applied a *de novo* review to the District Court's ruling that the pedigree information was not relevant to the EEOC's investigation. *Id.* The U.S. Supreme Court subsequently vacated the Ninth Circuit's judgment after holding that a District Court's decision whether to enforce an EEOC subpoena should be reviewed for abuse of discretion. The Supreme Court remanded the case to the Ninth Circuit so that the Ninth Circuit could re-evaluate the District Court's ruling under the proper standard of review. After reviewing the District Court's decision under the abuse-of-discretion standard, the Ninth Circuit still held that the District Court abused its discretion by denying enforcement of the subpoena. *Id.* The District Court found that the pedigree information was not relevant "at this stage" of the EEOC's investigation because the evidence McLane had already produced would "enable the [EEOC] to determine whether the [strength test] systematically discriminates on the basis of gender." *Id.* The Ninth Circuit rejected this approach, noting that the District Court's ruling was based on the wrong standard for relevance. The Ninth Circuit stated that under Title VII, the EEOC may obtain evidence if it relates to unlawful employment practices and is relevant to the charge under investigation. Quoting *EEOC v. Shell Oil Co*., 466 U.S. 54, 68-69 (1984), the Ninth Circuit opined that the relevance standard encompasses "virtually any material that might cast light on the allegations against the employer." *Id.* Applying *Shell Oil*, the Ninth Circuit found that the pedigree information was relevant to the EEOC's investigation since conversations with other employees and applicants who have taken the strength test "might cast light" on the allegations against McLane. *Id.* Defendant argued that, given all of the other information it had produced, the EEOC could not show that the production of nationwide pedigree information was relevant to the charge or its investigation under either a disparate treatment or disparate impact theory. *Id.* at 816. The Ninth Circuit construed the District Court's application of relevance to be a heightened "necessity" standard, and noted that the governing standard was "relevance," not "necessity." *Id.* The Ninth Circuit found that the District Court erred when it held that pedigree information was irrelevant "at this stage" of the investigation. *Id.* Rejecting the District Court's conclusion that the EEOC did not need pedigree information to make a preliminary determination as to whether use of the strength test resulted in systemic discrimination, the Ninth Circuit held that the EEOC's need for the evidence – or lack thereof – did not factor into the relevance determination. *Id.* While Defendant had argued that the pedigree information was not relevant because the charge alleged only a "neutrally applied" strength test – which by definition cannot give rise to disparate treatment – the Ninth Circuit rejected this approach, holding "[t]he very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take McLane's word for it on that score." *Id.* Accordingly, the Ninth Circuit held that because the District Court based its ruling on an incorrect view of relevance, it necessarily abused its discretion when it held that the pedigree information was not relevant to the EEOC's investigation. The Ninth Circuit concluded by noting that on remand, Defendant was free to renew its argument that the EEOC's request for pedigree information was unduly burdensome. *Id.* at 817. In explaining that it did not reach the issue in its original decision, the Ninth Circuit instructed that "[o]n remand, the District Court should also resolve whether producing a second category of

evidence – the reasons test takers were terminated – would be unduly burdensome to McLane." *Id.* Accordingly, the Ninth Circuit vacated the District Court's judgment and remanded for further proceedings.

***EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187 (S.D. Cal. Aug. 31, 2017).** The EEOC brought an action alleging Defendant engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act. In the complaint, Elsa Perez was identified as the charging party whose allegations provide the basis of the EEOC's action. Perez filed a motion seeking to intervene. The EEOC filed a notice of non-opposition. Perez asserted that the substantial overlap in the evidence needed to prove both the Title VII and her individual state law claims provided grounds for the Court to invoke its supplemental jurisdiction. Perez sought to pursue remedies for compensatory damages, punitive damages, and injunctive relief under Title VII and the California Fair Employment and Housing Act ("FEHA"). Defendant opposed the intervention on the grounds that it was untimely, would cause it substantial prejudice, and that Perez's rights were adequately represented by the EEOC. *Id.* at *3. The Court first noted that the parties did not dispute that Perez was an aggrieved person because she filed the charge upon which the EEOC's lawsuit was based, and thus Perez had the right to intervene. The Court reasoned that in determining whether the application to intervene had been timely requested, the Court should broadly construe the requirements of Rule 24 in favor of the moving party. As to timeliness, the parties disputed whether or not the motion to intervene was brought in a timely manner. Defendant asserted that Perez had been aware of this action since she filed a charge of discrimination with the EEOC on August 24, 2012, had been actively involved in this case and was aware of the deadline to intervene, and that the delay in moving to intervene was caused by her own lack of diligence. The Court disagreed, finding that unavoidable circumstances including Perez's own hospitalization, her son's health issues, and her full-time work schedule which caused the delay in filing were sufficient reasons to warrant the delay. *Id.* at *5. Defendant also argued that it would suffer considerable prejudice if forced to litigate Perez's claims because the addition of six causes of action would prolong the litigation and increase costs. The Court found that Perez had shown that her claims shared common questions of fact and were part of the same case and controversy, and but for Ms. Perez's reporting of the alleged discriminatory acts, the EEOC would not have filed suit. *Id.* at *6. The Court found that the claims shared a common nucleus of operative fact and the evidence needed to resolve Perez's state law claims substantially overlapped with the evidence relevant to the federal claims. *Id.* at *7. Finally, Defendant claimed that in order to sufficiently demonstrate her intervention as a matter of right, Perez must show that the applicant's interest must be inadequately represented by the parties before the Court. Defendant asserted that Perez failed to argue that her interest has not been adequately presented nor provided any evidence that it had not been adequately represented by the EEOC, and therefore failed to meet the standard for intervention. *Id.* The Court determined that Perez's intervention as a matter of right was authorized by a Title VII, and therefore she was not required to prove this adequacy requirement. *Id.* at *8. Regardless, the Court stated that it agreed with Perez's argument that "when the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* Therefore, the Court held that Perez established that the EEOC would not adequately represent her interests. Accordingly, the Court held that the request to intervene was timely and concluded that Perez has established that she is entitled to intervene as of right. The Court also exercised supplemental jurisdiction over Perez's state law claims in accordance with 28 U.S.C. § 1367. The Court found that the state law claims involved the same operative facts as the EEOC's claims and Perez's individual Title VII claims, and trying both cases in the same action would save the parties' time and money and would not prejudice the parties. Accordingly, the Court granted the motion to intervene.

***EEOC v. Sensient Dehydrated Flavors Co.,* 2017 U.S. Dist. LEXIS 101351 (E.D. Cal. June 29, 2017).** The EEOC brought suit alleging that Defendant engaged in unlawful employment practices on the basis of disability, such as discharging employees based on their use of leave as a reasonable accommodation, discharging employees based on actual or perceived disabilities, and failing to engage in the interactive process or providing reasonable accommodations for known disabilities in violation of the Americans With Disabilities Act ("ADA"). The EEOC sought both monetary and injunctive relief. The parties reached a settlement on monetary and injunctive terms. The EEOC filed a motion seeking approval of a proposed consent decree. *Id.* at *2. The Court noted that "before approving a consent decree," it must "independently determine that the proposed agreement is fundamentally fair, adequate, and reasonable," and that it conforms "to applicable laws." *Id.* at *2. The Court observed the proposed consent decree provided monetary relief to claimants in a total sum of $800,000, with

$600,000 going to the eight known claimants in this case, and up to $200,000 in a contingent fund from which currently unknown potential claimants could obtain relief, to be allocated at the EEOC's discretion. *Id.* at *3. The Court determined that the proposed consent decree set forth a number of forward-looking injunctive measures, including a prohibition on discriminatory employment practices and retaliation, and a requirement that Defendant engage in the interactive process with and provide reasonable accommodations to qualified individuals with disabilities. *Id.* at *4. Additionally, the parties agreed that Defendants would: (i) designate an equal employment opportunity monitor to ensure compliance with the decree and the ADA; (ii) designate an in-house ADA coordinator to track, monitor, process, and report on requests for accommodation; (iii) review and, if necessary, revise its policies and procedures regarding disability discrimination, reasonable accommodation, and retaliation; and (iv) provide training on employer obligations and employee rights under the ADA. *Id.* The Court concluded that the proposed consent decree provided substantial relief among claimants and Defendant's employees, and that it was the product of a fair arms-length negotiation process. *Id.* Accordingly, the Court found that the proposed consent decree was fundamentally fair, reasonable, and adequate, and thereby granted the EEOC's motion.

***EEOC v. The Cheesecake Factory,* 2017 U.S. Dist. LEXIS 144391 (W.D. Wash. Sept. 6, 2017).** The EEOC brought an action claiming that Defendant unlawfully discriminated against a hearing-impaired charging party due to his disability. *Id.* at *2. The EEOC alleged that Defendant: (i) failed to provide reasonable accommodations for his physical disability; (ii) terminated his employment due to his disability; and (iii) retaliated against him in violation of the American With Disabilities Act ("ADA"). *Id.* at *2. Defendant moved to compel responses to discovery requesting information regarding the charging party's employment and medical history. Defendant also requested that the EEOC admit or deny whether the charging party had any disability or impairment other than deafness. *Id.* at *5. The EEOC refused on the basis that the information was privileged. *Id.* Defendant believed that the charging party had another a disability in addition to hearing impairment because the EEOC had partially redacted documents, based on psychotherapist/patient privilege. *Id.* The EEOC moved to quash Defendant's subpoenas to prior employers. *Id.* at *1. The EEOC raised several objections to Defendant's request for discovery, including: (i) the psychotherapist-patient privilege; (ii) the charging party's privacy interest in medical records containing information about any other disabilities; and (iii) the relevance and proportionality of prior employment records. *Id.* at *5. The Court granted Defendant's motion in part and denied it in part, and denied the EEOC's motion to quash in its entirety. *Id.* at *31. The Court rejected Defendant's argument that the charging party had waived the privilege related to psychotherapist-patient communications by asserting damages based on "garden variety emotional distress." *Id.* at *13. However, the Court ruled that the information Defendant sought were discoverable because psychotherapist-patient privilege did not apply as the privilege applies only to communications that occurred "in the course of diagnosis or treatment." *Id.* at *8. Accordingly, the names of mental health providers and dates of treatment were discoverable. *Id.* at *9. Even where the privilege was applicable, the Court reasoned that the charging party had waived the privilege when he disclosed the information to third-party providers for purposes of seeking a benefit. *Id.* at *17. The Court also rejected the EEOC's argument that the charging party had a privacy interest in his medical records, noting there is no physician-patient privilege protecting medical records under federal law. *Id.* at *18. The Court acknowledged the constitutional right to privacy in medical records in some contexts, but ruled that because the charging party put his medical condition at issue, any privacy interest was waived. *Id.* at *22. The Court ordered the EEOC to respond to Defendant's discovery requests that related to any disability and provide any mental health records that contained information regarding a disability. *Id.* at *28.

***EEOC v. The Cheesecake Factory,* 2017 U.S. Dist. LEXIS 153549 (W.D. Wash. Sept. 19, 2017).** The EEOC brought an action on behalf of Oleg Ivanov, a hearing impaired employee, alleging that Defendants violated the Americans With Disabilities Act when they failed to provide him with accommodations during employment orientation. The Court had previously granted Defendants' motion to compel discovery. The Court issued a ruling on discovery issues, and subsequently the EEOC filed a motion requesting that the Court to reconsider its ruling on certain discovery disputes between the parties. The Court found that the EEOC failed to make a showing that: (i) there was error in the prior ruling, or (ii) new facts or legal authority existed that could not have been brought to the attention of the Court earlier through reasonable diligence. *Id.* at *2. The Court stated that it required EEOC to produce all of Ivanov's medical records that "relate to either Ivanov's hearing impairment or any other condition that constitutes a disability from January 1, 2010, to the present." *Id.* The Court held that

medical records of Ivanov's hearing impairment were relevant to the EEOC's ADA claims and to Defendants' defenses. Additionally, the Court found that the EEOC produced evidence of an undisclosed disability, and Defendants were entitled to discover information related to this undisclosed disability because of the relevance to their defense of EEOC's claims. *Id.* at *3. Similarly, the Court held that Ivanov waived his medical privacy rights and his psychotherapist-patient privilege as to records related to his hearing impairment and any undisclosed disability because he placed his disability or disabilities at issue due to the substance of the EEOC's claims under the ADA. *Id.* at*4. The Court determined that Defendants were entitled to Ivanov's medical and/or mental health records to the extent those records contained information about his hearing impairment or any undisclosed disability. *Id.* The Court reasoned that the EEOC placed those records at issue here by virtue of the substance of its ADA claims on Ivanov's behalf. *Id.* at *5. Accordingly, the Court denied the EEOC's motion for reconsideration.

***EEOC v. Trans Ocean Seafoods,* 2017 U.S. Dist. LEXIS 33240 (W.D. Wash. Mar. 8, 2017).** The EEOC brought suit alleging that Defendant engaged in discrimination and retaliation against its shellfish harvesters in violation of Title VII. Some of the shellfish harvesters joined the lawsuit as Plaintiff-Interveners. Defendant filed a motion for a protective order to safeguard witnesses who fear retaliation as a consequence of testifying at trial and a motion to grant Defendant relief from the deadline to serve its pretrial statement. *Id.* at *2. Defendant contended that it could not get a fair trial because material witnesses were afraid that if they testified, Plaintiff-Interveners would engage in retaliatory tactics, such as reporting them to Immigration and Customs Enforcement ("ICE") or harming them in other ways. *Id.* The Court found that a protective order was unnecessary because of laws that prohibit any party from intimidating or retaliating against a witness. *Id.* at *4. The Court stated that these already-existing laws, which all parties must observe, are sufficient protections against witness retaliation and rendered a protective order unnecessary. *Id.* Accordingly, the Court denied Defendant's motion for a protective order. Defendant also contended that it should be permitted to serve its pretrial statement after the applicable deadline. Defendant asserted that the EEOC was at fault for it missing the deadline because the EEOC's lawyers "only sent their pretrial statement to the lead counsel for this case, without copying any of his staff or other lawyers for Defendant." *Id.* at *5. Defendant also argued that it missed the deadline in good faith and that extending the Rule 16 deadline would not prejudice the EEOC. *Id.* The Court held that Defendant failed to explain why the email address to which the EEOC sent the pretrial statement had any bearing upon its independent responsibility to comply with Rule 16(i). The Court explained that the deadline supplied by the rule was set in relation to the pretrial order deadline; it was not triggered by the receipt of the EEOC's pretrial statement. *Id.* at *5-6. The Court therefore found that Defendant did not establish good cause to justify an extension. The Court also held that Defendant failed to show that it acted diligently or that its lack of diligence was outweighed by any other factor. *Id.* at *6. Accordingly, the Court denied Defendant's motion to grant relief from the deadline to serve its pretrial statement.

***EEOC v. Trans Ocean Seafoods,* 2017 U.S. Dist. LEXIS 38249 (W.D. Wash. Mar. 16, 2017).** The EEOC brought suit alleging that Defendant engaged in discrimination and retaliation against its shellfish harvesters in violation of Title VII. In preparation for jury trial, the EEOC and Plaintiff-Interveners filed several motions *in limine*, which the Court granted in part and denied in part. The EEOC first moved to exclude "any inquiry, evidence, argument, suggestion or mention of the immigration status, work authorization, or documents that indicate such information of Plaintiffs-Interveners, Claimants, their family members, or their witnesses." *Id.* at *3. The Court partially granted the motion and excluded all evidence concerning the immigration status of any party, claimant, witness, or other individual implicated in this matter. The EEOC also moved to exclude "testimony, evidence, comment, argument and questioning regarding the sexual behavior and predisposition of Claimants in this lawsuit, other than such information involved in direct conversations or contact with the alleged harasser." *Id.* at *5-6. The Court granted the motion and found the Defendant's assertions of relevance were speculative and unsupported. *Id.* at *6. The EEOC also moved to exclude "testimony, argument or other evidence relating to domestic violence allegedly experienced by Claimants, their family members, or their witnesses prior to 2011, when the incidents alleged in the complaint began, and after the Claimants no longer worked at Trans Ocean." *Id.* at *7. The Court also granted this motion. The EEOC further moved to exclude "testimony, argument or other evidence of the employment of any of the Claimants by entities other than Defendant." *Id.* at *8. Defendant opposed the motion on the basis that whether Claimants' other employers "had written harassment policies is relevant to whether Plaintiffs understand the requirements on the businesses to have written policies." *Id.* The

Court granted the motion, stating that it failed to see how the Claimants' degree of understanding about requirements to maintain written policies was a fact of consequence concerning Defendant's liability under anti-discrimination statutes. *Id.* at *8-9. The EEOC likewise moved to exclude "evidence or testimony regarding medical conditions or medical records regarding any Claimant." *Id.* at *9. Defendant opposed the motion, asserting that it had relevant, admissible evidence of Claimants' medical records. The Court granted the motion and stated that it would not fail to exclude irrelevant, unfairly prejudicial evidence with a vague, unsupported hypothetical in which sensitive material potentially could be used to impeach a witness. *Id.* The EEOC further moved to exclude "all testimony, evidence, comment, argument and questioning at trial of the wage & hour lawsuit that two of the Claimants' filed against Defendant in Skagit County Superior Court." *Id.* at *10. The Court found that the Skagit County action had no bearing on the instant matter and granted the motion. The EEOC next moved to exclude "evidence or argument at trial regarding current or former Defendant employees who asserted they have not been subjected to a sexually hostile or retaliatory work environment." *Id.* The Court reserved ruling on the EEOC's motion and stated that it would allow limited argument at the pre-trial conference on the merits of this motion and would issue its ruling at that time. *Id.* at *11. Finally, Plaintiffs moved to exclude evidence and testimony offered by witnesses that Defendant had not disclosed as required in accordance with Rule 26(a). Defendant opposed the motion, contending that it planned to use these witnesses solely for impeachment. *Id.* at *13. Accordingly, the Court denied the EEOC's motion and ruled that Defendant was permitted to present testimony from those witnesses for impeachment.

***EEOC v. Trans Ocean Seafoods,* 2017 U.S. Dist. LEXIS 100196 (W.D. Wash. June 28, 2017).** The EEOC brought suit alleging that Defendant engaged in discrimination and retaliation against its shellfish harvesters in violation of Title VII. The shellfish harvesters subsequently joined the case as Plaintiff-Interveners. At trial, the jury reached a partial verdict, finding against the EEOC and Plaintiffs-Interveners on all claims except for the EEOC's federal sexual harassment claim seeking relief for Serapia Matamoros and Plaintiff-Intervener Serapia Matamoros' federal and state sexual harassment claims. *Id.* at *2. The Court declared a mistrial on those claims as to which the jury could not reach a verdict. Defense counsel sought to withdraw from representing Defendant, but stated that they were willing to continue representing Defendant throughout the duration of post-trial motions practice. *Id.* at *3. The Court ordered defense counsel to submit supplemental briefing identifying the specific reasons they sought to withdraw. Defense counsel filed a supplemental brief containing these reasons and moved to seal the brief, asserting that it contained sensitive matters concerning their attorney-client relationship with Defendant. The EEOC and Plaintiffs-Interveners contended that it planned to relitigate the claims on which the jury deadlocked and that permitting counsel to withdraw would result in a prejudicial delay because Defendant would need to secure substitute counsel and, if they failed to do so, the Court would declare default judgment necessitating motions practice on the appropriate amount of damages. *Id.* at *4. After reviewing Defense counsel's reasons for seeking to withdraw, the Court found that professional considerations necessitated withdrawal. The Court agreed with defense counsel that the considerations implicated sensitive matters concerning their attorney-client relationship with Defendant. Accordingly, the Court granted Defendant's motion to seal. *Id.* at *4-5. The Court noted that it would unseal the brief at the conclusion of the proceedings, including any subsequent appellate proceedings. *Id.* at *5. In permitting the motion to withdraw, the Court held that the EEOC and Plaintiffs-Interveners failed to make a sufficient showing of prejudice to warrant denying the request of counsel for Defendant. The Court stated that it was not in a position to force a law firm to continue representing a client when professional considerations dictated otherwise. *Id.* As for EEOC and Plaintiffs-Interveners' concern that Defendant would default by failing to secure substitute counsel, the Court was not persuaded that the prospect of default would cause prejudice, harm the administration of justice, or unreasonably delay the resolution of the case. Accordingly, the Court granted Defense counsel's motion to withdraw.

***EEOC v. Trans Ocean Seafoods,* 2017 U.S. Dist. LEXIS 146576 (W.D. Wash. Sept. 8, 2017).** The EEOC brought claims of sexual harassment against Defendant in violation of Title VII and the Washington Law Against Discrimination ("WLAD"). Plaintiffs-Interveners alleged that they were sexually harassed by their immediate supervisor, Bartolo Pilar ("Pilar"), and other male employees while working as clam harvesters. Following a trial, the jury found, by a preponderance of the evidence, that Defendant did not know or should have known of the harassment of Plaintiff-Interveners Elena Perea Olea ("Perea") and Celia Sanchez Perea ("Sanchez") by Pilar or other employees. *Id.* at *2. Perea and Sanchez then filed a motion for a new trial. Plaintiffs-Interveners argue

that Defendant's response to a request for admission, business records, and testimony at trial established that Defendant knew that Perea and Sanchez were being harassed. *Id.* at *3. Plaintiffs-Interveners also submitted as exhibits notes entitled, "Sexual Harassment Claim Investigation," and discipline documentation forms indicating a prior complaint against Pilar. *Id.* at *4. Plaintiffs-Interveners argued that Matamoros, Perea, Sanchez, and Emily John-Martin all provided testimony corroborating Plaintiffs-Interveners' claim that Perea and Sanchez reported their sexual harassment to Defendant's Operations Manager, Sebastian Santelices. Matamoros, Perea, and Sanchez testified that they reported that Pilar was sexually harassing them on two occasions prior to filing a complaint with the EEOC. At a meeting off-site, Perea and Matamoros told Santelices that Pilar was making sexual comments about them. *Id.* at *6. Santelices then advised the women that there would be another meeting and that he would talk to Pilar. Perea and Sanchez made a second complaint about Pilar's sexual comments – shortly after the first – at an employee meeting. *Id.* Their account of this meeting with Santelices was supported by Santelices' notes from the "Sexual Harassment Claim Investigation" and Matamoros' discipline documentation form. At trial, Santelices stated that he did not remember meeting with Matamoros, Perea, and Sanchez. *Id.* at *7. The Court found that the jury, having observed Matamoros, Perea, Sanchez, and John-Martin, and considered their credibility, credited Santelices' testimony over theirs. However, when considering whether to grant a new trial, the Court opined that it could weigh the evidence and assess the credibility of the witnesses. As there was disparity between Santelices' testimony and that of the four other witnesses, the Court considered other corroborating evidence that supported each party's arguments. The parties agreed that there was a prior complaint against Pilar for his inappropriate use of "sexual language." *Id.* at *8. It was also undisputed that Matamoros told Santelices that Pilar was sexually harassing her and other female employees. After Matamoros reported that Pilar was engaging in sexually harassing behavior, Santelices met with Pilar and gave him a second warning. The Court held that this evidence, coupled with the compelling testimony of Matamoros, Perea, Sanchez, and John-Martin, outweighed Santelices' testimony and his version of these events. *Id.* at *8-9. Even crediting Santelices' testimony contradicting Plaintiffs-Interveners' claim that they reported that Pilar was sexually harassing them, there was still ample evidence that Defendant had notice of Pilar's behavior for at least a year before Matamoros filed her complaint with the EEOC and should have known that the harassment was occurring. *Id.* at *9. Accordingly, the Court found that the jury's verdict was contrary to the clear weight of the evidence and should be set aside. The Court thereby granted Plaintiff-Intervener's motion for a new trial.

***EEOC v. UPS*, 2017 U.S. Dist. LEXIS 112004 (D. Ariz. June 19, 2017).** The EEOC brought an action on behalf of Desiree Barnabas, a sales support representative, asserting that Defendant failed to provide her a reasonable accommodation and terminated her employment in violation of the Americans With Disabilities Act of 1990 ("ADA"). In particular, the EEOC asserted that due to a brain surgery and knee surgery with subsequent leave of absences, Barnabas was unable to remember how to use the requisite computer systems needed to perform her job. The EEOC alleged that instead of accommodating Barnabas, Defendant terminated her employment. Defendant filed a motion for summary judgment of all the EEOC's claims, which the Court denied. The EEOC provided a report from Barnabas' neuropsychologist that stated that Barnabas' working memory was "broadly within the high end of the low average range, which is surprising given her high average intellectual functioning." *Id.* at *11. The Court found that a reasonable jury could find that a limitation that placed someone even in the high end of the low average range of the general population limits someone "as compared to most people in the general population." *Id.* Defendant asserted that it was entitled to summary judgment because Barnabas failed to demonstrate that she was disabled under the ADA, as there was no evidence that her surgery and subsequent memory loss substantially limited any major life activity. The Court found that there were genuine issues of material fact remaining as to whether Barnabas was disabled under the ADA, and therefore declined to dismiss the EEOC's failure to accommodate claim. Therefore, the Court also denied summary judgment as to the EEOC's discriminatory discharge claims, as the issue of whether Barnabas was actually disabled was still in dispute. *Id.* at *12. Finally, Defendant argued that the Court should grant summary judgment on Barnabas' retaliation claim because she did not endure an adverse employment action. Defendant asserted that Barnabas chose to take an unpaid leave of absence, and remained an inactive employee. *Id.* at *13. However, the Court opined that Barnabas testified that she approached Defendant to request additional accommodations for her disability, not to request a leave of absence. Barnabas stated that Defendant insisted she take an unpaid leave of absence until she could provide medical documentation establishing her disability. The Court noted that if Barnabas' testimony was true, then Defendant placed her on unpaid leave in response to her request for

additional accommodations for her disability. Therefore, taking the evidence in the light most favorable to EEOC, the Court held that summary judgment on the retaliation claim was inappropriate at this time. *Id.* at *13-14. Accordingly, the Court denied Defendant's motion for summary judgement.

***EEOC v. ValleyLife, LLC*, 2017 U.S. Dist. LEXIS 7558 (D. Ariz. Jan. 19, 2017).** The EEOC brought an action alleging that Defendant engaged in unlawful employment practices in violation of the Americans With Disabilities Act ("ADA"). Defendant provides services to disabled individuals. Defendant's managers, supervisors, and employees receive no formal training on the FMLA or the ADA. The EEOC alleged that Defendant failed to accommodate four employees following work-related injuries that required FMLA leave. The parties filed cross-motions arguing that that they were entitled to summary judgment on the issue of whether the four charging parties were qualified individuals under the ADA. *Id.* at *11-12. The EEOC also sought summary judgment with regard to Defendant's alleged failure to engage in the interactive process with the individuals and the availability of potential reasonable accommodations. Defendant countered that it had no duty to engage in the interactive process, and that it was entitled to summary judgment because the EEOC could not demonstrate that it had an inflexible leave policy. The Court denied both motions because material questions of fact existed for all claims. The Court found that there were issues of fact as to whether Defendant had a duty to engage in the interactive process and/or whether it did so in good faith, as testimony from the charging parties conflicted with Defendant's assertions regarding accommodating their requests for FMLA leave and reasonable accommodations. *Id.* at *14-18. Defendant also contended that it was entitled to summary judgment on the EEOC's request for punitive damages because it had "no intractable leave policy" and it therefore "acted in good faith from a policy standpoint." *Id.* at *28. However, the testimony of Defendant's human resources director indicated that she was well trained on the ADA and arguably should have known the law. The Court determined that the question was not whether Defendant knew it was acting in a discriminatory manner, but whether Defendant was aware "that it may be acting in violation of federal law." *Id.* at *29. Furthermore, the Court found that the EEOC presented genuine issues of disputed fact related to its claims that Defendant terminated the charging parties' employment and refused to supply reasonable accommodations for the individuals once their FMLA leave expired that could affect the resolution of the EEOC's claim for punitive damages. Accordingly, the Court denied the parties' cross-motions for summary judgment.

***EEOC v. VF Jeanswear LP,* 2017 U.S. Dist. LEXIS 103487 (D. Ariz. July 5, 2017).** Charging party Lori Bell filed a charge of discrimination with the EEOC against Defendant alleging discrimination based on sex and age in violation of Title VII of the Civil Rights Act and the Equal Pay Act. Before filing her charge, Bell filed a lawsuit against Defendant in state court alleging gender and age discrimination as well as violations of equal wage statutes. On August 28, 2014, Defendant removed the lawsuit. The EEOC then issued Bell a right-to-sue notice and sent Defendant its first request for information as part of an administrative subpoena. Defendant responded with substantial information, but objected to Request No. 10 on grounds that it was unduly burdensome and not relevant to the issues involved in the charge. The EEOC sent Defendant a modified Request No. 10 and Defendant again objected, contending that even as narrowed, the request sought information not reasonably related to the charge. The EEOC filed a motion to enforce the administrative subpoena, which the Court denied. The EEOC asserted that the information sought was relevant to Bell's individual claims and class claims regarding lack of promotional opportunities for women and gender-based pay disparities. *Id.* at *4. The EEOC further contended that the information would provide the identities of witnesses and others who may be victims of disparate treatment and might also help the EEOC formulate other requests for information. *Id.* at *5. The EEOC's subpoena sought an electronic database identifying all supervisors, managers, and executive employees at Defendant's facilities (company-wide and nationwide) from January 1, 2012, to present, and for each individual identified, production of routine employment information, such as name, contact information, age, sex, date of hire, and employment history within the company. *Id.* at *14. In addition, the subpoena sought the reason for termination for individuals who were no longer employed by Defendant. The Court noted that Bell's charge alleged only a single discriminatory demotion and unequal pay claim. *Id.* at *15. Further, the Court explained that although Bell never held, sought, or was refused a managerial or "top" position, she asserted that females were not afforded the opportunity to compete for top positions. *Id.* The Court held that the requested information regarding all supervisors, managers, and executive employees did not bear on unequal pay claims, and was just a tip not bearing on her own experience or detriment. The Court held that even under a generous reading of relevance, the EEOC's nationwide, company-wide search for systemic discrimination in promotions to

top positions was too removed from Bell's charge of a single demotion from a sales job to be relevant. *Id.* at *16-17. The Court noted that as of August 15, 2016, Defendant had about 2,500 employees, including than 600 employees in a supervisor, manager, or executive position during the relevant period, and 200 had been terminated during that time. *Id.* at *19. Defendant asserted that it did not maintain an electronic database in the ordinary course of business with the requested information, and personnel files were maintained at the location where the employee worked or reported or at an off-site location. *Id.* Defendant estimated that it would require 24 hours of work to identify and prepare a complete list of the employees, 300 hours to retrieve and compile information that was available from its computerized personnel records, and additional time to obtain personnel files not available from its computerized personnel records, and would cost approximately $10,698.00. *Id.* at *19-20. The Court stated that it would order Defendant to supply only the data that its computer system would yield, with no searches of files or people's memories, and that anything more would be unduly burdensome. *Id.* at *22-23. Accordingly, the Court denied the EEOC's motion to enforce its administrative subpoena.

(x) Tenth Circuit

***EEOC v. BNSF Railway Co.,* 2017 U.S. App. LEXIS 6204 (10th Cir. April 11, 2017).** The EEOC brought an ADA action alleging that Defendant discriminated against the charging party, Kent Duty, when it revoked his offer of employment. Defendant filed a motion for summary judgment, which the District Court granted, finding that Duty was not disabled under the definition of the ADA. On appeal, the Tenth Circuit affirmed the judgement of the District Court. At age sixteen, a car accident left Duty with severe injuries to his right arm. Duty applied to work at Defendant as a locomotive-electrician. The job posting stated that Defendant expected its locomotive electricians to climb on and off locomotives and equipment, work around heavy machinery, lift equipment, use hand tools, and maintain and repair high-voltage electrical equipment. *Id.* Defendant made Duty a conditional job offer in which it explained that Duty would have to pass a background check and drug screening, and complete a medical-history questionnaire. *Id.* at *3-4. On the questionnaire, Duty revealed that he had nerve trauma and had undergone surgery in the past. Defendant's third-party medical contractor contacted Duty and arranged a medical exam. The exam showed that Duty had a normal range of motion in his right shoulder and elbow, but that his range of motion in his right wrist, particularly his backward movement, was zero as compared to a normal degree of range of 60. *Id.* at *4. Based on this test result and subsequent testing, Defendant ultimately determined that Duty could not meet its three-point-contact rule, a safety standard that applies to climbing in the workplace. *Id.* Defendant thereafter notified Duty that it had revoked the employment offer, but stated that he may be qualified for other positions. Duty never applied for any other positions at Defendant. The District Court found insufficient evidence that Duty had a "disability" within the ADA's definition, and granted summary judgment on all claims. *Id.* at *5. The EEOC conceded that Duty did not have an actual physical impairment that rose to a protected disability. Nevertheless, the EEOC contended he was disabled under the ADA because Defendant regarded him as disabled. The EEOC asserted that Defendant mistakenly believed that Duty's impairment substantially limited him in the major life activity of working. In response, Defendant asserted that it only considered Duty for the single job for which he applied. The Tenth Circuit found that was not the case because Defendant specifically pointed to other job opportunities in its communication to Duty. Further, Defendant only looked to perception of Duty's hand injury related to a specific task, *i.e.*, complying with the three-point-contact rule. The Tenth Circuit stated that looking to that perception, combined with Defendant's email inviting Duty to apply to other positions, could not establish that Defendant regarded Duty as unable to work in general. Defendant argued that the three-point-contact rule is "well-established in industrial settings." *Id.* at *9. Since the EEOC failed to show that Defendant considered Duty unable to perform jobs other than the locomotive-electrician job, the Tenth Circuit held that the District Court properly found that Plaintiffs failed to show Defendant regarded Duty as substantially limited in the major life activity of working. *Id.* at *18-19. The EEOC also asserted that Defendant regarded Duty as substantially limited in the major life activity of performing manual tasks. The Tenth Circuit opined that complying with a three-point-contact rule while climbing and gripping tools with both hands were both jobs-centered tasks, which do not amount to major life activities. *Id.* at *19. Accordingly, the Tenth Circuit held that the EEOC failed to show that Defendant regarded Duty as unable to perform any task central to his daily life. *Id.* at *20. The EEOC also claimed that Defendant violated the ADA by improperly "us[ing] the results of a pre-employment medical 'examination' by its physician to disqualify [him]." *Id.* The Tenth Circuit found that the medical exam occurred after Duty received a conditional offer of employment, and was therefore a post-offer, pre-employment medical exam, which falls under 42 U.S.C. § 12112(d)(3). *Id.* at *21. Thus, if Duty had a claim, it would arise under § 12112(d)(3) rather than (d)(2). The Tenth Circuit

determined that because the EEOC failed to show that Duty was disabled, any claims under (d)(3)(C) necessarily fail as well. Accordingly, the Tenth Circuit affirmed the District Court's ruling granting summary judgment to Defendant.

***EEOC v. Brown-Thompson General Partnership*, 2017 U.S. Dist. LEXIS 133173 (W.D. Okla. Aug. 21, 2017).** The EEOC brought an action on behalf of Casey Crothers, an employee, alleging that Defendant terminated him on the basis of his disability in violation of the Americans With Disabilities Act. The EEOC contended that Defendant neglected to make reasonable accommodations for Crothers and other employees by failing to provide light or modified duty assignments in the absence of workers' compensation claims or on-the-job injuries and by enforcing a policy that permitted no more than three-days of consecutive absences rather than additional leave as an accommodation. *Id.* at *1-2. The EEOC alleged that Crothers informed his supervisors about his psoriatic arthritis condition and his inability to lift more than ten pounds for a period of two to three weeks, the result of inflammation in his hands, feet, and back. *Id.* at *2. Crothers was not eligible for FMLA leave, and the EEOC argued that he was terminated rather than temporarily transferred as he had requested a leave of absence. *Id.* The EEOC filed a motion to compel discovery, contending that Defendant failed to provide adequate responses to certain discovery requests. Defendant asserted that it adequately responded to the EEOC's requests. The Court granted the EEOC's motion in part. *Id.* at *3. Specifically, the Court granted the EEOC's motion to the extent it sought: (i) information and documents relating to Defendant providing light or modified duty to employees with non-work related medical conditions, including the identity of such employees from May 2012 to present; (ii) information and documents relating to Defendant providing reasonable accommodations for employees with non-work related medical restrictions from May 2012 to present, including the identity of such employees from May 2012 to present; (iii) documents that related to Defendant providing reasonable accommodations to employees with work-related medical conditions from May 2012 to present; and (iv) documents identified or relied upon in Defendant's response to interrogatories. *Id.* at *3-4. The Court found the information sought was relevant and Defendant failed to establish that production of the requested information or documents would create an undue burden. The Court denied the EEOC's motion to the extent it sought Defendant's financial statements for 2015 and 2016. *Id.* at *5. Finally, the parties disagreed regarding Defendant's responses as they related to Interrogatory 13, which fell into the category of "facts and documents relevant to the EEOC's claims as well as allegations in the 7-Eleven's answer and the identity of persons with knowledge of those facts." *Id.* at *5-6. Defendant contended it offered the information requested as well as the documents in support of its responses. As such, the Court denied the EEOC's motion as it related to this Interrogatory 13. Accordingly, the Court granted in part the EEOC's motion to compel discovery.

***EEOC v. Centura Health,* 2017 U.S. Dist. LEXIS 141469 (D. Colo. Sept. 1, 2017).** The EEOC received 11 discrimination charges against Defendant claiming violations of the Americans With Disabilities Act ("ADA"). *Id.* at *1. The EEOC issued an administrative subpoena and Defendant complied in part, but refused to produce all the information sought by claiming that compliance was an undue burden. *Id.* at *2. The EEOC sought to enforce the subpoena and presented a declaration from its investigator, which asserted that Defendant's representative had previously indicated that the information easily could be produced as it was stored in a searchable electronic data base. *Id.* at *4. Defendant claimed that it would take nine employees and years of work to comply as the files would need to be manually checked, and that this would cost $730,000. *Id.* at *5. The Court referred the dispute to the Magistrate Judge and authorized him to modify the subpoena if he found that compliance would be unduly burdensome for Defendant. *Id.* The Magistrate Judge granted the EEOC's application in part and denied it in part, noting that compliance with the full scope of items sought would likely be unduly burdensome as the subpoena sought information requiring manual review of files of 15,500 employees. *Id.* at *21. However, the Magistrate Judge found that Defendant's declarations were inaccurate regarding the burden of complying with all of the items sought and that it did electronically store some of the information sought, such as information as to which employees were placed on leave and the type of leave requested. *Id.* at *16. To the extent that the information sought was stored electronically, the Magistrate Judge ordered compliance. *Id.* at *31. The Magistrate Judge also rejected the Defendant's argument that compliance with the subpoena was not required because the EEOC was seeking the information to investigate if Defendant engaged in a pattern of discrimination and not to investigate the individual charge. *Id.* at *25. The Magistrate Judge noted that the Court referred only on the issue of undue burden. *Id.* However, the Magistrate Judge indicated that how Defendant treated other employees who requested accommodations at the same facilities was directly relevant

to whether Defendant discriminated against the 11 charging parties based on disability. *Id.* at *23. The Magistrate Judge also rejected Defendant's argument that its non-charging employees had privacy interests in their medical information that precluded production of that information, noting that Defendant cited no legal authority in support of its privacy argument. *Id.* at *25. The Magistrate Judge concluded that the sensitive nature of non-charging parties' private medical information was not a basis for an employer to withhold the information from the EEOC. *Id.* at *28-29. The Magistrate Judge therefore modified the subpoena to require Defendant to produce all information in its electronically searchable sources that was responsive to requests and all information and all physical documents sought in items that were in Defendant's control. *Id.* at *30. The Magistrate Judge noted that if Defendant wanted to avoid the need for manual review of the 880 personnel files at issue, it may in the alternative produce the 880 employees' entire personnel files or have the files scanned and converted by software in an electronically searchable format. *Id.* Accordingly, the Magistrate Judge ruled that the application was granted in part. *Id.* at *32.

***EEOC v. CollegeAmerica Denver, Inc.*, 2017 U.S. App. LEXIS 17094 (10th Cir. Sept. 5, 2017).** The EEOC brought a claim on behalf of Debbi Potts, Defendant's former employee. The EEOC sued for unlawful-interference with statutory rights, which the District Court ultimately dismissed as moot. Regarding the EEOC's retaliation claim that remained for trial, Defendant presented a new defense that Potts had breached the settlement agreement by reporting adverse information to the EEOC without notifying Defendant. In response, the EEOC argued that by presenting this new theory, Defendant was continuing to interfere with the statutory rights of the former employee and the EEOC. As such, the EEOC appealed the dismissal of its unlawful-interference claim, arguing that the claim was no longer moot in light of Defendant's new case theory. On appeal, the Tenth Circuit reversed the dismissal of the EEOC's unlawful-interference claim. First, the Tenth Circuit opined that in determining whether a claim is moot, a special rule applies when Defendant voluntarily stops the challenged conduct. *Id.* at *4-5. When the conduct stops, the claim will be deemed moot only if two conditions exist, including: (i) it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur, and (ii) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. In arguing that the case was moot, Defendant submitted two declarations from its general counsel assuring that Defendant would not take the "positions known to trouble the EEOC." *Id.* at *6. In response, the EEOC argued that the declarations should not be relied upon since Defendant presented a new theory after the filing of the declarations – that the employee had breached the settlement agreement by reporting adverse information to the EEOC without notifying CollegeAmerica – an argument that continued Defendant's unlawful interference with statutory rights. The Tenth Circuit held that because Defendant planned to present its new theory in its state court suit, the potential for Defendant to repeat its allegedly wrongful behavior remained, and Defendant thus did not satisfy its burden of demonstrating the absence of a potential for reoccurrence. *Id.* The Tenth Circuit also rejected Defendant's argument that the case was moot because the outcome "would not affect anything in the real world." *Id.* at *7. The Tenth Circuit noted that in its state court suit, Defendant planned to argue that the employee breached the settlement agreement by reporting adverse information to the EEOC without notifying Defendant. The EEOC asserted that this argument would constitute unlawful-interference with the employee's rights, and thus it sought a permanent injunction prohibiting Defendant from unlawfully interfering with the statutory rights of the employee and the EEOC. The Tenth Circuit accepted the EEOC's argument, holding that if the EEOC prevailed on the merits and obtained an injunction, Defendant could not present its new theory in the state court suit against the employee, which "would constitute an effect in the real world." *Id.* Finally, the Tenth Circuit declined to consider Defendant's argument that the EEOC's unlawful-interference claim brought under 29 U.S.C. § 626(f)(4) failed as a matter of law since it could not be used as an affirmative cause of action, noting the District Court had not yet ruled on the issue and therefore it was to consider that issue on remand. *Id.* at *7-8. The Tenth Circuit also refused to consider Defendant's argument that the EEOC sought overly broad, unauthorized injunctive and declaratory relief, explaining it would not consider this issue since it was raised on appeal for the first time. Accordingly, the Tenth Circuit reversed and remanded the District Court's dismissal of the EEOC's unlawful-interference claim.

***EEOC v. Columbine Management Services, Inc.*, 2017 U.S. Dist. LEXIS 152986 (D. Colo. Aug. 16, 2016).** The EEOC brought an action alleging that Defendants discriminated against its personal care providers ("PCPs") and terminated them on the basis of their race and national origin in violation of Title VII. The EEOC also brought a retaliation claim on behalf of white supervisor, Marlene Hoem, for engaging in protected activity.

Id. at *1. The EEOC contended that Kiros Aregahgn (an Ethiopian national), and Mohamed Osman Mahboub, Sawson Ibrahim, and Hanaa Gual (all Sudanese nationals) had worked with Defendants for over 14 years, were well-liked by patients, and spoke English at all times. Pamela Lewis, a director, allegedly told Hoem that she had to get rid of the black-African PCPs because they did not speak English. *Id.* at *3. When Hoem refused to comply with Lewis' director, she was allegedly terminated. *Id.* Defendants then required the PCPs to take PCP training, administered a test, and terminated the four black-African PCPs because they did not pass the test. *Id.* The parties filed cross-motions for summary judgment, which the Court granted in part. The EEOC sought summary judgment on its claim for unlawful discrimination based on disparate impact. The Court explained that to establish a *prima facie* claim for disparate impact, the EEOC must come forward with evidence that shows that an employer's employment practice disparately impacted a protected group of employees. *Id.* at *7. As to the first element, there was no dispute that required passage of the PCP examination was a condition of employment, and was therefore an employment practice. Defendant contended that the EEOC, however, failed to provide sufficient statistical evidence to show that the PCP exam had a disparate impact on employees of a protected race or protected black-African. The EEOC's statistical evidence included test results indicating passage rates of 42.8% for black-African exam-takers, 55.6% for Black exam-takers, 99.3% for White exam-takers, and 100% for Hispanic exam-takers. *Id.* at *10. Defendant's expert refuted the findings, contending that the conclusions of the EEOC's expert were unreliable because the statistical sample was too small. *Id.* at *12. The Court thereby determined it was left with conflicting expert opinions. *Id.* at *13. Accordingly, because the conflict went to a material factual issue, the Court ruled that it must to be resolved by a jury, and summary judgment was not appropriate. *Id.* at *14. The EEOC also sought summary judgment on four affirmative defenses, including: (i) waiver/estoppel; (ii) *bona fide* occupational qualification; (iii) after-acquired evidence; and (iv) failure of conditions precedent. Defendant argue that charging parties led Defendant to believe they were fluent in English when they were hired, and had the Defendants known that they were not fluent in English, they would not have been hired. As a consequence, Defendant contended that the EEOC was now estopped from claiming that these employees were discriminated against on the basis of their limited English skills. The Court stated that estoppel was not an affirmative defense to a disparate impact claim. Defendant conceded that the *bona fide* occupational qualification defense was not applicable in this matter. *Id.* at *18. Accordingly, the Court found dismissal appropriate. As to the after-acquired evidence defense, Defendant argued that had it known of claimants' limited English, it would not have hired them. The Court determined that Defendant failed to provide evidence that the ability to speak fluent English was material to the performance of the PCP job at the time the claimants were hired or that Defendant had standards that advised employees that they would be discharged for false statements made in employment applications. *Id.* at *23. Finally, Defendant argued that it made monetary offers to the individual claimants to settle claims during conciliation, but the EEOC failed to disclose those offers to claimants. The Court stated that Defendant offered no legal authority for the proposition that, during conciliation efforts, the EEOC was required to convey settlement offers to the aggrieved employees. *Id.* at *22. The Court therefore granted summary judgment on the EEOC's failure to conciliate defense. Defendant also moved for summary judgment on the EEOC's retaliation claim for Hoem. The Court found that taken as true, the EEOC's evidence was sufficient to establish a *prima facie* disparity in test results for the protected groups. Viewed in the light most favorable to the EEOC, the Court opined that Hoem's verbalized disagreement could be interpreted as discrimination based on national origin and was sufficient for a *prima facie* showing. *Id.* at *30. The Court found that a reasonable jury could determine that in challenging Lewis' perceptions of the black-African PCPs, Hoem was identifying what she perceived to be unlawful discrimination. Accordingly, the Court denied Defendant's motion for summary judgment.

***EEOC v. JBS USA, LLC*, 2017 U.S. Dist. LEXIS 58303 (D. Col. April 17, 2017).** The EEOC brought an action on behalf of several aggrieved Somali Muslim employees alleging religious discrimination in violation of Title VII and retaliation based on their requests for religious accommodation for prayer breaks in the workplace. The Court bifurcated the case, resulting in the "Phase I" issue involving the pattern or practice claims presented by the EEOC, and the "Phase II" issue addressing all individual claims for relief of any claims not tried in Phase I, including all claims of harassment/hostile work environment as well as entitlements to back pay, compensatory damages, and punitive damages. Defendant moved to dismiss the EEOC's Phase I claim pursuant to Rule 12, and the EEOC moved to strike Defendant's motion to dismiss on procedural grounds. The Court noted that the deadline for dispositive motions passed more than three years before Defendant filed its motion to dismiss. *Id.* at *27. Defendant did not move to modify the deadline and did not argue in its motion that there was good cause to

do so. Defendant asserted that *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015), "recently confirmed" the legal principle on which it based its motion and suggested there was a change in law. *Id.* at *28. However, the Court found that *EEOC v. Abercrombie & Fitch* simply restated and interpreted the pre-existing statutory provisions of Title VII and did not alter the pleading requirements for such claims in way relevant to the case. *Id.* The Court stated that even if *Abercrombie & Fitch* made material changes to the law, Defendant would need to seek permission to file a belated Rule 12(b)(6) motion, which it did not do. *Id.* Accordingly, the Court denied Defendant's motion to dismiss as untimely and denied the EEOC's motion as moot.

***EEOC v. JBS USA, LLC,* 2017 U.S. Dist. LEXIS 122908 (D. Colo. Aug. 4, 2017).** The EEOC brought an action alleging that Defendant, a meat packing company, discriminated against its Muslim employees on the basis of religion by engaging in a pattern or practice of retaliation, discriminatory discipline and discharge, harassment, and denying its Muslim employees reasonable religious accommodations. After the EEOC moved for sanctions regarding Defendant's failure to produce two types of records relating to delays on its production line, the Court granted in part the EEOC's motion and barred Defendant from presenting evidence, testimony, or argument in its motions, at hearings, or at trial that unscheduled prayer breaks led to production line slowdowns or stoppages. Defendant operated a beef processing plant in Greeley, Colorado. *Id.* at *2. During the first week of Ramadan 2008, a dispute occurred between Defendant and its Muslim employees over their opportunities to pray, resulting in hundreds of Muslim employees walking off the job. Defendant subsequently fired 96 Muslim employees that refused to return to work. After the mass termination, numerous former employees filed discrimination charges with the EEOC. *Id.* In response, Defendant submitted a position statement where it argued that granting prayer breaks to employees would be an undue burden, in part, due to losses resulting from "each minute of production down-time." *Id.* Defendant continued to assert its undue burden affirmative defense, arguing in its summary judgment motion that production line slowdowns and downtime would have been caused by allowing prayer breaks to Muslim employees. The EEOC sought discovery from Defendant about its undue burden affirmative defense. The EEOC served a production request regarding the production of all reports or data showing all dates and times the fabrication lines on any and all shifts were stopped, as well as the speed of the lines. In response, Defendant produced documents that included records showing scheduled breaks, but did not provide or reference the down time reports or clipboards, which show unplanned downtime and slowdowns. The EEOC thereafter moved for sanctions for the loss or destruction of documents directly relevant to Defendant's allegations of undue hardship. The Court granted the EEOC's motion for sanctions. While Defendant had produced clipboards from 2012-2016 and down time reports from 2016, it claimed that all others had been destroyed. A designee of Defendant later testified via a Rule 30(b)(6) deposition that the down time reports were shipped to storage each year, but may have been destroyed. After searching its warehouse for "a day" in 2017, Defendant later located and produced some additional records. *Id.* at *6. The Court thus found that Defendant failed to supplement its production with responsive records in a timely manner. The Court held that because Defendant did not show that its failure to supplement was substantially justified or harmless, it would impose sanctions pursuant to Rule 37(c)(1). *Id.* The Court explained that spoliation occurs when a party loses or destroys evidence that it had a duty to preserve because it was relevant to proof of an issue at trial in current or anticipated litigation. *Id.* at *7. Defendant argued that it did not have a duty to preserve these documents because it had no way of knowing or anticipating that the EEOC would be interested in knowing the specific time of every instance of every day that the production line stopped for an unplanned or unexpected reason. The Court rejected this argument, holding that Defendant ignored the fact that it asserted an undue burden defense within a year of the September 2008 incident and after charges of discrimination had been filed against it. As such, the Court held that Defendant had a duty to preserve documents relevant to the burden posed by the proposed accommodations. *Id.* at *8. Arguing that the lack of production of records did not cause prejudice to the EEOC, Defendant asserted that the records did not show whether any slowdown or stoppage was related to a prayer break because the information they contained was "only as specific as the information known to the person filling out the down time report." *Id.* at *10. The Court rejected this argument, holding that "[r]ecords such as those sought, which potentially show the actual impact of unscheduled employee prayer breaks, are particularly important to understanding the impact such breaks would have on production line slowdowns or stoppages because they would provide contemporaneous records of whether unscheduled breaks led to production downtime." *Id.* at *12. Accordingly, the Court found that the EEOC was prejudiced by Defendant's spoliation of evidence. *Id.* The Court held that it would bar Defendant from presenting evidence, testimony, or argument in its motions, at hearings, or at trial that unscheduled prayer breaks led to production

line slowdowns or stoppages. *Id.* at *14. The Court explained that this sanction was "tailored to the evidence lost, destroyed, or withheld by Defendant because it alleviates the prejudice which the EEOC would otherwise suffer, namely, that Defendant may present evidence of stoppages through witnesses, but the EEOC would not be able to rebut such testimony with records that would likely prove whether stoppages actually occurred and, perhaps, for what reason." *Id.* Accordingly, the Court granted in part the EEOC's motion for sanctions for the loss or destruction of documents.

***EEOC v. Jetstream Ground Services*, 2017 U.S. App. LEXIS 26867 (10th Cir. Dec. 28, 2017).** The EEOC brought an action on behalf of five Muslim females who applied for and were denied cabin cleaning positions with Defendant. The EEOC alleged that Defendant refused to hire them for discriminatory reasons after they requested to cover their heads with a hijab and wear long skirts for religious purposes. The applicants also joined the EEOC's lawsuit as Interveners. Defendant asserted that its decisions to not hire the individual applicants were based on their applications and interviews. *Id.* at *3. However, during discovery, Defendant altered its positions and argued that the hiring decisions were based on the recommendations of supervisor Arnold Knoke. *Id.* Defendant asserted that two employees, Frank Austin and Gail Cadorniga, met with Knoke to hear recommendations on which employees to hire. Austin wrote the names Knoke recommended on a piece of paper; and after the meeting Cadorniga obtained the phone numbers for the recommended persons from the applications. *Id.* at *4. Cadorniga entered the information into an Excel spreadsheet, which she saved on her laptop and a flash drive. *Id.* Defendant claimed that Knoke's recommendations, and not any discriminatory animus, drove its hiring decisions. *Id.* The EEOC requested that Defendant produce all documents related to the non-discriminatory reasons for not hiring individual Plaintiffs, and Defendant produced a version of the Excel spreadsheet saved five days after the original spreadsheet was created. The earlier version was updated as information was modified or added, although it was undisputed that the names on the later spreadsheet were identical to the new hire names. *Id.* at *5. The EEOC filed a pre-trial motion for spoliation sanctions against Defendant, claiming that its failure to maintain the original versions of the recommendations violated 29 C.F.R. § 1602.14, which requires employers to preserve for one year all personnel or employment records that it makes or keeps and, if a discrimination charge has been filed, to continue to preserve the records until final disposition of the charge. *Id.* In the alternative, the EEOC requested exclusion of testimony by Defendant's witnesses about the list of Knoke's recommendations, or an instruction to the jury that they should infer that the missing documents were harmful to Defendant. *Id.* at *6. At a pre-trial hearing, the District Court reserved ruling on the motion, stating that it needed to "hear the evidence at trial" and that it could not determine at that point whether Defendant acted in bad faith in discarding the documents or whether the EEOC would be prejudiced. *Id.* at *6-7. At trial, the EEOC did not renew its request to exclude evidence of the Knoke list. The jury found for Defendant. The EEOC unsuccessfully moved for a new trial under Rule 59. On appeal, the EEOC argued that the District Court abused its discretion by refusing to impose a sanction on Defendant. The Tenth Circuit found that the EEOC never argued at trial that such evidence should be excluded. Although the EEOC filed a pre-trial motion to exclude the evidence as a spoliation sanction, and the District Court deferred ruling on the motion. The Tenth Circuit explained that only when a District Court rules definitively on the record before trial is the party seeking to exclude evidence excused from renewing the objection at trial. *Id.* at *8. The Tenth Circuit further determined that the EEOC conceded during closing argument at trial that the loss or destruction of the documents from the Knoke meeting was not in bad faith. *Id.* at *14. The Tenth Circuit concluded that the District Court did not abuse its discretion in rejecting the EEOC's requests for spoliation sanctions or denying the motion for new trial based on the failure to impose such sanctions. *Id.* at *18.

***EEOC v. Midwest Regional Medical Center,* 2017 U.S. Dist. LEXIS 147961 (W.D. Okla. Sept. 13, 2017).** The EEOC filed an action on behalf of Janice Withers ("Withers"), alleging that Defendant violated the Americans with Disabilities Act ("ADA") when it terminated Withers from her employment. *Id.* at *1. At trial, the jury entered a verdict in favor of Defendant. *Id.* The EEOC filed a renewed motion for judgment as a matter of law under Rule 50(b), contending that the evidence at trial was legally insufficient to sustain a verdict for Defendant. *Id.* at *1-2. Further, the EEOC contended that, alternatively, a new trial was proper where the jury was permitted to hear and consider irrelevant comments and evidence that substantially prejudiced EEOC's right to a fair trial. *Id.* at *2. Lastly, the EEOC asserted that it was entitled to summary judgment because Defendant's Rule 30(b)(6) deposition errata sheet of Bryttani Bay ("Bay") should have been stricken from consideration. The EEOC argued that based on the evidence presented, the jury should have found that Withers was a qualified individual with a

disability and that Withers' skin cancer was a determining factor in her termination. *Id.* at *3. Defendant contended that the evidence was sufficient for the jury to find it did not violate the ADA when it terminated Withers. The EEOC stated that Withers was discharged by Defendant while she was on a medical leave of absence ("LOA"). *Id.* at *4. The EEOC alleged that the reasons Defendant gave for terminating Withers; *i.e.,* excessive absences and three days straight of no call/no show, were pretext and, further, overwhelmingly supported the inference that Withers was terminated because of her skin cancer. *Id.* at *4-5. The Court found that while the EEOC may have proved by a preponderance of the evidence that Withers was a qualified individual with a disability under the ADA, it was reasonable for the jury to determine, based on the evidence presented at trial, that Withers' skin cancer was not a determining factor that prompted Defendant to discharge her. *Id.* at *5. In construing the evidence and inferences in favor of Defendant, the Court found that the jury could reasonably infer that while the policies and procedures were not followed with the termination of Withers, the decision and process to terminate Withers, while wrongful, was not because of Withers' skin cancer, but because of her excessive absences. *Id.* at *6-7. The EEOC further contended that errors committed during the trial entitled it to a new trial. However, the Court also determined that that the EEOC failed to demonstrate that any trial errors constituted prejudicial error against it. *Id.* at *7. Finally, the EEOC contended that it was entitled to summary judgment as a matter of law because had the Court not considered the errata sheet submitted by Defendant's Rule 30(b)(6) deponent Bay, it would have been undisputed that the medical LOA that Withers was placed on was legally protected as a reasonable accommodation. *Id.* at *8. Defendant contended that the EEOC's request for reconsideration of the Court's order on summary judgment in this matter was untimely, and, further, that the EEOC was barred from raising this argument because it was not made in its Rule 50(a) motion at trial. *Id.* The Court determined that the EEOC failed to set forth any new grounds warranting reconsideration of the Court's order on EEOC's motion for summary judgment. The Court found that the EEOC's request for the Court to reconsider its order on EEOC's motion for summary judgment was untimely, and essentially moot, as the issue of reasonable accommodation was not an issue the EEOC pursued at trial or raised in its Rule 50(a) motion for judgment as a matter of law at trial. Accordingly, the Court denied the EEOC's motions.

***EEOC v. Midwest Regional Medical Center,* 2017 U.S. Dist. LEXIS 147962 (W.D. Okla. Sept. 13, 2017).** The EEOC challenged the Court's decision to allow Defendant to recover certain copying costs in the amount of $252.64 and transcripts in the amount of $311.68. The EEOC sought a Court order reducing the award of costs to Defendant from $3,890.33 to $3,326.01. Specifically, the EEOC contended that Defendant's costs of $139.66 for color copies were not necessary, and therefore not recoverable. *Id.* at *1. Further, the EEOC contended that all but $.30 of Defendant's copies in black and white were not recoverable. Lastly, EEOC contended that Defendant's costs of $311.68 for transcripts were not recoverable because the transcripts in question were not offered into evidence at trial. *Id.* at *1-2. Defendant asserted that the challenged costs were reasonable and necessary. At the outset, the Court explained that to be recoverable, a prevailing party's transcription and copy costs must be "reasonably necessary to the litigation of the case." *Id.* at *3. Further, the Court noted that materials produced "solely for discovery" did not meet this threshold. *Id.* Having reviewed the parties' submissions, the Court found that Defendant was not entitled to the costs of the transcripts of John Paul and Amy Voliva, as they were not used at the trial. *Id.* at *4. The Court further determined that Defendant was entitled to the costs for the black and white and color copies it used at trial. Therefore, the Court held that the Court's award of costs to Defendant should be reduced by $311.68 and Defendant should be awarded $3,578.65 in costs as the prevailing party.

***EEOC v. Montrose Memorial Hospital*, 2017 U.S. Dist. LEXIS 144424 (D. Colo. Sept. 4, 2017).** The EEOC brought an action against Defendant alleging violations of the Age Discrimination in Employment Act ("ADEA") for constructive discharge of nurses over the age of 40. The EEOC determined during the process of seeking aggrieved individuals during discovery, between one and six alleged aggrieved individual entered into a separation agreements with Defendant. Accordingly, the EEOC moved for an order: (i) allowing removal of specific identifying information in the agreements and replace with "subject;" (ii) declaring that paragraphs 6, 9, 10, 12, and 13-16 are void as against public policy; (iii) finding that any individuals who signed agreements should be entitled to file charges with the EEOC or other agencies; (iv) determining that individuals who signed the agreement should be provided 300 days from the date of receipt of the notification to file a charge of discrimination with the EEOC; and (v) holding that the settlement agreements be deemed to have no effect on the rights of aggrieved individuals to participate in the lawsuit. *Id.* at *2-3. Defendant did not oppose the relief

sought as to striking certain paragraphs of the settlement agreement *in toto.* The Court therefore ordered that paragraphs 13, 14, and 16 be struck from the settlement agreement. *Id.* at *3. The EEOC also requested that paragraph 6 regarding a non-disparagement agreement be struck due to being vague and overly broad. The Court found that the non-disparagement agreement was not vague, was not overly broad, and need not be struck. *Id.* at *10. The EEOC also argued that a notice provision in the settlement agreement should be struck because it "might precipitate a chilling effect on claimants in violation of public policy." *Id.* at *11. The Court agreed that it could have that effect but amended the notice to reduce that possibility. As to the EEOC's remaining requests, the Court found that blanket orders as requested were not yet appropriate. *Id.* at *12. Accordingly, the Court granted in part and denied in part the EEOC's motion.

***EEOC v. PJ Utah, LLC,* Case No. 14-CV-695 (D. Utah Jan. 4, 2017).** The EEOC brought a civil enforcement action against a franchisee of Papa John's for violating the ADA by denying a reasonable workplace accommodation to the charging party, Scott Bonn, and for firing him for requesting this accommodation. The parties filed a joint stipulation for an extension of time of discovery deadlines, which the Court granted in part. The Court granted the parties' request to extend the last day of written discovery and fact discovery each by one month, with new deadlines of February 3, 2017 and February 17, 2017, respectively. *Id.* at 1. The Court also vacated the status conference scheduled for the day following this order. However, the Court denied the parties' request for a continuance as to any further dates given the age of the case. *Id.* The Court therefore held that the deadline for filing dispositive motions remained April 14, 2017. *Id.* The Court thereby granted in part and denied in part the parties' joint stipulation for a continuance of discovery deadlines.

***EEOC v. Roark-Whitten Hospitality 2 LP*, 2017 U.S. Dist. LEXIS 153891 (D.N.Mex. Sept. 21, 2017).** The EEOC brought an action claiming that Defendants discriminated against a group of minority hotel workers in violation of Title VII of the Civil Rights Act of 1964. *Id.* at *2. The EEOC sought specific relief from Defendant Jai, including a permanent injunction enjoining "Jai Hanuman and any other successor employer" from engaging in discriminatory employment practices; an order requiring Jai to carry out and institute "policies, practices, and programs which provide equal employment opportunities" and "which eradicate the effects of its past and present unlawful employment practices;" back pay; front pay; reinstatement; "compensation for past and future pecuniary losses," including relocation and job search expenses; emotional distress damages; and punitive damages. *Id.* at *3-4. Jai filed a motion to dismiss, which the Court denied. Jai argued that the EEOC failed "to even plead elements of a cause of action against Jai" other than, "at best, inferring some sort of successor liability against Jai." *Id.* at *8. Jai further argued that it was not a necessary party to the lawsuit because EEOC alleged that Whitten Inn committed the discriminatory acts, not Jai. Finally, Jai asserted that, because it had sold the hotel, "it is impossible for Jai to implement the requested policies and procedures." *Id.* at *8-9. The EEOC contended that the Court should not consider the sale of the hotel from Jai to SGI, because the fact was outside the operative pleading, *i.e.*, the second amended complaint. The EEOC asserted that its claims against Jai were based on successor liability for the wrongdoings of its predecessor, rather than direct liability for Jai's own conduct. *Id.* at *9. The EEOC further argued that the test for successor liability "must be determined upon the facts and circumstances of each case," and that therefore it would be an error for the Court to dismiss its claims prior to discovery. *Id.* at *10. The Court found that the EEOC asserted plausible factual allegations of successor employer liability against Jai, and thus it stated a claim of successor employer liability. *Id.* at *11. The EEOC alleged that Jai had notice of the case, could grant relief including back pay, and various facts to demonstrate the continuity of the operation between Whitten Inn and Jai, including continuing to operate a hotel and using the same location, personnel, machinery, and equipment. Jai primarily argued that it could not be liable because it sold the property and hotel. *Id.* at *12-13. Jai argued that it "cannot provide the relief requested, *i.e.,* reinstatement" because it sold the hotel. *Id.* at *15. The Court determined that though Jai could not reinstate the charging parties, other relief against Jai could be granted, including lost wages and benefits during the period Jai owned the hotel. Jai further argued that it should be dismissed because it was not a necessary party under Rule 19. However, the Court found that whether an existing party is necessary is not the issue addressed by Rule 19. Rather, under Rule 19, Jai would be entitled to dismissal if it identified an absent person in whose "absence, the Court cannot accord complete relief among existing parties," or whose absence impairs or impedes Jai's ability to protect its interest, or whose absence leaves a current Defendant at a substantial risk of incurring multiple or inconsistent obligations. *Id.* at *16-17. The Court found that Jai had not identified such an

absent person, and thus Rule 19 did not require dismissal of Jai as a Defendant. Accordingly, the Court denied Defendant's motion to dismiss.

***EEOC v. Roark-Whitten Hospitality 2 LP,* 2017 U.S. Dist. LEXIS 183012 (D.N.Mex. Nov. 2, 2017).** The EEOC brought an action claiming that Defendants discriminated against a group of minority hotel workers in violation of Title VII of the Civil Rights Act of 1964. Defendant Whitten sold Roark-Whitten 2 ("RW2") to Defendant Jai in 2014. The EEOC added Defendant Jai to the lawsuit as a successor employer. Jai subsequently sold the hotel to SGI, LLC ("SGI") and the EEOC added SGI as a successor employee in a third amended complaint. On August 15, 2017, Charles Archuleta, an attorney for Defendants RW2 and Jai, filed a motion to withdraw as counsel. *Id.* at *3. Archuleta contended that he had not been in contact with RW2 since July of 2017 and had not communicated with Whitten since June of 2017. Archuleta stated that Jai did not oppose his motion to withdraw. Accordingly, the Court granted the motion and ordered Defendants RW2 and Jai to obtain new counsel no later than October 2, 2017. *Id.* at *4. Despite the Court's order, no attorney entered an appearance on behalf of RW2 or Jai by October 2, 2017. On October 6, 2017, the EEOC filed a motion asking the Court to issue an order to show cause why RW2 and Jai should not be held in civil contempt and, upon a finding of civil contempt, enter default judgment against them. The Court explained that to determine the appropriate sanction for a violation of the Court's order, it should consider five factors, including: (i) the degree of actual prejudice to the non-offending party; (ii) the amount of interference with the judicial process; (iii) the culpability of the litigant; (iv) whether the Court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (v) the efficacy of lesser sanctions. *Id.* at *8. As to the first factor, the Court found that Defendants' failure to retain replacement counsel prejudiced the EEOC by causing considerable delay, as the case had been pending for three years, and some basic discovery had yet to take place. As to the second factor, the Court opined that the amount of interference with the judicial process was also substantial. The depositions of the principals of RW2 and Jai had not taken place, and depositions of the charging parties had been put on hold. Further, the Court had not been able to reschedule the settlement conference or set additional scheduling order deadlines due to Defendants' lack of counsel. *Id.* at *10. The Court further determined that the culpability for failing to comply with the Court's orders was squarely with RW2 and Jai, and heavily weighed in favor of imposing sanctions. Additionally, the Court found that RW2 and Jai were specifically warned in advance that a default judgment could result from their failure to obtain counsel. Finally, the Court opined that a lesser sanction, such as a monetary sanction or striking certain defenses, would not be effective. *Id.* at *15. The Court found that RW2 and Jai willfully failed to comply with the Court's order to obtain counsel and participate in discovery, which had brought the case to a complete standstill. *Id.* at *15-16. The Court entered a default judgment against RW2 and Jai. The Court concluded that lesser sanctions would not be effective because without counsel for Defendants, this case could not move forward, and Plaintiffs would be left without a way to pursue their claims. Accordingly, the Court granted the EEOC's motion and entered judgement against Defendants.

***EEOC v. State Of New Mexico*, 2017 U.S. Dist. LEXIS 198770 (D.N.Mex. Dec. 4, 2017).** The EEOC brought an action alleging that Defendant discriminated against corrections officers on the basis of their age, and retaliated against them for engaging in protected activity in violation of ADEA. The EEOC also alleged that Defendant engaged in similar discrimination against other aggrieved individuals. Defendant moved to dismiss the claims with respect to the unidentified aggrieved individuals pursuant to Rule 12(b)(6). Defendant argued the claims were insufficient under the *Twombly* standard – from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) – and that the EEOC failed to provide sufficient notice about any additional aggrieved individuals during the pre-filing conciliation period. *Id.* at *4. In support of these arguments, Defendant offered various exhibits relating to the EEOC's investigation and conciliation. *Id.* The EEOC opposed Defendant's motion to dismiss, and stated that if Court was willing to entertain Defendant's evidence regarding pre-filing communications, the EEOC requested that the motion to dismiss be converted to a summary judgment proceeding. *Id.* Defendant favored exclusion of the contested exhibits rather than conversion to ensure any distinct arguments about notice pleading were not subsumed by a converted summary judgment motion. *Id.* at *5. The Court agreed with Defendant's approach, excluded the contested exhibits, and denied the EEOC's motion to convert. The Court stated that the parties would also be permitted to amend their pending summary judgment motions to include any evidence or arguments not considered in the Court's ruling. The Court noted that to demonstrate age discrimination under the ADEA, the EEOC must allege the aggrieved parties: (i) are over 40 years of age; (ii) suffered an adverse employment action; (iii) were qualified for the positions at issue; and (iv) were treated less

favorably than others not in the protected class. *Id.* at *10. A retaliation claim under § 623(d) requires a showing that: (i) the employees engaged in a protected activity; (ii) the employer took a subsequent materially adverse action against them; and (iii) a causal connection exists between the protected activity and the adverse action. *Id.* at *10-11. The Court explained that there was no binding case law addressing how much information the EEOC's complaint must provide about unidentified parties. The Court noted that case law authorities have suggested that the complaint must identify: (i) specific facts about the charging parties; (ii) a description of the group of workers; (iii) a description of the discriminatory conduct; and (iv) the time-frame during which the discrimination occurred. *Id.* at *11. Applying these principles, the Court concluded that the EEOC's complaint stated a plausible claim for relief on behalf of the unidentified aggrieved individuals. The complaint alleged all of the necessary statutory elements of age discrimination and retaliation claims under 29 U.S.C. §§ 623(a)(1) and (d). *Id.* at *13. The Court therefore declined to dismiss the EEOC's complaint under the *Twombly* standard. *Id.* at *14. Defendant also argued that the EEOC's claims on behalf of the unidentified aggrieved individuals violated the "Party Plaintiff" rule contained in 29 U.S.C. § 216(c). *Id.* at *15. By its terms, § 216(c) sets two relevant limitations, including: (i) it terminates an employee's right to become a "Party Plaintiff" in a private employment action when the EEOC files its own suit; and (ii) it establishes when the statute of limitations begins to run on certain FLSA enforcement actions. *Id.* The Court stated that at oral argument, the EEOC offered to file an amended complaint to satisfy the Party Plaintiff rule, if it in fact applied. *Id.* at *16. The Court agreed that the EEOC should identify each aggrieved individual in the record, and ordered the EEOC to file a supplemental pleading. The Court held that a supplemental pleading would be less disruptive at this phase in the litigation because an amendment triggers various obligations and deadlines on the part of Defendant. Accordingly, the Court denied Defendant's motion to dismiss and ordered the EEOC to file a supplement pleading.

***EEOC v. TriCore Reference Laboratories,* 2017 U.S. App. LEXIS 3481 (10th Cir. Feb. 27, 2017).** The EEOC brought an action claiming that Defendant violated the Americans With Disabilities Act of 1990 ("ADA") and Title VII by failing to provide Kellie Guadiana with a reasonable accommodation and by terminating her employment. In 2011, Guadiana began working at the Albuquerque, New Mexico location of Defendant as a phlebotomist. *Id.* at *4. In November 2011, Guadiana requested accommodations to her work schedule and responsibilities due to her rheumatoid arthritis, which she asserted was exacerbated by her pregnancy. After reviewing the doctors' notes that Guadiana submitted in support of her requests, Defendant determined that she could not safely perform the essential functions of her position. Defendant offered Guadiana the opportunity to apply to other positions within the company for which she was qualified and whose essential functions she could perform. After Guadiana did not apply to a new position, Defendant terminated her employment. Guadiana filed a charge of discrimination with the EEOC alleging that Defendant had discriminated against her due to her disability (rheumatoid arthritis) and sex (and pregnancy). *Id.* at *5. Based on evidence uncovered during the EEOC's investigation of the underlying charge, the EEOC informed Defendant that the scope of its investigation was expanded to include a "[f]ailure to accommodate persons with disabilities and/or failure to accommodate women with disabilities (due to pregnancy)." *Id.* at *6. As part of its investigation, the EEOC requested: (i) a complete list of employees who had sought an accommodation for disability, along with their personal identifying information; and (ii) a complete list of employees who had been pregnant while employed at Defendant, including the employees' personal identifying information and whether they sought or were granted any accommodations. The EEOC sought this information for a four-year time-frame. Defendant refused on the grounds that the EEOC did not have an actionable claim of discrimination. The EEOC submitted another letter seeking the same information but limited to a three-year time-frame. After Defendant again refused to comply, the EEOC subpoenaed the information it had sought in its letter. Defendant petitioned the EEOC to revoke the subpoena, arguing it was unduly burdensome and constituted a "fishing expedition." *Id.* at *7. The EEOC denied Defendant petition. The EEOC submitted an application to the District Court requesting an order to show cause why the subpoena should not be enforced. Defendant argued the information requested was not relevant to Guadiana's charge. The District Court noted that to the extent the subpoena sought evidence to show Defendant had a pattern or practice of discrimination, Tenth Circuit case law did not support such a request. Further, to the extent the subpoena sought evidence to compare Guadiana with other employees, the pregnancy request would not provide evidence of relevant comparators. As a result, the District Court denied the EEOC's request. On the EEOC's appeal, the Tenth Circuit affirmed the District Court's decision. As an initial matter, the Tenth Circuit explained that to show subpoenaed information was relevant, the EEOC must establish that it had a realistic expectation that the information requested would advance its investigation, and must further establish the link

between its investigatory power and the charges of discrimination. The Tenth Circuit noted that "[t]he EEOC has not alleged anything to suggest a pattern or practice of discrimination beyond TriCore's failure to reassign Ms. Guadiana." *Id.* at *15. Second, the EEOC argued that the District Court erred in denying the comparator-evidence pregnancy request. While the Tenth Circuit disagreed with the District Court and found that the pregnancy request might uncover information that was potentially relevant to Guadiana's charge, it nonetheless held that the EEOC failed to present the relevance arguments in District Court and therefore failed to meet its burden of explaining how the pregnancy request would offer information relevant to Guadiana's charge. Finally, the Tenth Circuit noted that even if the EEOC provided such an explanation regarding relevancy, its request was nonetheless overbroad because it sought information having no connection to Guadiana's charge, such as information about pregnant employees who never sought an accommodation. Accordingly, the Tenth Circuit affirmed the District Court's denial of the EEOC's request to enforce the subpoena.

(xi) Eleventh Circuit

***EEOC v. Austal,* 2017 U.S. Dist. LEXIS 133302 (S.D. Ala. Aug. 22, 2017)**. The EEOC brought an action to enforce an administrative subpoena relative to a pending EEOC charge alleging that Defendant discriminated against the charging party in violation of the Americans With Disabilities Act ("ADA"). *Id.* at *2. The EEOC asserted that Defendant terminated the charging party for violating its attendance policy when he should have been granted a leave of absence. *Id.* Defendant claimed that the charging party was granted a leave of absence. *Id.* at *3. Defendant provided the EEOC with a list of 88 other employees who had been terminated under its attendance policy, and the EEOC sought to enforce a subpoena requesting additional information about the other employees including whether they had a disability and had requested an accommodation. *Id.* at 1. Defendant moved to quash the subpoena. The Magistrate Judge recommended that the Court deny the EEOC's motion and grant Defendant's motion. *Id.* at *34. Defendant refused to provide additional information and repeatedly asked the EEOC the relevance of the information regarding other employees in determining the individual charging party's charge. It was not until the EEOC brought the matter before the Court that it argued that the information was relevant to the attendance policy under which the charging party was terminated. *Id.* at *27. The Magistrate Judge noted that the EEOC's argument was made too late and should have been supplied to Defendant during the enforcement stage. *Id.* Based upon the EEOC's inability to consistently articulate how the information it sought was relevant, the Magistrate Judge recommended that the Court find that the EEOC had not met its burden of demonstrating that the information subpoenaed was relevant to the individual charge of discrimination. *Id.* at *33. Accordingly, the Magistrate Judge recommended that the Court deny the EEOC's application to enforce the administrative subpoena and grant Defendant's motion to quash subpoena. *Id.* at *34.

***EEOC v. CRST International, Inc.*, 2017 U.S. Dist. LEXIS 180761 (M.D. Fla. Nov. 1, 2017)**. The EEOC bought an action on behalf of the charging party, Leon J. Laferriere, alleging that Defendant discriminated against Laferriere on the basis of his disability, denied him a reasonable accommodation, denied him a job, and retaliated against him in violation of the Americans With Disabilities Act ("ADA"). Defendant filed a motion to dismiss, or in the alternative, to transfer the matter to the U.S. District Court for the Northern District of Iowa. *Id.* at *4. The EEOC argued that the alleged unlawful employment practices were committed in Florida and therefore venue was proper. Laferriere's psychiatrist prescribed an emotional support dog to help him cope with his post-traumatic stress and mood disorders from his military service. Laferriere applied for a truck driver position with Defendant, and was informed that because he had no prior experience, if hired, he would be required to do over-the-road training. Laferriere informed Defendant that he wanted to bring the support dog with him during his training. Defendant explained that it could not force Laferriere's lead driver to take the dog on the truck when it came time to complete the over-the-road training. *Id.* at *5. Defendant attempted to make other arrangements to accommodate Laferriere, but ultimately it did not hire him. The Court noted that the first statutory basis for venue focuses on the judicial district in which the unlawful practice was committed. Defendant argued that venue in Florida was not proper under this prong, as the allegedly unlawful employment practices occurred in Iowa. In support of its motion, Defendant provided the declarations of Nichole Moreland and Morris Schneider. Moreland explained that all of her contact with Laferriere, including her review of his on-line application and discussions regarding the driver training program occurred from her office in Cedar Rapids. Similarly, Schneider conducted all of his communications regarding alternate arrangements for Laferriere from his office in Cedar Rapids. *Id.* The EEOC alleged that the unlawful employment practices in this case consisted of "a series of events that involve conduct both in Iowa and in Florida." *Id.* The "events" the EEOC alleged

occurred in Florida included Laferriere's review of the job description for the position; his completion of his job application; participation in telephone and email communications with Defendant; attending driving school in Jacksonville at Defendant's direction; requesting a reasonable accommodation while in Florida; and objecting to Defendant that its no-pet policy was discriminatory. *Id.* at *8. The Court found that the EEOC neither alleged nor produced any evidence suggesting that the practice of denying Laferriere the position in Oklahoma City took place in the Middle District of Florida. The Court held that the acts the EEOC referenced as occurring in Florida merely comprised the events leading up to the allegedly unlawful employment practice. *Id.* at *9. The Court stated that the decision not to hire Laferriere because of his disability was the allegedly unlawful decision, and that decision took place in Iowa. *Id.* at *10. Accordingly, the Court granted the motion to transfer.

***EEOC v. Doherty Enterprises, Inc.,* 2017 U.S. Dist. LEXIS 34688 (S.D. Fla. Feb. 28, 2017).** The EEOC brought an action seeking to enjoin Defendants from using its arbitration agreement to deter its employees from filing charges or cooperating with the EEOC or state fair employment practices agencies. According to the allegations, Defendants had conditioned employment on the agreement of the applicants and employees to sign the arbitration agreement. The EEOC filed a second motion to compel discovery responses and documents, which the Court denied. Previously, on July 20, 2016, the EEOC moved to compel several items, including "[f]or the period of April 23, 2012-April 23, 2015, a copy of any internal complaint of employment discrimination either: (i) made by any applicant or employee via Defendant's hotline; or (ii) made by any applicant or employee to any person and made known to Defendants' human resources personnel in accordance with Defendant's EEO policies." *Id.* at *2. The Court granted the motion with respect to the EEOC's discovery, as it sought "complaints made to Defendant's human resources personnel, but only for the time period from July 2013 through January 2015." *Id.* The EEOC subsequently claimed that Defendant provided responsive information regarding 39 internal complaints of discrimination, but the Commission believed that only a few of those internal complaints could possibly have related to harassment because, at the deposition of Defendant's 30(b)(6) representative, Kathleen Coughlin, she explained that she had produced complaints of discrimination, but not complaints of harassment. The EEOC also sought Rule 37 sanctions against Defendant. Defendant argued that the Court only ordered it to produce internal complaints of employment discrimination and that Coughlin testified at her deposition that Defendant did produce all internal complaints of employment discrimination from July 2013 to January 2015 as ordered by the Court. *Id.* at *3. Defendant contended that completing a search for all file documents with the word "harassment" in them would return irrelevant documents and would be burdensome. *Id.* The EEOC argued that Defendant should have known that harassment is a form of discrimination as this has been established by the relevant case law. *Id.* at *4. The EEOC asserted that it sought the documents to refute Defendant's affirmative defenses. *Id.* at *5. Defendant, on the other hand, argued that requiring it to conduct a further search of the large number of paper records in its possession would be overly burdensome. *Id.* Defendant asserted that if the EEOC wanted to include documents reflecting harassment complaints on the basis of a protected category, it should have properly and specifically requested such documents. *Id.* at *6. The Court agreed with Defendant and found that the EEOC should have specifically sought documents regarding harassment complaints based on a protected category if that was what it wanted. *Id.* at *7. The Court further noted that good faith conferral between the parties could have resolved the issue, but that the parties refused to confer in good faith throughout this case. The Court further stated that discovery was already closed and that the parties had filed motions for summary judgment. *Id.* at *8. Accordingly, the Court denied the EEOC's motion to compel discovery.

***EEOC v. Doherty Enterprises, Inc.,* 2017 U.S. Dist. LEXIS 34787 (S.D. Fla. Feb. 28, 2017).** The EEOC brought an action seeking to enjoin Defendants from using an arbitration agreement to deter employees from filing charges or cooperating with the EEOC or state fair employment practices agencies. According to the allegations, Defendants had conditioned employment on the agreement of applicants and employees to sign the arbitration agreement. The EEOC filed a motion for a protective order prohibiting the deposition of the EEOC's lawyers, Robert Weisberg and Kristen Foslid*. Id.* at *1. The Court found that the EEOC had shown good cause for the Court to enter a protective order as to the deposition of Weisberg because his deposition would constitute wasteful and unnecessary discovery disproportionate to the issues in the case. *Id.* at *11. The Court noted that Weisberg was the EEOC's Rule 30(b)(6) representative, and he had already participated in a lengthy deposition as the EEOC's corporate representative. Although the Court recognized that a Rule 30(b)(6) deposition is distinct from a deposition given in one's individual capacity, in this case it appeared that nothing

further could be asked of Weisberg that was not asked in the Rule 30(b)(6) deposition and that would be relevant and would not invade the attorney-client privilege, the work-product privilege, and/or the government deliberative process privilege. *Id.* The Court determined that the personal deposition of Weisberg would appear to amount to nothing more than harassment and an improper fishing expedition. *Id.* at *13. Accordingly, the Court granted the motion with respect to Weisberg. The Court found that Foslid was different, however, for numerous reasons, including the facts that: (i) she signed and verified the EEOC's interrogatory responses; and (ii) she was the only individual who had personal knowledge about how she herself searched for Defendant's arbitration agreement on the internet. *Id.* at *14. The Court noted that one of the discrete issues about which Defendant sought to depose Foslid was the EEOC's fourth supplemental objections and answers to Defendant's first set of interrogatories. *Id.* at *15. Defendant argued that it should be permitted to have Foslid testify under oath as to why the EEOC changed its supplemental interrogatory response so recently. *Id.* at *16. The Court found that that this specific information sought by Defendant was relevant and proportional. *Id.* The Court also determined that the need for the information outweighed the dangers of deposing the EEOC's attorney since Foslid chose to draft and sign the interrogatory responses on the EEOC's behalf. *Id.* at *17. The Court held that a deposition of Foslid was the only practical means available of obtaining the information as to why the interrogatory response was changed. Thus, the Court ruled that Foslid should be required to testify on this limited issue.

***EEOC v. GMRI, Inc.,* Case No. 15-CV-20561 (S.D. Fla. Mar. 10, 2017).** The EEOC brought suit alleging that Defendant engaged in discrimination and retaliation in violation of the ADEA. The parties disagreed on whether communications between the EEOC and persons/witnesses for whom the EEOC sought relief were privileged. As no Eleventh Circuit case law precedent existed, the Court requested that the parties submit notices of supplemental authority. *Id.* at 1. Based on the case law submitted, the Court adopted the view that although there was no formal attorney-client relationship between the EEOC and the witnesses/prospective employees, the EEOC counsel were acting as *de facto* counsel for the witnesses. However, the Court noted that the privilege belonged to the client, and therefore a client may waive the protection. The Court explained that the EEOC could not force a witness/person for whom relief is sought to maintain the privilege and it could not prohibit that person from expressly and affirmatively advising that he or she did not want the EEOC to act as counsel or on his or her behalf. *Id.* at 2. Accordingly, the Court stated that communications between the EEOC and the persons for whom it was seeking relief were privileged and Defendant was not entitled to obtain discovery about the communication unless these persons waived that privilege. The Court further noted that Defendant would need to demonstrate the person actually did not want the EEOC to represent him or her in order to obtain discovery under a waiver theory. *Id.* at 3.

***EEOC v. GMRI, Inc.,* Case No. 15-CV-20561 (S.D. Fla. Oct. 12, 2017).** The EEOC brought suit alleging that Defendant engaged in discrimination and retaliation in violation of the ADEA at over 30 restaurants. The EEOC filed a motion for spoliation and Rule 37(e) sanctions on the ground that Defendant failed to preserve documents and electronically-stored information ("ESI"). The Court held a hearing on the motion and determined that it must conduct a supplemental evidentiary briefing to rule on the EEOC's motion. Defendant contended that it was under a duty to preserve the information and documents for only one restaurant because the two charges that triggered the EEOC's investigation concerned that sole location. *Id.* at 1. The EEOC argued that Defendant was under a duty to preserve for all of Defendant's restaurants in the U.S. because the scope of the investigation expanded into a national investigation encompassing all restaurants. *Id.* at 1-2. In support of its position, the EEOC relied on a letter from EEOC investigator Katherine Gonzalez on August 31, 2011 in which she purportedly advised Defendant that the scope of the investigation had expanded *Id.* at 2. Defendant contended that it did not receive the letter and noted several unusual aspects about it, including: (i) the letter had an incorrect address; (ii) it was not signed by Investigator Gonzalez; (iii) its records did not contain the letter or a copy; and (iv) it received another letter one day later, on September 1, 2011, which was signed by Investigator Gonzalez. *Id.* Defendant argued that it never knew the EEOC's investigation was national until the lawsuit was filed in February of 2015. *Id.* at 4. However, the EEOC also submitted a letter from Defendant's in-house paralegal in January of 2012, which stated that evidence Defendant submitted of employee rosters showing that 16.4% of employees were over the age of 40 "refutes the allegation that Defendant maintains a nationwide hiring policy that discriminates against individuals over the age of 40." *Id.* Accordingly, the Court determined that Investigator Gonzalez and Defendant's in-house paralegal were important fact witnesses and should testify at a

hearing. The Court therefore scheduled a follow-up supplemental evidentiary hearing and declined to rule on the EEOC's motion.

***EEOC v. GMRI, Inc.,* 2017 U.S. Dist. LEXIS 181011 (S.D. Fla. Nov. 1, 2017).** The EEOC brought an action alleging that Defendant discriminated against Anthony Scornavacca, Hugo Alfaro, and a group of applicants over the age of 40 in violation of the Age Discrimination in Employment Act ("ADEA"). *Id.* at *11. The EEOC's administrative investigation focused on the hiring location where Scornavacca and Alfaro interviewed. Subsequently, the investigation extended to other hiring decisions at other restaurants. The EEOC filed a nationwide lawsuit after the parties were unable to resolve the matter after the conclusion of the administrative investigation. After discovery, Defendant filed a motion for summary judgment and the EEOC filed a motion for spoliation and Rule 37(c) sanctions. *Id.* at *3. The parties disagreed as to when and if Defendant was on notice that the EEOC was expanding its investigation to include Defendant's hiring practices throughout the nation. *Id.* at *8. The EEOC alleged that Defendant failed to preserve and intentionally destroyed paper applications and interview booklets and failed to preserve electronically-stored emails regarding the specific hiring decisions challenged in the lawsuit. *Id.* at *3. The EEOC sought an order: (i) prohibiting Defendant from introducing evidence about the content of lost emails; (ii) permitting the EEOC to introduce evidence of the email destruction; (iii) allowing the EEOC to argue to the jury that the lost emails would have contained information supporting its claim; (iv) authorizing the Court to consider the lost email arguments for summary judgment purposes; and (v) permitting a permissive inference, both at the summary judgment stage and at trial, that the emails, had they been preserved, would have mentioned that Defendant preferred younger applicants. *Id.* at *4. The Magistrate Judge denied the EEOC's motion in part and granted it in part. After two hearings where witnesses testified, the Magistrate Judge denied the EEOC's request for permissible inferences at the summary judgment and trial stages. *Id.* at *6. However, the Magistrate Judge ruled that the EEOC could present evidence of the purported destruction of the missing documents and emails in the trial and argue to the jury that Defendant acted in bad faith as defined by Rule 37(e)(2) and that if the jury agreed with the EEOC then the jury could infer that the loss of the electronically-stored information was unfavorable to Defendant. *Id.* As a result, the Magistrate Judge ruled that the parties would be able to introduce evidence of the missing documents and electronically-stored information and the circumstances surrounding the destruction or absence of the records, as well as the possible motives for their alleged destruction. *Id.* at *8. In addition, the Magistrate Judge denied the EEOC's request for a permissible inference as to the paper applications and interview booklets because the EEOC failed to establish that they were crucial to its case or that Defendant acted in bad faith to deprive the EEOC of the information's use in litigation. *Id.* at *7. However, with respect to the email evidence, the Magistrate Judge ordered that the EEOC, pursuant to Rule 37 (e)(2), would be allowed to seek a permissible inference, if it persuaded a jury that Defendant acted in bad faith, to deprive the EEOC of the email evidence's use in the litigation. *Id.* at *89.

***EEOC v. KB Staffing, LLC*, 2017 U.S. Dist. LEXIS 37938 (M.D. Fla. Mar. 16, 2017).** The EEOC brought an action challenging Defendant's use of a pre-offer health questionnaire that applicants were required to fill out prior to placement in any position. The EEOC asserted that from 2011 to 2013, Defendant required all applicants to complete the same pre-employment medical questionnaires in violation of the ADA. Further, the EEOC alleged that the applicants "suffered damages" as a result of Defendant's use of the pre-employment medical questionnaire. *Id.* at *3. Defendant moved to dismiss and contended that the EEOC was required to allege actual damages suffered by the applicants. The EEOC countered that Defendant was not entitled to judgment on the pleadings where the facts in EEOC's complaint plausibly establish a violation of § 102(d) of the ADA. The Court noted that under the ADA, a job applicant, whether or not disabled, must "show some damages" resulting from the prospective employer's violation. *Id.* To state a plausible claim for relief, "damages liability under § 12112(d)(2)(A) must be based on something more than a mere violation of that provision" and "there must be some cognizable injury-in-fact of which the violation is a legal and proximate cause for damages to arise." *Id.* at *4. Defendant contended that the EEOC has failed to allege that any applicants suffered any damages. Defendant pointed out that the EEOC's claim that the class members "suffered damages" was nothing more than a conclusion, and therefore did not meet the applicable pleading standards. *Id.* The Court found that the EEOC alleged only a conclusion that individuals subjected to Defendant's unlawful practices in connection with its obtaining medical information from applicants for employment have suffered damages. *Id.* at *4-5. The Court held that the EEOC's allegation pled no more than a conclusion consistent with Defendant's liability, and

therefore fell short of the line between possibility and plausibility of entitlement to relief. *Id.* at *5. The Court determined that because the EEOC failed to allege "enough facts to state a claim to relief that is plausible on its face" on behalf of the purported group of applicants, its claim was insufficient as a matter of law. *Id.* Therefore, the Court found that the EEOC's claim brought on behalf of the applicants should be dismissed. However, the Court stated that there was a distinction between the EEOC's purported claim on behalf of a group of applicants, and a claim asserted on its own. The EEOC contended that it suffered injury sufficient to confer standing to bring its own claim. The Court held that the EEOC may assert a claim in its own right, deriving standing directly from the statute and its own "statutory enforcement authority." *Id.* at *6. Accordingly, the Court granted Defendant's motion to dismiss as to the claim brought by the EEOC on behalf of the purported group of applicants and denied the motion with respect to the EEOC's own claim.

***EEOC v. Labor Solutions Of AL, LLC*, 2017 U.S. Dist. LEXIS 38619 (N.D. Ala. Mar. 17, 2017).** The EEOC investigated charges of discrimination against East Coast Labor Solutions, LLC ("East Coast"), alleging that East Coast discriminated against the charging parties on the basis of their national origin and that it failed to accommodate their disabilities. Following its investigation, the EEOC issued a letter of determination to East Coast finding reasonable cause to believe that Title VII and the ADA were violated with respect to the charging parties and a group of current and former employees. *Id.* at *8. The EEOC thereafter unsuccessfully attempted to conciliate with East Coast. *Id.* In November 2013, East Coast ceased operations. Defendant Labor Solutions of Alabama, LLC ("LSA") was formed in October 2014. Despite the fact that Defendant was not in existence when the alleged misconduct occurred, the EEOC filed a lawsuit alleging that Defendant subjected claimants to discriminatory treatment based on their national origin and failed to accommodate their disabilities. While East Coast partnered with its owner Labor Solutions (a different entity than Defendant), the only entity named in the lawsuit was Defendant. Thereafter, Defendant moved to dismiss, arguing that the EEOC failed to allege that Defendant employed claimants, and therefore the case should be dismissed for lack of subject-matter jurisdiction and failure to state a claim under Title VII and the ADA. *Id.* at *9. Defendant also argued that the EEOC failed to exhaust its administrative prerequisites, noting that it was not named in the original EEOC charge or in any amendment thereto. *Id.* The Court granted Defendant's motion to dismiss. First, the Court addressed the EEOC's argument that it alleged plausible facts to infer so-called "successor liability." *Id.* at *11. After thoroughly examining various Eleventh Circuit precedents regarding successor liability, the Court explained that "[a]lthough the Court agrees with the EEOC that successorship does not have to be conclusively determined at this stage of the litigation, that does not absolve the agency from pleading facts which make its existence plausible." *Id.* at *28-29. The Court determined there were "no facts suggesting substantial (or even any) continuity in business operations from East Coast to LSA. The complaint contains no allegations that there was any sale of East Coast, or any of its assets, to LSA." *Id.* at *30. Finding there was no successor liability, the Court further reasoned that: (i) East Coast had been defunct nearly an entire year before Defendant was formed; (ii) there was no allegation that Defendant employed substantially the same workforce and/or supervisors as East Coast; (iii) the Complaint did not allege that Defendant operated at the same location as East Coast; (iv) there was no allegation as to whether East Coast could have provided relief before or after any alleged sale or transfer; and (v) there was no allegation as to whether Defendant could provide any relief now. *Id.* The Court further rejected the EEOC's argument that East Coast and Defendant were both temporary staffing agencies and that both entities shared the same managing officers, principal office address, and company email accounts; the Court opined that this was not enough to demonstrate continuity when one considered the break in time between when East Coast ceased operations and Defendant began operations. *Id.* at *30-31. Finally, the Court concluded that even if the complaint had plausibly alleged that Defendant was the successor to East Coast, it should still be dismissed since it was undisputed that Defendant was not named in the original EEOC charge, or in any subsequent amendment. *Id.* at *32. Accordingly, the Court granted Defendant's motion to dismiss, but noted the EEOC could file an amended complaint to attempt to cure its deficiencies.

***EEOC v. Labor Solutions Of AL, LLC*, Case No. 16-CV-1848 (N.D. Ala. April 18, 2017).** The EEOC investigated charges of discrimination against East Coast Labor Solutions, LLC ("East Coast"), alleging that East Coast discriminated against multiple employees on the basis of their national origin and failed to accommodate their disabilities. The Court previously held that the EEOC failed to plausibly allege that Defendant was the successor to East Coast and dismissed the action. *Id.* at 1. The Court allowed the EEOC to amend its complaint

within 21 days to state any facts that may be appropriate to the inquiry. Further, the Court allowed the EEOC to amend in order to allege facts that may be relevant to whether the EEOC exhausted its administrative remedies to Defendant. The EEOC filed an amended complaint adding three new Defendants, including East Coast Labor Solutions, LLC; Labor Solutions, LLC; and East Coast Labor Solutions of West Virginia. LLC. *Id.* The Court found that the amended complaint was filed well past the 21 day deadline. Further, the Court determined that the EEOC failed to demonstrate that it had any opposing parties' written consent to file the amended complaint. *Id.* at 2. Finally, the Court held that its previous order did not allow amendment for the purpose of adding Defendants. *Id.* Accordingly, the Court ordered that the amended complaint be stricken. The Court stated that the EEOC could file a new amended complaint that complies with the Court's prior order or it could file a motion seeking leave to file an amended complaint that exceeds the Court's prior order. *Id.* at 3.

***EEOC v. Labor Solutions Of AL, LLC*, 2017 U.S. Dist. LEXIS 180729 (N.D. Ala. Nov. 1, 2017).** The EEOC investigated charges of discrimination against East Coast Labor Solutions, LLC ("East Coast"), alleging that East Coast discriminated against multiple employees on the basis of their national origin and that it failed to accommodate their disabilities. The Court had previously held that the EEOC failed to plausibly allege that Defendant was the successor to East Coast and dismissed the action. *Id.* at *1. However, the Court allowed the EEOC to amend its complaint within 21 days to state any facts that may be appropriate to the inquiry. Further, the Court allowed the EEOC to amend in order to allege facts that may be relevant to whether the EEOC exhausted its administrative remedies as to Defendant. The EEOC subsequently filed an amended complaint adding three new Defendants, including East Coast Labor Solutions, LLC, Labor Solutions, LLC, and East Coast Labor Solutions of West Virginia, LLC. *Id.* The Court struck the amended complaint, finding that: (i) it was filed well past the 21 day deadline; (ii) that the EEOC failed to demonstrate that it had any opposing parties' written consent to file the amended complaint; and (iii) that its previous order did not allow amendment for the purpose of adding Defendants. *Id.* The EEOC then filed a motion for leave to file an amended complaint, which the Court granted. The proposed amended complaint contained pertinent factual allegations relevant to whether the EEOC satisfied the administrative prerequisites prior to filing suit. *Id.* at *3. Defendant argued that filing the amended complaint would be futile as to Defendants East Coast Labor Solutions, LLC, Labor Solutions, LLC, and East Coast Labor Solutions of West Virginia, LLC. *Id.* at *7. Specifically, Defendant asserted that, as to these entities, the EEOC failed to exhaust the administrative prerequisites to filing suit. The Court noted that in the original complaint the EEOC alleged that "more than 30 days prior to the institution of this lawsuit, the Charging Parties filed charges of discrimination with the Commission alleging violations of Title VII and the ADA by Defendant East Coast." *Id.* The new allegations in the proposed amended complaint asserted that claimants filed the charge "alleging violations of Title VII and the ADA by Defendants." *Id.* at *8. The proposed complaint further stated that "Claimants, in their charges, identified their employer as "East Coast Labor Solutions, Inc." and the EEOC did not argue that any entity other than East Coast was actually named. *Id.* Defendant contended that the EEOC failed to plausibly plead that allowing East Coast Labor Solutions, LLC, Labor Solutions, LLC, and East Coast Labor Solutions of West Virginia, LLC to be named as Defendants would fulfill the purposes of Title VII. In response, the EEOC argued that the more liberal standard of Rule 9(c) should apply. Rule 9(c) provides "in pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity." The Court stated that the EEOC pled in the proposed amended complaint that "all conditions precedent to the institution of this lawsuit have been fulfilled." *Id.* at *11. The Court held that this satisfied the EEOC's burden pursuant to Rule 9(c). Accordingly, the Court granted the EEOC's motion for leave to file an amended complaint.

***EEOC v. West Customer Management Group, LLC,* 678 Fed. Appx. 836 (11th Cir. 2017).** The EEOC brought an action alleging national origin discrimination on behalf of Derrick Roberts, whom Defendant, a customer service provider, allegedly did not hire as customer service representative based on his thick Jamaican accent. At trial, the jury returned a verdict for Defendant, finding that Roberts was not qualified for the customer service representative position. Defendant then moved for an award of attorneys' fees and expenses under Title VII, arguing that the EEOC's action was frivolous, unreasonable, and groundless. The District Court granted Defendant's motion for attorneys' fees. On appeal, the Eleventh Circuit reversed the District Court's decision The Eleventh Circuit found that the District Court abused its discretion in awarding attorneys' fees and costs to Defendant because the EEOC's case was not "so patently devoid of merit" as to justify an award. *Id.* at

838. The Eleventh Circuit opined that the District Court previously had denied Defendant's motion for summary judgment, which illustrated that the EEOC offered sufficient evidence to create a triable issue of discrimination. *Id.* at 839. The Eleventh Circuit further opined that the District Court held trial on the merits, and although the EEOC's case at trial may have been weak, it was not frivolous. The Eleventh Circuit observed that the EEOC offered evidence that: (i) Defendant did not want to hire Roberts because of Roberts' accent; (ii) Roberts' accent did not interfere with his ability to communicate; (iii) Defendant treated Roberts differently than other applicants by refusing to inform Roberts that he could reapply with Defendant; and (iv) Defendant, over time, had revised its rationale for rejecting Roberts' application. *Id.* The Eleventh Circuit found that, taken together, the evidence provided support for a finding that Defendant denied Roberts employment based on his accent and national origin. Therefore, the Eleventh Circuit concluded that because the EEOC's case was not "patently devoid of merit," it must reverse the District Court's award of attorneys' fees and costs to Defendant. *Id.*

(xii) District Of Columbia Circuit

No reported decisions.

(xiii) U.S. Supreme Court

***EEOC v. McLane Co.,* 137 S. Ct. 1159 (2017).** The EEOC brought an action on behalf of charging party, a "cigarette selector," which was a physically demanding job that required employees to lift, pack, and move large bins of products. The EEOC alleged that McLane violated Title VII when it terminated her employment. *Id.* at 1165-66. After charging party returned from three months of maternity leave, she was required to undergo a physical evaluation that was required for all new employees and employees returning from medical leave. *Id.* at 1165. The charging party tried three times to pass the evaluation, but failed each time. *Id.* McLane then terminated her employment. The charging party claimed that she was terminated on the basis of her gender. *Id.* During the investigation of her charge of discrimination, the EEOC requested, among other things, a list of employees who were requested to take the physical evaluation. *Id.* Although McLane provided a list that included each employee's gender, role at the company, evaluation score, and the reason each employee had been asked to take the evaluation, the company refused to provide "pedigree information" relative to names, social security numbers, last known addresses, and telephone numbers of employees on that list. *Id.* In the process of negotiating the scope of information that would be provided, the EEOC learned that McLane used its physical evaluation on a nationwide basis. The EEOC therefore expanded the scope of its investigation to be nationwide in scope. The District Court refused to order the production of pedigree information, holding that it was not "relevant" to the charges at issue because that information (or even interviews of the employees on the list provided by McLane) could not shed light on whether an evaluation represented a tool of discrimination. *Id.* at 1066. On appeal, the Ninth Circuit reviewed the District Court's decision *de novo* and held that the District Court had erred in finding the pedigree information irrelevant to the EEOC's investigation. *Id.* On further appeal, the U.S. Supreme Court granted *certiorari* to resolve the disagreement among the Courts of Appeals regarding the appropriate scope of review on appeal. *Id.* The EEOC and McLane both agreed that the District Court's decision should be reviewed under an abuse-of-discretion standard. *Id.* The Supreme Court therefore appointed an *amicus curiae* to brief the Ninth Circuit's use of *de novo* review. *Id.* The Supreme Court began its analysis by noting that in the absence of explicit statutory command, the proper scope of appellate review is based on two factors, including: (i) the history of appellate practice; and (ii) whether one judicial actor is better positioned than another to decide the issue in question. *Id.*at 1166-67. Regarding the first factor, the Supreme Court noted that abuse-of-discretion review was the longstanding practice of the Courts of Appeals when reviewing a decision to enforce or quash an EEOC administrative subpoena. *Id.* at 1167. The Supreme Court noted that Title VII had conferred on the EEOC the same subpoena authority that the National Labor Relations Act had conferred on the National Labor Relations Board ("NLRB"), and decisions of District Courts to enforce or quash an NLRB subpoena were reviewed for abuse-of-discretion. Regarding the second factor, the Supreme Court held that the decision to enforce or quash an EEOC subpoena is case-specific, and one that does not depend on a neat set of legal rules. Rather, a District Court addressing such issues must apply broad standards to "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Id.* In particular, in order to determine whether evidence is relevant, the District Court has to evaluate the relationship between the particular materials sought and the particular matter under investigation. *Id.* The Supreme Court reasoned that these types of fact-intensive considerations were more appropriately done by District Courts rather than Courts of Appeals. The *amicus*

curiae argued that the District Court's primary role is to test the legal sufficiency of the subpoena, which does not require the exercise of discretion. *Id.* at 1168. The Supreme Court held that this view of the abuse-of-discretion standard was too narrow. *Id.* at 1168-69. The Supreme Court explained that the abuse-of-discretion standard is not only applicable where a decision-maker has a broad range of choices as to what to decide, but also extends to situations where it is appropriate to give a District Court's decision an unusual amount of insulation from appellate revision for functional reasons. *Id.* at 1169. The Supreme Court found that those functional considerations weighed in favor of the abuse-of-discretion standard rather than a *de novo* standard of review. *Id.* Because the Ninth Circuit did not apply that standard on appeal, the Supreme Court remanded the case to the Ninth Circuit for further proceedings.

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

***Knox, et al. v. John Varvatos*, 2017 U.S. Dist. LEXIS 171705 (S.D.N.Y. Oct. 17, 2017).** Plaintiff, a former sales associate, filed a collective action alleging that Defendant, a clothing designer and retail store, provided a clothing allowance of $12,000 a year to male employees and not female employees in violation of the Equal Pay Act ("EPA"). Plaintiff moved for conditional certification of a collective action, which the Court granted in part and denied in part. *Id.* at *1. Plaintiff alleged that under Defendant's clothing policy, male sales employees working at Defendant-operated stores were provided with a $12,000 annual allowance to purchase branded clothing to wear to work. *Id.* at *4. In support of her allegations, Plaintiff supplied a written employee dress code which addressed itself to "all employees working in our retail locations" and stated that "all male retail employees receive a clothing allowance." *Id.* Plaintiff also provided an email exchange she had with an employee in Defendant's human resources department, in which the employee informed Plaintiff that Defendant does not "provide a clothing allowance for female employees." *Id.* Defendant asserted that its policy was "giving a credit to male sales professionals who, unlike female sales professionals, are required to wear expensive menswear when working." *Id.* at *5. Plaintiff argued that she was similarly-situated to all female sales associates employed by Defendant nationwide because Defendant subjected them to the same clothing allowance policy in violation of the EPA. *Id.* at *8. The Court opined that Plaintiff made the requisite modest factual showing in light of her own observations and Defendant's numerous statements that the male-only clothing allowance policy existed. *Id.* at *12. The Court found that the dress policy stated unequivocally that all "male" employees receive a clothing allowance, and applied to "all employees working in retail locations," thereby indicating that the clothing allowance policy was applicable to all sales associates employed at any one of Defendant's 22 U.S.-based stores. *Id.* Defendant also argued that conditional certification was inappropriate because Plaintiff had not demonstrated that potential opt-in Plaintiffs performed "equal work" to either Plaintiff or to male comparators. *Id.* at *15. However, the Court stated that the question for the "similarly-situated" inquiry was not whether Plaintiff's job duties are identical to other potential opt-in Plaintiffs, but, rather, whether the proposed Plaintiffs were

similarly-situated under 29 U.S.C. § 216(b) with respect to their allegations that the law has been violated. *Id.* at *15-16. The Court ruled that Plaintiff made the requisite modest factual showing that she and potential opt-in Plaintiffs were similarly-situated with respect to Plaintiff's allegation that Defendant's policy to provide the clothing allowance to male sales associates and not to female sales associates violated their rights under the EPA. *Id.* at *16. Finally, Defendant disputed Plaintiff's proposed collective action as overbroad and too vaguely defined. *Id.* at *17. The Court held that it could address Defendant's concerns in the manner in which notice under 29 U.S.C. § 216(b) would be sent to the proposed collective action members. Accordingly, the Court granted Plaintiff's motion for conditional certification, with modifications to the proposed notice to address Defendant's concerns.

(iii) Third Circuit

***Bryan, et al. v. Government Of The Virgin Islands*, 2017 U.S. Dist. LEXIS 19843 (D.V.I. Feb. 13, 2017).** Plaintiffs, a group of current and former government employees in the U.S. Virgin Islands brought an action alleging Defendant violated the Age Discrimination in Employment Act ("ADEA") and territorial law of the Virgin Islands when it required older employees to pay additional salary amounts into their retirement funds. Plaintiffs sought class certification of their territorial law claims under Rule 23 and conditional certification of their ADEA claims under 29 U.S.C. § 216(b). Plaintiffs sought class certification under Rule 23(b)(3). The Court found that Plaintiffs met the requirements of Rule 23(a) and Rule 23(b)(3). The Court thereby granted class certification for Plaintiffs' territorial law claims for a class defined as all employees who attained 30 or more years of credited service as of July 5, 2011, who did not retire as of September 30, 2011, and thereafter paid an additional 3% of their salary into the retirement fund. *Id.* at *4-5. The Court found that the named Plaintiffs were adequate class representatives and it approved Plaintiffs' counsel as class counsel. *Id.* at *5. The Court also found that Plaintiffs met the fairly lenient standard for conditional certification of their ADEA claims by making a modest factual showing that the employees identified were similarly-situated to Plaintiffs. The Court requested that the parties submit a proposed notice form in short order. The Court also ordered Defendant to provide Plaintiffs with the names, last known addresses, email addresses, and telephone numbers of potential Plaintiffs. *Id.* at *7.

(iv) Fourth Circuit

No reported decisions.

(v) Fifth Circuit

No reported decisions.

(vi) Sixth Circuit

No reported decisions.

(vii) Seventh Circuit

***Dayton, et al. v. Oakton Community College,* 2017 U.S. Dist. LEXIS 74916 (N.D. Ill. May 17, 2017).** Plaintiff, a former part-time faculty member, filed an action on behalf of himself and a proposed collective action of similarly-situated part-time and adjunct faculty of the college, alleging that the implementation of a new retirement policy violated the ADEA. Defendant, a two-year community college, employs full-time, part-time, and adjunct faculty to teach the courses it offers. Plaintiffs are not covered by a collective bargaining agreement, and are not eligible for tenure. State Universities Retirement Systems ("SURS") is a pension plan that provides retirement benefits to eligible individuals who are or were employed by covered public Illinois state universities or community colleges. Defendant is one of the public community colleges covered by SURS. In 2012, Illinois amended its Return to Work Law to place additional earnings limitations on SURS annuitants who return to work for covered colleges and universities over age 60. Under the amended law, an employer must pay a financial penalty to SURS if the employer employs an "affected annuitant" after August 1, 2013. Following the passage of the amended Return to Work Law, Defendant decided that it would not re-employ any SURS annuitants who became affected annuitants under the law so that it could avoid paying the penalty for employing affected annuitants. *Id.* at *5-6. Approximately 79 faculty and staff members became ineligible for employment as a result of the college's decision. *Id.* at *7. Plaintiff asserted that Defendant's decision to terminate the annuitants'

employment because of their status as annuitants violated the ADEA and the Illinois Constitution. Plaintiff moved to certify that group as an ADEA collective action and Rule 23 class action including all part-time and adjunct faculty who were denied employment at Oakton Community College as the result of its policy to not employ or re-employ SURS annuitants and who are not affected annuitants. *Id.* at *8. Defendant argued that collective action certification would be inappropriate because each purported collective action member's claim was different from the claims of other collective action members and required individualized assessment. The Court concluded that the putative collective action members shared sufficiently similar factual and employment settings to justify conditional certification of a collective action. The Court stated that although their likelihood of being assigned courses, and the number of courses they might be assigned might differ, it was undisputed that Defendant's decision not to employ SURS annuitants was made on a college-wide basis and was not based on any particular annuitant's individual circumstances such as his or her job performance, class schedule, or availability to teach classes. *Id.* at *12. Thus the questions of whether the college's decision had a disparate impact on older faculty and whether this violated the ADEA were questions common to each collective action member's claims. *Id.* Defendants argued that Rule 23(a)'s commonality requirement was not satisfied because the issue of whether each proposed class member would continue to receive course assignments, and could thus assert a claim for damages, depended upon individualized circumstances. *Id.* at *16. The Court opined that Plaintiffs' claims concerned a single decision applied college-wide. Thus, the Court found that each of the proposed class members suffered the same injury, irrespective of the damages to which each member might be entitled, and the determination of whether the college's decision that resulted in their injury violated the ADEA or the Illinois Constitution may be determined in one stroke. Defendant also contended that Plaintiff's claims were not typical of those of proposed class members because each putative class member's entitlement to damages would depend upon his or her individual circumstances. *Id.* at *17. The Court found that though the putative class members' damages might be different, Defendant's liability to each of them was based on the same alleged employment practice. Defendant further argued that Plaintiff could not satisfy Rule 23(b)(3)'s predominance requirement because questions of individual damage calculations would inevitably overwhelm questions common to the class. *Id.* at *19. The Court found that the calculation of damages in this case appeared unlikely to be overly complicated, as each putative class member's prior course load and wage rate could be easily identified. The Court thereby granted Plaintiffs' motion for class certification of the Illinois Constitution claims and conditional certification of their ADEA claims.

(viii) Eighth Circuit

No reported decisions.

(ix) Ninth Circuit

No reported decisions.

(x) Tenth Circuit

No reported decisions.

(xi) Eleventh Circuit

***Jones, et al. v. RS&H, Inc.,* 2017 U.S. Dist. LEXIS 60088 (M.D. Fla. April 20, 2017).** Plaintiff, a former employee, alleged that Defendant violated the ADEA when it terminated a group of employees as part of a reduction-in-force ("RIF"). Plaintiff worked for Defendant from 1991 through 2015. When Defendant terminated Plaintiff, it stated that his termination was part of the RIF. *Id.* at *1-2. After Defendant terminated 23 employees nationwide, including seven from its Tampa location, Plaintiff filed an EEOC charge alleging age discrimination. Plaintiff stated that Defendant had more work than the projected staffing requirement, and thus there was no reason for his termination. Plaintiff further alleged that Defendant rarely allowed non-officers to work until they retired. In addition, Defendant was alleged to have hired young employees, and then terminated older employees once the young employees were trained. According to Plaintiff, one supervisor commented just prior to the RIF that he had been informed that Defendant was looking to reduce staff, specifically older personnel. Plaintiff further alleged that Defendant's agents often said, "young people are our future." *Id.* at *2. After being issued a notice of suit rights letter from the EEOC and thereafter bringing suit, Plaintiff sought to conditionally

certify a nationwide collective action of former employees who were terminated from October 28, 2014 through August 24, 2015 (*i.e.*, within 300 days prior to Plaintiff's filing of his EEOC charge), and who were at least 40 years old at the time of their termination. Two opt-in Plaintiffs who also worked at the Tampa location and were terminated during the 2015 RIF filed affidavits in support of Plaintiff's allegations of age discrimination. In opposition to the motion for conditional certification, Defendant argued that: (i) Plaintiff was not a proper representative because his ADEA claim was time-barred; (ii) Plaintiff's EEOC charge did not provide sufficient notice of claims from the proposed collective action; and (iii) the scope of the proposed collective action was too large. The Court granted in part and denied in part Plaintiff's motion for conditional certification. First, in support of its argument that conditional certification was not warranted since Plaintiff was not a proper representative, Defendant argued that Plaintiff's suit was untimely because he filed his suit 95 days after the EEOC issued the notice of rights to sue letter. *Id.* at *5-6. The Court rejected this argument, citing evidence submitted by Plaintiff's counsel illustrating that he did not receive the notice of letter until over two weeks after it was stamped. Defendant also argued that conditional certification was not warranted for the proposed nationwide collective action because Plaintiff's EEOC charge did not give adequate notice that such claims were being asserted. *Id.* at *7. After examining Plaintiff's EEOC charge, which indicated that "[o]n the day of my termination 5 of the 7 [Tampa, Florida] employees let go were over 50 and had at least 10 years with the company," the Court found that Plaintiff's EEOC charge could not be read to give notice that he was asserting claims on behalf of a nationwide group of employees. The Court agreed with Defendant that, at best, Plaintiff's charge put Defendant and the EEOC on notice that Plaintiff may be pursuing age discrimination claims on behalf of himself and the four other employees terminated on the same day at his Tampa work location. *Id.* at *9-10. In addition, the Court determined that the decision-maker who terminated Plaintiff and the two opt-ins was never involved in a decision to terminate any employee outside of the Tampa location. Accordingly, the Court declined to certify a nationwide collective action. The Court explained that to conditionally certify a collective action: (i) there must be other employees who desire to opt-in; and (ii) those employees must be similarly-situated to Plaintiff. Given that two former employees had already opted-in, and that three of the five individuals that were over 50 and were terminated during the June 2015 RIF wanted to pursue ADEA claims, the Court found that the first element was met. Regarding the similarly-situated element, the Court noted that while Plaintiff attempted to assert company-wide claims of pattern or practice of age discrimination, he did not show a sufficient factual basis on which a reasonable inference could be made that Defendant had a pattern or practice of discriminating against all employees at all locations based on their age. *Id.* at *15-16. Plaintiff offered no evidence that any employees outside of Tampa were interested in joining the lawsuit, nor did he identify any decision-makers outside of Tampa who allegedly discriminated on the basis of age during the RIF. The Court further opined that the evidence that Plaintiff submitted only could support his contention of a pattern or practice of age discrimination within the Tampa location. As such, the Court denied Plaintiff's motion to conditionally certify a nationwide collective action of former employees over 40 who were terminated during the June 2015 RIF, but conditionally certified a collective action consisting of the five individuals that were terminated from the Tampa location.

***Jones, et al. v. RS&H, Inc.,* 2017 U.S. Dist. LEXIS 77187 (M.D. Fla. May 22, 2017).** Plaintiff, a former employee, alleged that Defendant violated the ADEA when it terminated a group of employees as part of a reduction- in-force ("RIF"). Plaintiff worked for Defendant from 1991 through 2015. When Defendant terminated Plaintiff, it stated that his termination was part of the RIF. *Id.* at *1-2. After Defendant terminated 23 employees nationwide, including seven from its Tampa location, Plaintiff filed an EEOC charge alleging age discrimination. After being issued a notice of right to sue letter and thereafter bringing suit, Plaintiff initially moved to conditionally certify a nationwide class of former employees who were terminated from October 28, 2014 through August 24, 2015 (*i.e.*, within 300 days prior to Plaintiff's filing of his EEOC charge), and who were at least 40 years old at the time of their termination. *Id.* at *2-3. The Court granted conditional certification for a much narrower class consisting of the five employees at the Tampa location that were terminated in the June 2015 RIF who were at least 40 years old at the time of their termination. The Court found that the scope of the nationwide collective action for which Plaintiff requested conditional certification was too broad. Plaintiff subsequently sought reconsideration of the order. Plaintiff asserted three major grounds justifying reconsideration, including: (i) an intervening change in controlling law; (ii) the availability of new evidence; and (iii) the need to correct clear error or to prevent manifest injustice. *Id.* at *5. When investigating Plaintiff's charge of discrimination, the EEOC asked Defendant to provide the name, age, position, and department for the 23 employees that were terminated during the June 2015 nationwide RIF. Defendant's response to the EEOC's

request showed that 21 of the 23 people terminated during the June 2015 nationwide RIF were over 40 years old. Plaintiff contended that the EEOC's request for information regarding the employees affected by the RIF nationwide demonstrated that the EEOC and Defendant were on notice that Plaintiff's charge of discrimination included a nationwide collective action. Furthermore, Plaintiff contended that the fact that 21 of the 23 employees terminated during the June 2015 RIF were over 40 provided evidence of a significant age bias, and, therefore, these 21 employees should be certified as a collective action. *Id.* at *6-7. The Court stated that even accepting this new evidence, its original decision to limit the collective action was correct. The Court found that Plaintiff failed to show that there were other employees that were employed outside of Tampa who desired to opt-in and that those employees were similarly-situated to Plaintiff. The Court held that the now narrower proposed nationwide collective action of 21 still consisted of workers employed in a different divisions and located in ten cities in four states and involved different decision-makers. *Id.* at *7. Thus, the Court concluded that Plaintiff's motion for reconsideration must be denied, as conditional certification was not warranted for a nationwide collective action consisting of the 21 people that were terminated during the June 2015 RIF that were over 40 years old at the time of their termination. *Id.* at *8.

(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 2017 that implicated § 216(b) certification issues. These rulings included arbitration issues in ADEA collective actions; discovery in ADEA collective action litigation; disparate impact issues in ADEA collective actions; disqualification issues in ADEA collective action litigation; procedural issues in ADEA collective action litigation; and release and notice issues in ADEA/EPA collective action litigation.

(i) Arbitration Issues In ADEA Collective Actions

***Cerjanec, et al. v. FCA US, LLC,* 2017 U.S. Dist. LEXIS 206409 (E.D. Mich. Dec. 15, 2017).** Plaintiffs, a group of current and former employees, filed a collective action alleging that Defendant's employee-evaluation policy had a disparate impact on employees aged 55 and older in violation of the ADEA. Plaintiffs alleged that as a result of Defendant's policy, they received lower evaluation scores, which resulted in missed career advancements, bonuses, and other employment opportunities. *Id.* at *1-2. Defendant sought to compel arbitration, asserting that Plaintiffs assented to arbitration when they continued to work at Defendant after receiving notice of Defendant's arbitration policy. *Id.* at *2. The Court denied Defendant's motion to compel arbitration. In 1995, Defendant began utilizing an Employment Dispute Resolution Process ("EDRP"), under which non-union employees were required to arbitrate most disputes arising from their employment. *Id.* Defendant argued that Plaintiffs, although hired prior to the implementation of the EDRP, were bound to arbitrate by continuing to work with Defendant after being notified of the EDRP's implementation. *Id.* at *5. Defendant stated that in May of 1995, Plaintiffs were sent a letter informing them that it would soon implement the EDRP. *Id.* at *9-10. Attached to the letter was a brochure that provided an overview of the process and stated that: "IT APPLIES TO YOU. It will govern all future legal disputes between you and Chrysler that are covered under the Process." *Id.* at *10. The 1995 EDRP policy provided for exclusive, final, and binding arbitration for "all eligible disputes whether based on federal, state or local law including breach of contract, discrimination or retaliation claims." *Id.* at *10-11. Since Plaintiffs continued working with Defendant after receiving this policy, Defendant argued that they assented to the 1995 policy via their conduct. The Court disagreed and found that the policy language did not inform employees how the EDRP applied to them and did not tell them that it applied to them if they continued to work at Defendant. *Id.* at *13. The Court reasoned that in the absence of any signed agreement or any Defendant-distributed materials expressly telling Plaintiffs that they would accept the terms of the EDRP by continuing their employment, the Court could not find that there was an agreement to arbitrate. *Id.* at *14. Accordingly, the Court denied Defendant's motion to compel arbitration.

(ii) Discovery In ADEA Collective Action Litigation

***Heath, et al. v. Google, Inc.,* Case No. 15-CV-1824 (N.D. Cal. July 27, 2017).** Plaintiffs, a group of job applicants, brought an action alleging that Defendant engaged in a systematic pattern or practice of discriminating against individuals over 40 years old in its hiring, compensation, and other employment decisions in violation of the Age Discrimination in Employment Act ("ADEA") and the California Fair Employment and Housing Act. The parties disputed the scope of discovery, and sought an order delineating the scope and extent of discovery Defendant could obtain from the opt-in Plaintiffs. The Court reviewed the arguments and stated that it wanted to be fair and give Defendant necessary discovery, but not impose an undue burden on the opt-ins and their counsel. *Id.* at 2. The Court determined that Defendant was entitled to discovery relative to: (i) all facts that supported Plaintiffs' claims that Defendant failed to hire because of age; (ii) witnesses that could attest to the ADEA claim facts; (iii) an estimate of Plaintiffs' damages or other compensation sought from Defendant; and (iv) Plaintiffs' efforts to mitigate the damages estimated. *Id.* at 2-3. As to Defendant's request for documents, the Court found that Defendant was entitled to: (i) Plaintiffs' documents supporting the facts identified in the interrogatory responses; (ii) Plaintiffs' documents referred to in preparing interrogatory answers; and (iii) copies of Plaintiffs' birth certificates or government-issued documents showing date of birth. *Id.* at 3. The Court stated that the parties must agree on a process to randomly select 75 opt-in Plaintiffs from which to propound the discovery. Further, the Court held that Defendant may select 35 individuals for depositions not to exceed 3 hours each, 30 of which would be conducted by video and 5 in-person.

***Heath, et al. v. Google, Inc.,* 2017 U.S. Dist. LEXIS 133564 (N.D. Cal. Aug. 21, 2017).** Plaintiffs, a group of job applicants, brought an action alleging that Defendant engaged in a systematic pattern or practice of discriminating against individuals over 40 years old in its hiring, compensation, and other employment decisions in violation of the Age Discrimination in Employment Act ("ADEA") and the California Fair Employment and Housing Act. Defendant filed a motion for relief from the Court's order denying two of Defendant's requests for relief and requested briefing on the remaining ground for relief involving the language of Defendant's interrogatory. Defendant originally served two interrogatories requiring opt-in Plaintiffs to detail "all facts of any kind that relate" to their claims that Google failed to hire them because of their age and their self-assessment of how they performed at their interviews at Defendant. *Id.* at *3. The Court analyzed the two interrogatories and narrowed the language to require the opt-in Plaintiffs to "identify and describe in detail all facts of any kind that support your claim that Google failed to hire you because of your age." *Id.* Defendant objected to the language that required opt-in Plaintiffs to provide only information helpful to their claims, and not information that undermines them. Thus, the question before the Court was whether its order substituting the word "support" for Defendant's word "relate" was clearly erroneous or contrary to law. *Id.* at *4. The Court found that it was neither because as drafted the interrogatory "cast much too wide a net." *Id.* The Court noted that the substitution of the word "support" in the interrogatory would strike a fair balance between limiting the burden on Plaintiffs from Defendant's broad discovery requests while still allowing Defendant to secure discovery to sufficiently prepare its defenses. *Id.* at *5. The Court determined that the core issue was what Defendant knew at the time it made its hiring decisions, and information regarding how the opt-in Plaintiffs perceived their interview performance was tangentially relevant at most. Accordingly, The Court denied Defendant's motion for relief.

(iii) Disparate Impact Issues In ADEA Collective Actions

***Heath, et al. v. Google, Inc.,* 2017 U.S. Dist. LEXIS 147763 (N.D. Cal. Sept. 12, 2017).** Plaintiffs, a group of job applicants, brought an action alleging that Defendant engaged in a systematic pattern or practice of discriminating against individuals over 40 years old in its hiring, compensation, and other employment decisions in violation of the Age Discrimination in Employment Act ("ADEA") and the California Fair Employment and Housing Act. Plaintiffs filed a motion for leave to file a second amended complaint. Plaintiffs sought to amend their complaint to add a disparate impact claim in order to conform the complaint to the evidence, and to add updated U.S. Department of Labor ("DOL") workforce statistics. *Id.* at *2. The Court granted Plaintiffs' motion. Plaintiffs argued that good cause existed to amend the complaint because recent case law authority held that the right to make a disparate impact claim under the Age Discrimination in Employment Act ("ADEA") extends to any adversely affected individual regardless of whether he or she is an applicant or employee. *Id.* at *3. The Court found that that Plaintiffs acted with diligence and did not unduly delay in seeking leave to amend the complaint in light of the new authority. *Id.* at *5. The Court also further determined that the prejudice to

Defendant in allowing the amendment was minimum. Given the trial date of April 1, 2019, the Court noted that Defendant would have ample time to brief and argue a motion to dismiss the disparate impact claim, and to conduct further discovery, if necessary, in the event that the disparate impact claim survived. *Id.* at *6. The Court also found that Plaintiffs had not unduly delayed in seeking the proposed amendment, and there was no evidence in the record of bad faith or dilatory motive. *Id.* at *7. Finally, the Court found that futility did not weigh against Plaintiffs in this instance. The Court explained that whether applicants may allege disparate impact claims under the ADEA is a novel question in the Ninth Circuit, and the parties were limited in their briefing on the issue in the context of Plaintiffs' motion for leave to amend. Accordingly, the Court granted Plaintiffs' motion for leave to amend.

Karlo, et al. v. Pacific Glass Works, LLC, **849 F.3d 61 (3d Cir. 2017).** Plaintiffs, a group of salaried employees over 50 years old, brought a putative collective action against Defendant under the Age Discrimination in Employment Act ("ADEA") alleging claims of disparate treatment, disparate impact, and retaliation after Defendant engaged in several reductions-in-force ("RIF") due to a decline of sales in the automobile industry. The District Court originally granted Plaintiffs' motion for conditional certification of a sub-group comprised of employees terminated by Defendant that were at least 50 years old. *Id.* at 66. Subsequently, the case was transferred to another District Court, which granted Defendant's motion to decertify the collective action. *Id.* at 67. Defendant also moved for summary judgment on each claim. The District Court granted summary judgment on the disparate impact claim because the District Court found that it was not cognizable under the ADEA because the group that was favored was at least 40 years old and within the protected class of the ADEA. In addition, Plaintiffs lacked evidence to support their disparate impact theory because the District Court excluded statistics relating to the testimony of their expert. *Id.* The District Court also granted summary judgment as to the disparate treatment claim, which Plaintiffs did not appeal. On Plaintiffs' appeal of the disparate impact ruling, the Third Circuit reversed. It held that the disparate impact claim was cognizable where a sub-group of employees over 50 years old were alleged to have been disfavored relative to younger employees under 50 years old who also were protected under the ADEA. The Third Circuit held that while the ADEA protects only those individuals who are at least 40 years of age, the fact that the favored group members were over 50 years old was "an utterly irrelevant factor," as the ADEA protects individuals of a protected class and not the protected class itself. *Id.* at 72. The Third Circuit held that an ADEA disparate impact claim may proceed when a Plaintiff offers evidence that a specific facially neutral employment practice claim caused a disproportionate adverse impact based on age. The District Court had excluded the report of Plaintiffs' expert because the facts used were not reliable, it failed to utilize any of the generally accepted statistical adjustments, and his testimony did not fit the claims at issue. The Third Circuit vacated the District Court's order, finding that it erred in excluding the expert's report and remanded for examination of the expert's opinion under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). However, the Third Circuit affirmed the District Court's decision to decertify the collective action because the named Plaintiffs failed to show that the opt-in Plaintiffs were similarly-situated, as required under 29 U.S.C. § 216(b), as incorporated by the ADEA. Because the opt-in Plaintiffs held several different titles with varied duties located in separate divisions and there were six different decision-makers that were involved in the RIF decisions, the Third Circuit concluded that the District Court did not commit clear error when it determined that Plaintiffs were not similarly-situated. *Id.* at 86.

***O'Brien, et al. v. Caterpillar*, 2017 U.S. Dist. LEXIS 140264 (N.D. Ill. Aug. 31, 2017).** Plaintiffs, a group of employees, filed a collective action asserting that Defendant's Supplemental Unemployment Benefit ("SUB") Plan liquidation program caused a significant disparate impact on older workers in violation of the ADEA. The parties cross-filed motions for summary judgment. The Court denied Plaintiffs' motion and granted Defendant's motion. Since the 1950s, Defendant's labor contract included a pension plan and, until 2012, it included a SUB plan. The SUB plan provided supplemental compensation to eligible employees who were laid off. In March 2012, Defendant and the Union began renegotiating the collective bargaining agreement ("CBA"), with one objective in the renegotiation being to eliminate the SUB plan. *Id.* at *4. Defendant wanted to use the accumulated SUB funds to incentivize retirements among retirement-eligible employees, so their positions could be filled by newly-hired employees who would be subject to a lower "new hire" compensation package. *Id.* at *6. Defendant proposed to eliminate the SUB and distribute *pro rata* the accumulated SUB funds as a retirement incentive for retirement-eligible SUB participants who retired before the end of 2012 pursuant to a "metering" chart, which was intended to regulate departures to avoid operation disruptions. *Id.* at *7. The Union ultimately

rejected this and all additional proposals from Defendant because it did not want to eliminate the SUB plan. *Id.* The 2005 CBA thus expired without an agreement between Defendant and the Union, and, subsequently, the Union went on strike and a federal mediator negotiated an agreement. The new agreement provided for termination of the SUB plan as of August 20, 2012. *Id.* at *8. Defendant would distribute the SUB fund assets in equal shares to two groups, including: (i) SUB participants who were retirement-eligible under the pension plan and who voluntarily retired between October 1, 2012, and January 1, 2013; and (ii) SUB participants who were not eligible to retire under the pension plan, but who remained employed and were participants in the 401(k) tax-deferred retirement plan as of January 1, 2013. Plaintiffs were 48 retirement-eligible SUB participants who chose not to retire and, therefore, did not receive a share of the SUB funds. Plaintiffs claimed that the memorandum of understanding that contained the SUB plan distribution provision of the 2012 CBA had a disparate impact on older participants. The Court found that the undisputed facts demonstrated that Plaintiffs failed to establish a *prima facie* case of disparate impact discrimination. *Id.* at *18. First, the Court noted that Plaintiffs did not point to a specific employment practice or policy. Although Plaintiffs asserted that Defendant's SUB liquidation plan resulted in a significant disparate impact on older workers, that plan failed to satisfy the specific employment practice requirement because it was the culmination of several elements unrelated to age. Further, the Court found that the CBA defined which members could participate in the SUB plan, and that determination was unrelated to age. Likewise, despite Plaintiffs' attempt to show statistical disparity based on age, the Court noted that the correlation between age and retirement-eligibility is definitional. Further, the Court found that Plaintiffs mistakenly painted the SUB plan requirement that employment-eligible participants choose to retire in order to receive a share of the funds as an "unlawful choice." *Id.* at *19. The Court opined that the choice was not defined by age, but by retirement eligibility. *Id.* at *20. The Court held that the decision to retire and partake in the SUB plan liquidation, rather than forego the disbursement and keep working, was determined not by age, but by the "host of other factors." *Id.* Thus, the Court concluded that Plaintiffs failed to establish a *prima facie* case of disparate impact age discrimination. Accordingly, the Court granted Defendant's motion for summary judgment and denied Plaintiffs' motion for summary judgment.

***Romero v. Allstate Ins. Co, Inc.,* 2017 U.S. Dist. LEXIS (E.D. Pa. April 27, 2017).** Plaintiffs, a group of insurance agents, brought an action alleging that Defendant terminated their employment contracts in violation of the Age Discrimination in Employment Act ("ADEA") and § 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Court granted Defendant's motions for partial summary judgment as to Plaintiffs' ADEA disparate impact claims and Plaintiffs' ERISA claims. Plaintiffs challenged Defendant's decision to transition over 6,200 employee agents to independent contractor status for business reasons, leaving those independent contractors without employee benefits, including pension and health and welfare benefits. *Id.* at *199. Under the "Preparing for the Future Program," employees with R830 and R1500 agreements could remain with Defendant under independent contractor R3001 agreements. *Id.* at *220. Existing R3000 agents could continue to work the remainder of their 18-month contracts after which they could become R3001 agents or leave the company. *Id.* Plaintiffs claimed that Defendant's decision not to include the temporary R3000 employee agents in the Preparing for the Future Program, while including the other employee agents with R830 or R1500 contracts, created a disparate impact upon this 18-month employee group that tended to be younger. *Id.* at *227. Plaintiffs' expert concluded that the median age of R3000 agents was 37, while the median age of R830/R1500 agents was 50. *Id.* at *228. Plaintiffs argued that the program violated the ADEA by creating a disparate impact between the younger R3000 temporary employee agents and Plaintiffs. *Id.* at *227. The Court ruled that, although Plaintiffs established a *prima facie* case, their disparate impact claim failed because Defendant demonstrated that it based its differentiation on reasonable factors other than age. *Id.* at *232. The Court found that Defendant met its burden of production and persuasion on this affirmative defense because it instituted the program to end indefinite employment arrangements in favor of independent contractor agreements. *Id.* at *233. Absent the program, R830 and R1500 agents would have continued working as employees indefinitely. Defendant explained that it did not subject R3000 agents to the program because, unlike R830 and R1500 agents, R3000 agents had temporary 18-month employment agreements, after which they could seek to become R3001 agents. The Court ruled that Defendant's decision to exclude R3000 agents from the program was reasonable because the R3000 agents could either part ways with Defendant after their term or convert to R3001 agents. Plaintiffs also alleged that this same decision violated § 510 of the ERISA. *Id.* at *234. Plaintiffs contended that Defendant's termination of their employment contracts through the Program constituted an adverse employment action depriving them of pension and other benefits to which they would

otherwise be entitled under the ERISA plans. *Id.* at *234. The Court granted Defendant's motion for partial summary judgment as to this claim because Defendant offered legitimate, non-discriminatory reasons for eliminating its employment agent force in favor of an independent contractor force. The Court relied upon the Seventh Circuit's ruling in *Isbell v. Allstate Insurance Co*., 418 F.3d. 788 (7th Cir. 2005), *cert. denied*, 547 U.S. 1021 (2006), that Defendant's same decision did not violate § 510. *Id.* at *237. In *Isbell v. Allstate Insurance Co*, the Seventh Circuit ruled that Allstate had legitimate business reasons for its decision, as independent contractors were paid higher commissions than the employee agents, and Allstate believed paying its sales force primarily through commissions spurred the salespeople to sell more. As such, the Court ruled that Defendant had the same legitimate business reasons tied to this decision. *Id.* at *243. Accordingly, the Court granted Defendant's motion for partial summary judgment as to Plaintiffs' ADEA disparate impact claim and the motion for partial summary judgment as to Plaintiffs' § 510 ERISA claims. *Id.*

***Villarreal, et al. v. R.J. Reynolds Tobacco Co.*, 2017 U.S. App. LEXIS 11455 (11th Cir. June 27, 2017).** Plaintiff, a job applicant, brought an action alleging that Defendants rejected his job application on the basis of his age in violation of the ADEA. Plaintiff's job application was rejected in 2007, and over two years later in 2010, lawyers contacted him and told him that Defendants discriminated against him on the basis of his age. The screening guidelines described the targeted candidate as someone 2 to 3 years out of college, who adjusted easily to changes, and Defendant had instructed the hiring contractor to stay away from applicants who had been in sales for 8 to 10 years. After he filed his charge with the EEOC, Plaintiff continued to apply with Defendants, and was rejected every time. Plaintiff brought a collective action under the ADEA alleging disparate treatment under § 4(a)(1), and disparate impact under § 4(a)(2). The District Court dismissed the disparate impact count and the untimely parts of both counts. When Plaintiff later moved for leave to amend the complaint, he alleged in his proposed complaint that he was not an employee of Defendants and that he was unaware of the screening guidelines. The District Court denied the motion to amend, and subsequently, Plaintiff moved to dismiss the remaining parts of the complaint, which the District Court dismissed with prejudice. On appeal, a divided panel of the Eleventh Circuit reversed in *Villareal v. R.J. Reynolds Tobacco, Co.*, 806 F.3d 1288 (11th Cir. 2015). Subsequently, the Eleventh Circuit granted a rehearing *en banc*, and affirmed the dismissal, in part. The Eleventh Circuit ruled on Plaintiff's argument that his disparate treatment claim was timely under the continuing-violation doctrine. Because of the nature of hostile work environment claims, the Supreme Court has held an employer may be liable for acts outside of the 180-day limitations period if: (i) at least one act contributing to the claim happens within the limitations period; and (ii) the acts outside of the limitations period are part of the same hostile work environment claim. In such a case, a Plaintiff need only bring suit within 180 days of any "act contributing to the claim." *Id.* at *3. Plaintiff argued that Defendant engaged in a pattern or practice of discrimination against older job applicants, and therefore the continuing-violation doctrine should make his disparate treatment claim timely. *Id.* at *4. However, the Eleventh Circuit held that Plaintiff's disparate treatment claim did not fall within the scope of the continuing-violation doctrine, because claims under the continuing-violation doctrine can apply only to types of discriminatory acts that "are different in kind from discrete acts," specifically, those minor incidents that alone would not be actionable, but which become actionable due to their "cumulative effect." *Id.* at *5. The Eleventh Circuit opined that Plaintiff was not challenging the cumulative effect of Defendants' multiple refusals to hire older applicants; instead, he was challenging each individual refusal-to-hire, and the Supreme Court specifically has recognized that "refusal to hire" is a discrete act. *Id.* As a result, Eleventh Circuit determined that the continuing-violation doctrine could not make Plaintiff's disparate treatment claim timely. Therefore, the Eleventh Circuit affirmed the District Court's dismissal of Plaintiff's complaint.

(iv) Disqualification Issues In ADEA Collective Action Litigation

***Shields, et al. v. General Mills,* 2017 U.S. Dist. LEXIS 208921 (D. Minn. Dec. 20, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant discriminated against them in violation of the Age Discrimination in Employment Act ("ADEA") when it terminated their employment as a result of a workforce restructuring. Defendant filed a motion to disqualify Plaintiffs' counsel Snyder & Brandt PA and Nicholas Kaster. The Magistrate Judge recommended denying the motion, and on Rule 72 review, the Court adopted the Magistrate Judge's recommendation. Defendant moved for disqualification because former executive James Heflin, a named Plaintiff, had worked with Defendant's attorneys in an earlier age bias case raising nearly identical allegations and gained knowledge of privileged information, including details about litigation strategy.

Defendant therefore contended that counsel should not be permitted to represent Heflin or Plaintiff Peggy Maxe, a named Plaintiff in the earlier case. The Magistrate Judge found that although the evidence suggested that Heflin did have access to some privileged communications, the attorneys took numerous, substantial steps to prevent any disclosures. The Magistrate Judge concluded that the preventative measures employed by Plaintiffs' counsel were sufficient to resolve the minimal possibility the Heflin had access to confidential information, no disclosure occurred, and as counsel did not have an improper intent, the risk of taint to future litigation was minimal. On Rule 72 review, the Court agreed and held that Snyder & Brandt and Nichols Kaster could continue to represent Plaintiffs as long as they "maintain the currently established ethical wall" that each had erected. *Id.* at *2.

(v) Procedural Issues In ADEA Collective Action Litigation

***Rabin, et al. v. PricewaterhouseCoopers LLP,* Case No. 16-CV-2276 (N.D. Cal. Nov. 15, 2017).** Plaintiff, an accountant, filed a class and collective action alleging that Defendant's hiring practices discriminated against job applicants aged 40 and over in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), the California Fair Employment and Housing Act ("FEHA"), the California Unfair Competition Law ("UCL"), and the Michigan Elliott-Larsen Civil Rights Act ("MCRA"). Prior to briefing on Plaintiff's motion for class certification, Defendant moved to file a joint discovery letter under seal. Specifically, Defendant sought to seal information relative to the total number of potential class members, including approximately 14,000 potential job applicants. Defendant argued that this information was confidential and commercially sensitive. Plaintiff argued that the number of potential Plaintiffs was not privileged, protectable as a trade secret, or otherwise entitled to legal protection. The Court denied Defendant's motion to seal information regarding the total number of potential class members. *Id.* at *1. The Court noted that the number of potential members and number of members in the proposed class action was not confidential information. *Id.* Accordingly, the Court denied Defendant's motion to seal. *Id.*

(vi) Release And Notice Issues In ADEA/EPA Collective Action Litigation

***McLeod, et al. v. General Mills, Inc.,* 2017 U.S. App. LEXIS 6422 (8th Cir. April 14, 2017).** 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. The employees were offered severance packages in exchange for signing release agreements. *Id.* at *3. The release agreements required the employees to release Defendant from all claims related to their termination, including claims under the ADEA. *Id.* The release agreements also contained a dispute resolution provision that required the employees to submit any claim covered by the release agreement to arbitration on an individual basis. *Id.* Plaintiffs sought a declaratory judgment that the releases were not "knowing and voluntary," as required by 29 U.S.C. § 626(f)(1). *Id.* at *5. Plaintiffs also asserted collective action claims and individual claims for alleged ADEA violations. *Id.* Defendant moved to compel arbitration of the employees' claims, and the District Court denied the motion. *Id.* On appeal, the Eighth Circuit reversed. Plaintiffs argued that § 626(f) contains the necessary "contrary congressional command" to render their release agreements invalid. *Id.* Specifically, Plaintiffs relied on § 626(f)(1) and § 626(f)(3) of the ADEA to argue that compelling arbitration results in an effective waiver of their substantive rights under the ADEA. *Id.* Section 626(f)(1) of the ADEA prohibits the waiver of any ADEA right or claim, unless the waiver is "knowing and voluntary." *Id.* at *6. Section § 626(f)(3) describes how to prove a "waiver," requiring that the "the party asserting the validity of a waiver shall have the burden of proving in a Court of competent jurisdiction that a waiver was knowing and voluntary . . . ." *Id.* Plaintiffs argued that, by moving to compel arbitration of their claims, Defendant was asserting the validity of a waiver by forcing them to forego their "right" to a jury trial and their "right" to proceed by a collective action. *Id.* The Eighth Circuit rejected this argument. "In § 626(f)," the Eight Circuit explained, '"waiver' refers narrowly to waiver of *substantive* ADEA rights or claims – not, as the former employees argue, the 'right' to a jury trial or the 'right' to proceed" in a collective action. *Id.* at *7. The Eighth Circuit, therefore, decided that no "rights or claims" are "waived" by agreeing to bring claims in arbitration. *Id.* The Eighth Circuit also rejected Plaintiffs' argument that § 626(b), by incorporating 29 U.S.C. § 216(b), gave them a "right" to bring a collective action. *Id.* at *9. The Eighth Circuit noted that the ADEA borrows the procedural mechanism for a collective action from § 216(b) of the FLSA. Section 626(b) incorporates § 216(b), which allows an employee to sue on behalf of himself "and other employees similarly-situated." *Id.* Thus, the Eighth Circuit explained that § 626(b) expressly allows

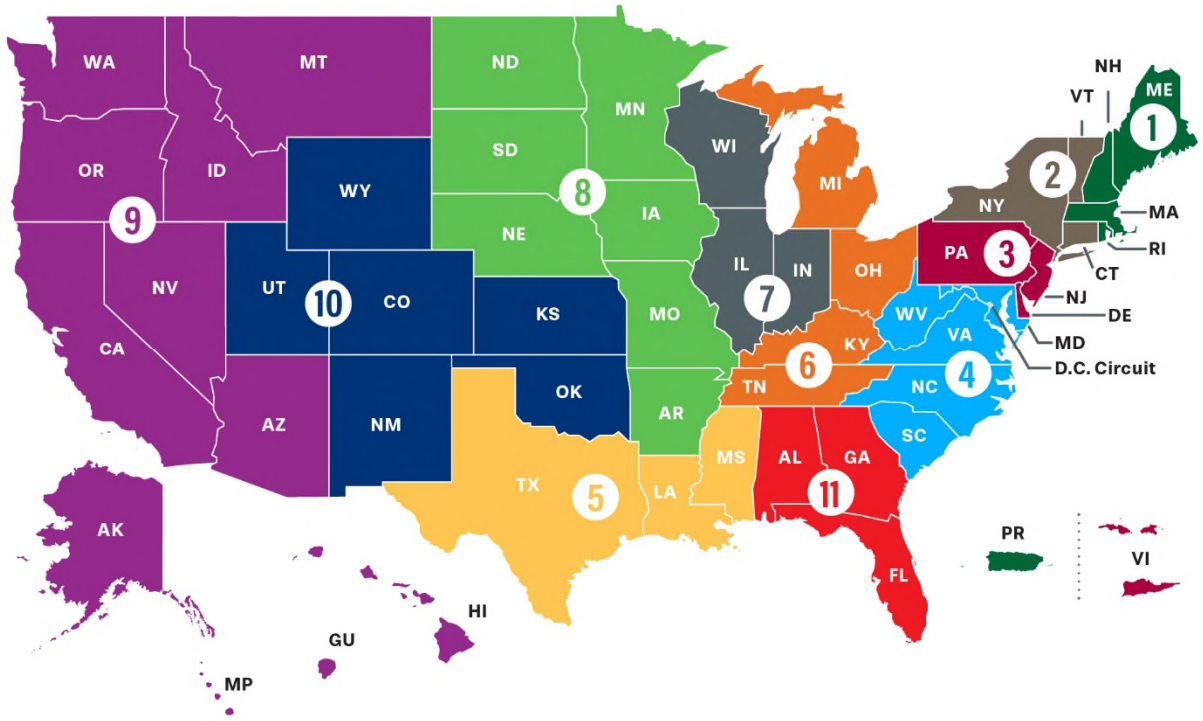
employees to bring collective actions for age discrimination. Although the Eighth Circuit acknowledged that the ADEA expressly authorizes employees to sue collectively, it held that § 626(b) does not create a non-waivable, substantive right to do so. *Id.* The Eighth Circuit reasoned that "[s]tanding alone, § 216(b) does not create a non-waivable substantive right; rather, its… authorization can be waived by a valid arbitration agreement." *Id.* The Eighth Circuit found no convincing reason why § 626(b)'s incorporation of § 216(b) would "elevate the procedural… authorization to a substantive § 626(f)(1) 'right.'" *Id.* Ultimately, the Eighth Circuit concluded that the ADEA does not provide a "contrary congressional command" overriding the Federal Arbitration Act's mandate to enforce agreements to arbitrate ADEA claims, and that the District Court should have granted the company's motion to compel arbitration. *Id.* Next, Plaintiffs argued that an arbitration panel could not grant them their declaratory relief, *i.e.*, decide the question of whether their waiver of substantive ADEA rights was "knowing and voluntary." *Id.* at *10. Plaintiffs argued that the question could only be resolved in the District Court because of § 626(f)(1)'s mandatory language stating that a party "shall have the burden of proving in a Court of competent jurisdiction." *Id.* The Eighth Circuit declined to decide this issue, finding instead that the question was not justiciable. *Id.* Because Defendant had not yet asserted that any Plaintiffs had in fact waived their ADEA claims, and because Plaintiffs were seeking declaratory relief only "if and to the extent" Defendant asserted that defense, the Eighth Circuit concluded that declaratory relief was hypothetical. *Id.* at *12. "No Article III case or controversy arises," the Eight Circuit explained, "when Plaintiffs seek a 'declaratory judgement as to the validity of a defense' that a Defendant 'may or may not raise.'" *Id.* at *13. Accordingly, the Eighth Circuit held that the District Court did not have jurisdiction to decide whether the employees' waiver was "knowing and voluntary." *Id.*

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 2017. FLSA collective actions were filed more frequently than all other types of workplace class actions.

Statistically, plaintiffs were successful in securing conditional certification approximately 73% of the time. In terms of "second stage" decertification motions, employers also prevailed in a majority of those cases (approximately 63% 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	6	33	4	12	25	21	17	8	25	10	8	1
Conditional Certification Motions Denied	2	6	2	1	5	5	7	4	23	1	7	0
Decertification Motions Granted	0	3	1	0	1	1	3	1	5	0	0	0
Decertification Motions Denied	0	3	0	0	2	0	1	2	2	0	0	0

Total: 170 Conditional Certifications Granted / 63 Conditional Certifications Denied
15 Decertification Motions Granted / 9 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

***Brayak, et al. v. New Boston Pie, Inc.*, 2017 U.S. Dist. LEXIS 187945 (D. Mass. Nov. 14, 2017).** Plaintiffs, a group of former pizza delivery drivers, filed an action alleging that Defendants failed to pay overtime wages, failed to pay all tips due or minimum wages for non-tipped work, and unlawfully retained some of the drivers' tips in the form of delivery charge, in violation of the FLSA and state wage & hour laws. Plaintiffs filed a motion for class certification of their state law claims, which the Court granted in part and denied in part. The Court stated that Plaintiffs' delivery charge and inside work claims previously received thorough treatment in a recent decision certifying a nearly identical class in other litigation. The Court therefore fully adopted the analysis and conclusions from that case and certified Plaintiffs' motion to certify the driver class with respect to the delivery charge and inside work claims. *Id.* at *3. The Court then examined Plaintiffs' claim for overtime wages. The Court explained that Plaintiffs, as restaurant workers, brought claims under the Massachusetts Wage Act on the basis that Defendants failed to timely remit all "wages earned," inclusive of payments required under federal overtime law, 29 U.S.C. § 207. *Id.* at *4. The Court was unpersuaded by Plaintiffs' allegations, holding that it was well settled that federal overtime claims must be brought as collective actions under 29 U.S.C. § 216(b) rather than as class actions under Rule 23. *Id.* at *5. The Court noted that this was not a case in which Plaintiffs with independently valid state and federal claims sought class certification of both together. Instead, Plaintiffs cited federal overtime protections as a basis for their state law Wage Act recovery, but later disclaimed the federal scheme governing those protections when it carried less advantageous procedural requirements. *Id.* Accordingly, the Court granted Plaintiffs' motion as to the driver class for the inside work and delivery charge claims, and denied it as to the overtime claims. *Id.* at *6.

***Chebotnikov, et al. v. LimoLink, Inc.*, 2017 U.S. Dist. LEXIS 104262 (D. Mass. July 6, 2017).** Plaintiffs, a group of limousine drivers, brought a class and collective action alleging that Defendant violated Massachusetts wage statutes and the FLSA by misclassifying them as independent contractors and denying them all gratuities paid by customers. Plaintiffs alleged that they operated their own limousine companies and, through those companies, contracted with Defendant to provide limousine services to its customers. *Id.* at *1-2. Plaintiffs moved to certify two classes pursuant to Rule 23. Plaintiffs' first putative class (the "tips class") consisted of 36 vendors who provided rides for Defendant's customers in Massachusetts and had not received the total proceeds of gratuities paid by customers since August 27, 2011. Plaintiffs' second putative class (the "misclassification class") consisted of 17 individual drivers, designated by Defendant as "independent operators," whom it classified as independent contractors since August 27, 2011. *Id.* at *2. The Court granted the motion for class certification as to the tips class and denied it as to the misclassification class. As to the tips class, the putative class included 36 vendors, which the Court found satisfied numerosity. The Court also held that there were common questions of law and fact, including whether Defendant charged a gratuity to its customers, whether it remitted that gratuity to individuals other than the drivers, and whether the drivers had any managerial responsibilities for Defendant in violation of the Massachusetts Tip Act. The Court determined that it was undisputed that, prior to 2014, Defendant had a policy of charging customers a gratuity and that it retained such charges as part of its general revenue stream. *Id.* at *4. The Court reasoned that there was no reason to think that the resolution of those factual inquiries would vary between class members. *Id.* The Court also held that the typicality requirement was satisfied because the alleged injuries all arose out of the same course of conduct, *i.e.,* Defendant's practice of charging gratuities and retaining those gratuities as part of its general revenue stream. *Id.* at *5. The Court noted that there was also no reason to doubt that the named Plaintiffs would adequately represent the interests of the class, as they had established that all class members had the same interest in receiving gratuities allegedly owed to them and that there was no apparent conflict of interest between themselves and the other class members as to the tips claim. *Id.* at *5-6. Furthermore, the Court held that Plaintiffs' chosen lead counsel appeared to be a qualified and experienced attorney in the areas of employment law and class action litigation. The Court also found that common questions of law or fact predominated over questions concerning only individual class members. Finally, the Court ruled that a class

action was superior to other available methods of adjudication, and given the common questions of law and fact, a class action would more efficiently resolve the Tips Act claims than would a series of individual cases. Accordingly, the Court granted Plaintiffs' motion to certify the tips class. As to the misclassification class, the Court found that Plaintiffs failed to establish all of the elements required for class certification. First, the Court opined that the relatively low number of putative class members, combined with their ease of identification and geographic proximity, suggested that the numerosity requirement was not satisfied. *Id.* The Court also determined that there were not common questions of fact capable of class-wide resolution, because adjudicating whether Defendant misclassified independent operators required an individualized and fact-intensive inquiry. *Id.* at *8. The Court stated that it would need to determine the size and nature of each individual operator's limousine business, as well as whether each individual operator had the opportunity to negotiate the terms of Defendant's service agreement, which would affect the analysis of whether they were misclassified as independent contractors. *Id.* The Court concluded that because the answers to those central questions were not capable of class-wide resolution, certification was inappropriate as to the misclassification class. Accordingly, the Court granted in part and denied in part Plaintiffs' motion for class certification.

***DaSilva, et al. v. Border Transfer Of MA,* 2017 U.S. Dist. LEXIS 186012 (D. Mass. Nov. 9, 2017).** Plaintiffs, a group of former delivery drivers, alleged that Defendant improperly classified them as independent contractors instead of employees, and therefore unlawfully deducted certain business expenses from their pay. Plaintiffs filed a motion for class certification pursuant to Rule 23, which the Court granted. Defendant provided delivery services for large retail stores such as Sears. Plaintiffs delivered merchandise and their relationship with Defendant was governed by a "contract carrier agreement," which stated that Plaintiffs were independent contractors. *Id.* at *3. Plaintiffs sought to certify a class of all individuals who: (i) entered into a contract carrier agreement directly or through a business entity; (ii) personally provided delivery services for Defendant on a full-time basis in Massachusetts; and (iii) who were classified as independent contractors, at any time since June 23, 2013. *Id.* at *6. Defendant did not dispute that the numerosity requirement was met, as 59 individuals made up the proposed class. *Id.* at *10. Defendants argued that individualized evidence was required to determine whether Massachusetts law applied to all putative class members' claims. The Court stated that the other potentially relevant jurisdictions were Rhode Island and Connecticut, and there were material differences in the wage laws of Massachusetts, Rhode Island, and Connecticut, including the level of control required as a part of its independent contractor test. *Id.* at *12. The Court explained that the control test in the Massachusetts Wage Act is conjunctive and requires a company using an independent contractor to show that the contractor was free from its control both as a matter of contract and as a matter of fact. In contrast, both the Rhode Island and Connecticut independent contractor tests focus solely on the existence of a contractual right to control rather than the exercise of actual control. *Id.* at *13. Having found at least one potentially relevant difference among the state laws, the Court opined that it must undertake a choice-of-law analysis. The Court stated that the choice-of-law question was whether the Massachusetts Wage Act would apply to a driver who signed a contract with Defendant (a Michigan corporation headquartered in Tennessee that operates in Massachusetts) through a Rhode Island corporate entity to deliver goods from a Massachusetts facility to a mix of Massachusetts and out-of-Massachusetts customers. *Id.* at *14-15. Plaintiffs argued that because only a single common issue was necessary to meet the commonality requirement of Rule 23(a), they satisfied the requirement by showing that either contractual control or actual control could be adjudicated on a class-wide basis. *Id.* at *15. The Court agreed and held that since all drivers would be subject to the common proof of whether Defendants improperly took deductions in violation of the Wage Act, Plaintiffs met the commonality requirement. *Id.* at *27. The Court further found that typicality was met because Plaintiffs' claims and the putative class members' claims arose from the same agreements and class-wide treatment, and Plaintiffs and the class members asserted the same legal theory of misclassification. *Id.* at *28. The Court determined that Plaintiffs met the adequacy requirement because Plaintiffs and the putative class members shared an interest in recovering wages lost as a result of misclassification. Further, the Court opined that Plaintiffs' attorneys were highly experienced in class action employment litigation and specifically in Wage Act misclassification claims. *Id.* at *29. Finally, since Plaintiffs demonstrated that their claims appeared to be provable by common evidence that predominated over any individualized issues, the Court found that the predominance requirement was also met. The Court stated that although there may be a need for individual damage determinations, that fact did not alone defeat predominance. The Court also determined that efficiency and the policy considerations unique to the

employment context made class adjudication superior. *Id.* at *31. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Dvornikov, et al. v. Landry's, Inc.*, 2017 U.S. Dist. LEXIS 49178 (D. Mass. Mar. 31, 2017).** Plaintiffs, a group of restaurant workers, brought a class action alleging that Defendant violated the Massachusetts Tips Act and the Massachusetts Minimum Wage Law by forcing them to contribute to a tip-pool that included hostesses. Plaintiffs filed a motion for class certification, and the Court granted the motion. Plaintiffs were employed at Defendant's Chart House restaurant as servers. Plaintiffs were paid at the service, or tipped rate, and were required to participate in an automated, tip-sharing program. *Id.* at *3-4. Defendants argued that Chart House hostesses properly participated in the tip-sharing program, in compliance with the Tips Act, because they were "waitstaff employees." *Id.* at *9. Plaintiffs asserted that Chart House hostesses should not qualify as "waitstaff employees." *Id.* Plaintiffs further argued that Defendants violated the Minimum Wage Law because Chart House servers remitted a portion of their tips to hostesses in violation of the Tips Act. Plaintiffs sought certification of a class of all individuals who worked as servers at the Chart House in Boston at any time from June 25, 2012 to July 1, 2015, and who remitted any portion of their tips to hostesses through Defendants' tip share program. *Id.* at *20. The Court found that Plaintiffs met all of the requirements of Rule 23(a) and 23(b)(3). The Court stated that the putative class included approximately 70 servers who worked at the Chart House over the past three years, and was therefore sufficiently numerous. *Id.* at *21. The Court also determined the Plaintiffs met the commonality requirement because Defendants employed a uniform, tip sharing system that applied to all servers and hostesses during the relevant time period. *Id.* at *24. Further, there was a single pivotal legal question at issue, *i.e.,* whether Chart House hostesses qualified as "waitstaff employees" under the Tips Act, and thus whether the automated tip-sharing program complied with Massachusetts law. *Id.* at *25. The Court held that common questions of law and fact predominated over any questions specific to individuals because the evidence that would be presented at trial was common to all hostesses, including internal company documents, job descriptions, or other communications involving employer expectations for hostesses and firsthand employee experiences. *Id.* at *25-26. The Court addressed typicality and adequacy together and found that the alleged injuries arose from the same events or course of conduct, *i.e.,* namely, the automated tip-sharing program that required all servers to remit portions of their tips to hostesses that shared the shift. *Id.* at *27. The Court stated that Plaintiffs were servers who worked at the Chart House in Boston during the relevant period, were required to participate in the program that remitted tips to hostesses, and were paid at a service rate. *Id.* Thus, the injuries of the proposed named Plaintiffs and putative Plaintiffs arose from same course of conduct by Defendant. Further, the Court opined that all of the claims were based on the same legal theory *i.e.*, that the Chart House hostesses did not qualify as waitstaff employees and that the tip sharing program therefore violated the Tips Act. *Id.* at *28. Accordingly, Plaintiffs met Rule 23's typicality requirement. The Court also held that Plaintiffs would fairly and adequately protect the interests of the class. The Court opined that Plaintiffs' counsel was clearly qualified, experienced, and able to undertake this litigation. Accordingly, the Court concluded that Plaintiffs satisfied the adequacy requirement. Finally, the Court held that Plaintiffs demonstrated that a class action was superior to other available methods for fairly and efficiently adjudicating the controversy. The Court stated that judicial economy would be served by allowing the matter to proceed as a class action, rather than consolidated or individual actions. Further, the Court determined that it would be unlikely that individuals would litigate such cases alone because the average person, especially working on a server's salary, likely could not afford counsel or the time to proceed *pro se*. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Lazo, et al. v. Sodexo, Inc.*, 2017 U.S. Dist. LEXIS 183455 (D. Mass. Nov. 6, 2017).** Plaintiffs, a group of service employees, filed a class action alleging that Defendant violated the Massachusetts Tips Act by retaining money collected from patrons as service charges, rather than remitting the monies to waitstaff and service employees as the statute requires. Plaintiffs filed a motion for class certification, which the Court denied. Plaintiffs moved to certify a class of at least 604 food and beverage waitstaff and service employees working at 35 Massachusetts locations where Defendant imposed, and improperly retained, a "service charge," on patron food and beverage purchases. *Id.* at *1-2. The Court found that Plaintiffs only identified 15 locations in their brief, and described Defendant's purported practices at only seven locations. *Id.* at *8. The Court stated that Defendant's interrogatory responses and declarations explained a variety of different services to a variety of different clients at a variety of different locations employing a variety of different practices regarding fees. *Id.* at

*12. The Court held that although Plaintiffs asserted that class certification was appropriate because the ultimate resolution was based on "one central issue – the legality of Defendant's practice and policy of collecting and retaining service charges from patrons" – that claim was refuted by the factual record. *Id.* The Court held that even if it were assumed that every member of the putative class had some version of a claim for relief under the Tips Act, the dissimilarities in billing practices and work procedures across the proposed locations, and therefore across class members, reflected an lack of a "practice and policy" of charging fees that was common to all service venues. *Id.* at *13. The Court further determined that Plaintiffs' proposed class was so broad that it included class members who worked at locations for which there is no evidence offered that fees were even imposed. *Id.* at *13-14. The Court stated that Plaintiffs failed to demonstrate that there were questions of fact or law that could provide a common answer across the various services provided by Defendant over the range of various locations, which was governed by differing contractual terms and fees between Defendant and clients. *Id.* at *14. The Court held that Plaintiffs were not aggrieved by the same practice or policy as the putative class members because there was no "practice or policy" common to the multiple locations where the putative class members worked. *Id.* The Court therefore opined that Plaintiffs failed to show a consistent practice or policy regarding the imposition of fees across their proposed class locations that would permit class-wide resolution of their claim, by permitting the determination of a "common answer" to a class-wide issue. *Id.* at *14-15. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Romulus, et al. v. CVS Pharmacy, Inc.*, 2017 U.S. Dist. LEXIS 107538 (D. Mass. July 12, 2017).** Plaintiffs, a group of shift supervisors, brought an action in state court alleging that Defendant had a policy under which they were required to remain on store premises when taking rest or meal breaks when there were no other managerial employees on-duty, and Defendant did not pay them wages for those breaks in violation of the Massachusetts Wage Act. Plaintiffs sought class certification of two classes pursuant to Rule 23(b)(3), including: (i) all shift supervisors who worked for an hourly wage in Massachusetts between July 25, 2008 and May 14, 2013 and were not paid for meal breaks during which Defendant required them to remain in the store, and sought recovery of wages for unpaid meal breaks during that period (the "First Class"); and (ii) all shift supervisors who worked for an hourly wage in Massachusetts between May 15, 2013 and the date of final judgment and who were not paid for meal breaks during which Defendant required them to remain in the store, and sought recovery of wages for unpaid meal breaks during that period (the "Second Class"). *Id.* at *3. Plaintiffs maintained that Defendant had two policies that led to their unpaid work during breaks: (i) in that until at least May 2013, Defendant's "management coverage policy" prohibited shift supervisors from leaving store premises when no other "managerial employees" were present; and (ii) under the "unpaid meal break" policy, meal breaks must be unpaid. *Id.* at *3-4. Defendant asserted that Plaintiffs could not establish commonality. Plaintiffs maintained that commonality was established because all shift supervisors were subjected to Defendant's management coverage policy and unpaid meal break policy. *Id.* at *8. The Court agreed with Defendant and found that Plaintiffs' evidence on its face did not provide common proof of an illegal practice such that it was able to resolve all of the putative class members' claims. *Id.* at *9. The Court determined that the policies themselves did not necessitate that a shift supervisor remain in the store during unpaid meal breaks or that a shift supervisor must take a meal break when he or she is the only manager present. *Id.* at *10. Further, the Court found that to the extent a situation did arise where the shift supervisor was required to remain in the store during a meal break, Defendant's policies suggested that he or she would be compensated. *Id.* The Court thereby determined that Plaintiffs' testimony regarding whether they were paid for meal breaks for which they remained in store, and if not, why, would vary by the individual. Therefore, the Court held that neither of the proposed classes satisfied the commonality requirement, and denied Plaintiffs' motion.

***Torrezani, et al. v. VIP Auto Detailing, Inc*., 2017 U.S. Dist. LEXIS 31276 (D. Mass. Mar. 6, 2017).** Plaintiffs, a group of auto detailing employees, brought a class and collective action alleging that Defendant violated various provisions of the Massachusetts Minimum Fair Wage Law ("MMFWL"), the FLSA, and the Massachusetts Wage Act ("MWA") by failing to pay them and similarly-situated individuals overtime wages. Plaintiffs sought certification of their Rule 23 state claims and conditional certification of a collective action of their FLSA claims pursuant to 29 U.S.C. § 216(b), which the Court granted. Plaintiffs worked for Defendants for several years performing vehicle detailing and cleaning at auto dealerships in Massachusetts. Plaintiffs asserted that they typically worked somewhere between 50 and 60 hours per week and were not provided breaks. Plaintiffs further alleged that they were paid on an hourly basis and were not paid premium or overtime

compensation for hours worked in excess of 40 per week. Moreover, Plaintiffs contended that Defendants failed to accurately record the time worked by employees and did not issue them pay stubs detailing the hours worked and rate of pay. *Id.* at *2. Although the Court initially questioned whether the 30 identified potential class members met the numerosity requirement of Rule 23, it ultimately determined that one of the primary purposes behind class actions was judicial economy. *Id.* at *7. The Court found that avoiding multiple suits by as many as 30 additional class members strongly favored maintaining the lawsuit as a class action, particularly because Court could reasonably infer that substantially all of the class members had limited financial resources and would find it difficult to pursue the claims themselves. *Id.* at *8. With respect to commonality, the Court opined that Plaintiffs essentially alleged that Defendants had engaged in *per se* illegal wage policies, *i.e.*, non-payment of overtime wages, which violated the rights of all class members. *Id.* at *8. The Court stated that Defendants did not dispute that there were factual and legal questions common to the class, *i.e.*, that Defendant failed to pay employees who worked as car detailers and cleaners overtime wages for hours worked in excess of 40 hours per week. *Id.* at *9. The Court found that the evidence showed that the prospective class shared common questions of law and fact sufficient to satisfy commonality. The Court also ruled that Plaintiffs alleged injuries arose from the same events and course of conduct as the injuries of the proposed class members and therefore the claims were typical to the class. *Id.* at *10. The Court likewise determined that Plaintiffs would vigorously pursue both their own claims and those of the proposed class members, and that their counsel demonstrated that they were qualified, experienced, and fully prepared to represent the class. *Id.* at *12. The Court opined that common issues predominated because the form of monetary damages was common to all class members. The Court stated that while class members probably could litigate the claims on their own, it was unlikely many of the class members would have the resources to do so, particularly because many of the class members worked for only limited periods of time and were likely to recover a minimal amount so that pursuing individual claims would be impractical. *Id.* at *14. Hence, the Court held that class action would be a far more efficient and economical manner to proceed. The Court held that Plaintiffs met the Rule 23 requirements for class certification. As to conditional certification of Plaintiffs' FLSA claims, the Court determined Plaintiffs sufficiently met their burden of establishing that there was a similarly-situated group of potential Plaintiffs, such that conditional certification was warranted. *Id.* at *17. Accordingly, the Court authorized notice to proposed collective action members under 29 U.S.C. § 216(b). The Court therefore granted Plaintiffs' motion for conditional certification of a FLSA collective action and their motion for class certification of state law claims pursuant to Rule 23. *Id.* at *18.

***Vargas, et al. v. Spirit Delivery And Distribution Services, Inc.*, 2017 U.S. Dist. LEXIS 43358 (D. Mass. Mar. 24, 2017).** Plaintiffs, a group of delivery drivers, brought a class action against Defendant alleging claims for violation of the independent contractor provision of the Massachusetts Wage Act (the "MWA"), unjust enrichment, and *quantum meruit*. Plaintiffs alleged that as a result of unlawfully characterizing them as independent contractors rather than employees, Defendant deprived them of various rights and benefits to which they were entitled. *Id.* at *2. Plaintiffs further alleged that as a result of mischaracterizing the nature of their employment, Defendant made illegal deductions from their wages and was unjustly enriched. *Id.* Plaintiffs filed a motion for class certification, which the Court granted. Plaintiffs sought to certify a Rule 23 class of all individuals who signed settlement carrier contracts with Defendant, in either their individual capacities or through personal corporate entities, and who personally provided Massachusetts-based delivery services for Defendant at any time between June 28, 2010 and the present. *Id.* at *3. Plaintiffs asserted that the class met the commonality requirement because it was defined by the common legal question of the drivers' employment status, *i.e.*, whether Defendant has misclassified them and other delivery drivers as independent contractors in violation of the independent contractor provision of the MWA. *Id.* at *37. Plaintiffs also asserted that the employment status of proposed class members could be resolved through common evidence. The Court found that the record demonstrated that drivers worked for different customers of Defendant who set their own standards and requirements, and therefore it remained an open question as to whether individualized scrutiny would be required as to each class member both on the issue of whether they were "employees" and, if they were, the extent to which Defendant was liable to them. *Id.* at *39. However, the Court stated that it appeared that answers to these inquiries should be readily ascertainable through Defendant's corporate records. *Id.* The Court therefore held that Plaintiffs' allegation that Defendant's system-wide policy of mischaracterizing its drivers as independent contractors in violation of the MWA satisfied the commonality requirement. *Id.* at *40. Defendant asserted that Plaintiffs' claims were not typical of the claims of the proposed class. Defendant contended that the corporate status of various class members who contracted with it and the presence of some contracts with

individuals and absence of contracts with others destroyed any possibility of a finding that Plaintiffs' claims were typical of the proposed classes' claims. *Id.* at *42. The Court disagreed and found the Plaintiffs' alleged injuries arose from the same events and course of conduct as those of the proposed class members. *Id.* at *42-43. Defendant also challenged whether Plaintiffs satisfied the adequacy requirement. Defendant argued that the named Plaintiff Civil lacked the integrity to represent the class because he failed to provide complete personal and corporate tax returns relating to the services he performed. The Court found that it would not determine that such conduct made Civil inadequate to represent the interests of the class at this time. *Id.* at *43. As to Rule 23(b) requirements, the Court stated that it was satisfied that common issues predominated, and that the proposed relief, in the form of monetary damages, was common to all class members. *Id.* at *44-45. The Court explained that there may be some individual issues, but these uncommon issues did not outweigh common ones. *Id.* at *45. Further, the Court found that while class members probably could litigate the claims on their own – given that some class members worked for Defendant only for a limited period and were likely to recover a minimal amount – pursuing individual claims would be impractical. *Id.* Moreover, the Court held that multiple actions would result in increased expense for the parties and the Court as the result of duplicative discovery and multiple proceedings. *Id.* at *45-46. The Court therefore concluded a class action was a superior method for resolving the claims at issue, and granted Plaintiffs' motion for class certification.

(ii) Second Circuit

***Alcantra-Flores, et al. v. Vlad Restoration LTD,* 2017 U.S. Dist. LEXIS 67147 (E.D.N.Y. May 2, 2017).** Plaintiffs, a group of employees, filed a collective and class action alleging that Defendant violated the overtime provisions of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs moved for conditional certification of the FLSA claims as a collective action. Plaintiffs alleged that the purported collective action of approximately 30 to 35 employees performed similar duties and functions working as foremen, demolition workers, restoration workers, and construction workers during the relevant period. *Id.* at *2. Plaintiffs further argued that the potential collective action members were similarly-situated because all of the employees performed similar job duties and were paid pursuant to a "scheme that enacted an improper policy of failing to compensate these employees with proper overtime premium pay." *Id.* In opposing Plaintiffs' motion, Defendants argued that conditional certification was not proper because 21 potential collective action members executed release agreements waiving any claims in the action. *Id.* at *2-3. Defendants concurrently filed a motion to remove the 21 potential collective action members from the action, relying on the same arguments they made in opposition to Plaintiffs' motion for conditional certification. The Magistrate Judge granted Plaintiffs' motion for conditional certification, finding that the affidavits submitted – stating that Defendants "failed to pay them overtime premium wages" and asserting that they have "personal knowledge of other employees" subject to the same unlawful practices – were an adequate showing to merit conditional certification. *Id.* at *3. The Magistrate Judge explicitly declined to consider or rule on Defendants' motion to remove the 21 potential collective action members. On Rule 72 review, Defendants argued that the Magistrate Judge erred in granting conditional certification because it "overlooked" Defendants' motion to remove the 21 potential Plaintiffs, thereby undermining the requirement that the purported collective was similarly-situated and sufficiently numerous. *Id.* at *4. The Court opined that the appropriate time to consider the purported releases of the 21 potential Plaintiffs would be after discovery, and Defendants would be able to move to decertify the collective action at that time. *Id.* at *10. Defendants further asserted that the potential collective members were not sufficiently numerous to proceed as a class action without the 21 Plaintiffs who purportedly released their right to proceed collectively. *Id.* at *11. The Court held that it would not be proper for it to consider whether to remove the 21 potential Plaintiffs at this stage of the litigation. The Court found that it therefore must accept Plaintiffs' allegation that the potential class size was between 30 and 35 members. Moreover, the Court explained, unlike certification under Rule 23, numerosity is not a prerequisite to conditional certification for FLSA claims. *Id.* at *12. Accordingly, the Court denied Defendants' motion.

***Ansoralli, et al. v. CVS Pharmacy, Inc.*, 2017 U.S. Dist. LEXIS 20075 (E.D.N.Y. Feb. 13, 2017).** Plaintiffs, a group of current and former market investigators, brought a putative collective action alleging that Defendant violated various provisions of the FLSA and the New York Labor Lab ("NYLL"). Plaintiffs filed a motion for conditional certification of their collective action, which the Court granted. Plaintiffs submitted declarations from themselves and five other former employees who worked as market investigators under the supervision of Anthony Salvatore and Abdul Saliu, two regional loss prevention managers. The declarations averred that Salvatore and Saliu required market investigators to work off-the-clock, and that the work resulted in unpaid

overtime. *Id.* at *3. The off-the-clock tasks included responding to work-related telephone calls, emails, and text messages from Salvatore and Saliu, attending meetings with other market investigators, completing paperwork and communicating with police about shoplifting suspects "caught" while on-the-clock, and performing surveillance of shoplifting suspects. *Id.* at *4. Defendant contended that Plaintiffs' declarations fell short of establishing the existence of a formal, uniform company-wide policy to require employees to work off-the-clock and not pay overtime wages. *Id.* Defendant argued that at most Plaintiffs alleged unlawful actions by individual, anomalous managers. Defendant further argued that Plaintiffs were not similarly-situated to the putative collective action members because the factual allegations regarding the terms and conditions of employment in the complaint and Plaintiffs' declarations were "entirely different" than those of the five other former employees. *Id.* As to Defendant's first argument, the Court opined that the FLSA does not require that a Plaintiff identify a formal, facially unlawful policy before obtaining conditional certification of a collective action. The Court opined that it was sufficient to show that Defendant's managers implemented a facially lawful policy in an unlawful manner, which resulted in a pattern or practice of FLSA violations. *Id.* at *5. As to Defendant's second argument, the Court determined that at this stage it was immaterial that there may be factual differences between the complaint and the various declarations in support of the motion for conditional certification. The Court determined that all that was necessary was some identifiable factual nexus binding the named Plaintiffs and potential collective action members together as victims of a particular practice. *Id.* at *6. The Court held that Plaintiffs and the putative collective action members were sufficiently similar in that they were all required to work off-the-clock and were not paid for that time. *Id.* Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action and authorized notice to be sent to potential collective action members.

***Arciello, et al. v. County Of Nassau*, 2017 U.S. Dist. LEXIS 179182 (S.D.N.Y. Oct. 30, 2017).** Plaintiffs, a group of County employees in various departments, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs alleged that they consistently experienced six-to eight-week delays in payment of their overtime wages. *Id.* at *4. Moreover, when Plaintiffs eventually received their overtime wages, they asserted that their pay stubs did not specify the day, week, or month to which those wages corresponded. *Id.* The Court found that Plaintiffs had made a sufficient factual showing that they and the potential collective action members –other non-exempt employees of the County who did not receive overtime compensation in a timely manner – were together victims of a common policy or plan that violated the FLSA. *Id.* at *11. The Court stated that Plaintiffs' complaint alleged that Defendants had a policy and practice of refusing to promptly pay overtime compensation at the statutory rate to Plaintiffs for their hours worked in excess of 40 hours per workweek, and that Defendant knew of the issue but their failure to pay in a prompt manner continued. *Id.* at *12. The Court determined that Plaintiffs' allegations were supported by Plaintiffs' respective declarations submitted in support of their motion, each of which described Defendant's practice of paying overtime wages six to eight weeks late, specifically named other employees who had been affected by such delays, noted that a previous grievance was filed relating to the delayed payment of overtime wages, and claimed that the delays continued even after Defendant became aware of the issue. *Id.* at *13. Defendant argued that Plaintiffs were not similarly-situated to the proposed collective action members because not all employees used the same time system as an interface for their time management. *Id.* at *14. The Court reasoned that while Plaintiffs' complaint suggested that Defendant's transfer to the new time system contributed to the delays in overtime payments, Plaintiffs did not allege that only those employees using time system in question experienced such delays. *Id.* Instead, Plaintiffs asserted that Defendants' policy and practice of refusing to promptly pay overtime compensation affected both those employees that use the time system and those that did not. *Id.* In light of the evidence that Defendant's allegedly unlawful practices were widespread and impacted employees beyond those using the time system, the Court found a sufficient "factual nexus" between Plaintiffs' situation and the situation of the proposed collective action members such that conditional certification should be granted. *Id.* at *15. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Balderramo, et al. v. Go New York Tours Inc.,* 2017 U.S. Dist. LEXIS 100106 (S.D.N.Y. June 27, 2017).** Plaintiffs, a group of tour bus drivers, brought a class and collective action alleging that Defendant failed to pay minimum wages, overtime, and uniform reimbursement in violation of the FLSA and the New York Labor Law

("NYLL"). Plaintiffs sought to certify their NYLL claims as a class action pursuant to Rule 23 on behalf of all employees of Defendant who worked as tour bus drivers and tour guides within six years prior to the filing of the complaint. The Court granted Plaintiffs' motion. It found that the proposed class consisted of over 40 members and was therefore met the numerosity requirement. *Id.* at *8. Because all of Plaintiffs' claims derived from the same wage & hour policies, the Court determined that there were a number of questions common to the class, including: (i) whether Defendant paid overtime for hours worked over 40 each week; (ii) whether Defendant paid the class members uniform maintenance pay; (iii) whether Defendant failed to pay spread of hours compensation; and (iv) whether Defendant failed to provide employees with proper wage notices and statements. *Id.* at *10. The Court also found that Plaintiffs met the typicality requirement because all class members' claims arose from the same policies and practices – namely failure to pay the overtime premium, spread-of-hours, and uniform maintenance pay – and the arguments Plaintiffs made in support of Defendants' liability were typical of those that would be made by others in the class. *Id.* at *11. The Court held that Plaintiffs adequately represented the class because they were willing to be class representatives and to protect the interests of the class, as they specifically claimed to have knowledge of Defendants' compensation policies and practices, and their claims mirrored those of the other class members. *Id.* at *13. Relative to Rule 23(b)(3)'s predominance requirement, the Court opined that the principal issue in this case concerned Defendants' wage & hour practices, which were subject to generalized, rather than individual, proof. *Id.* at *15. The Court determined that the questions that were common to all class members therefore predominated over those questions of damages individual to each employee. The Court also found superiority was met because Plaintiffs' recoveries were likely to be small and they were thereby less likely to bring individual suits. Finally, the Court concluded that because the class was merely comprised of Defendants' tour bus drivers and tour guides since March 27, 2009, it could be easily ascertained by reference to Defendants' own records. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Balverde, et al. v. Lunella Ristorante, Inc.*, 2017 U.S. Dist. LEXIS 59778 (S.D.N.Y April 19, 2017).** Plaintiffs, a group of hourly restaurant employees, filed an action alleging that Defendant violated various provisions on the FLSA and the New York Labor Law ("NYLL"). Plaintiffs had previously filed a motion to conditionally certify a collective action. Pursuant to Plaintiffs' motion, the Court conditionally certified the FLSA minimum wage and overtime claims as a collective action. Plaintiffs subsequently filed a Rule 23 motion for class certification of the NYLL claims, which the Court granted in part. Specially, Plaintiffs sought to certify: (i) claims for unpaid minimum wages, overtime wages, unpaid spread-of-hours, and failure to provide wage notice as a Rule 23(b)(3) class action on behalf of a class defined as "all hourly employees who worked for Lunella Ristorante, Inc. at any time from July 15, 2009 through the present" (the "unpaid wage class"); and (ii) claims for unlawfully withheld gratuities (Count VII) as a Rule 23(b)(3) class action on behalf of a tipped sub-class defined as "all waiters, bussers, runners and bartenders who worked for Lunella Ristorante, Inc. at any time from July 15, 2009 through the present" (the "unpaid tips sub-class"). *Id.* at *8-9. As a threshold matter, the Court considered whether the unpaid wage class should be certified with respect to back of the house kitchen employees. The Court had previously held in its conditional certification ruling that Plaintiffs failed to demonstrate a common policy or practice that applied to back of the house employees. *Id.* at *10. Therefore, the Court had granted Plaintiffs' motion for conditional certification but only as to servers, bartenders, and runners. *Id.* at *11. Defendants contended that Plaintiffs submitted no additional substantive information that should alter the Court's determination with regards to back of the house employees for purposes of the Rule 23 motion. The Court agreed and therefore excluded kitchen or back of house employees from the unpaid wage class. *Id.* Turning to the Rule 23 requirements for the redefined class, Defendants argued that Plaintiffs were unable to satisfy the numerosity requirement if the Court did not include back of the house kitchen employees. *Id.* at *12-13. Defendants asserted that because there were 38 tipped workers that appeared in their records, Plaintiffs could not satisfy numerosity. However, the Court noted that the time period of Defendants' records was only through the end of 2015 and Plaintiffs sought to certify the class through the present. The Court stated that even without the records from 2016 and 2017, if there were 38 employees as Defendants alleged, the Court still found numerosity satisfied. *Id.* at *14. As to commonality, the Court held that because all of Plaintiffs' claims derived from the same wage & hour policies, it found questions common to the class. The Court determined that since the answers to these questions would drive the resolution of the litigation, the Court deemed that the commonality requirement was satisfied. *Id.* at *16. The Court also rule that named Plaintiff and counsel were adequate representatives for the litigation. The Court stated that Plaintiffs established that there were disputed

issues that could be resolved through generalized proof on the legality of Defendants' various wage & hour practices. *Id.* at *18. The questions common to all class members therefore predominated over those questions of damages individual to each employee. *Id.* at *24. The Court further explained that Plaintiffs' NYLL claims arose out of the same nucleus of operative facts as their FLSA claims, which were going to be adjudicated as a collective action. Therefore, the Court concluded that a class action was superior to other available methods for adjudicating this controversy. Accordingly, the Court granted Plaintiffs' motion for class certification of their NYLL claims subject to the redefined class definition excluding back of house employees from the unpaid wage class.

***Benavides, et al. v. Serenity Spa NY,* 2017 U.S. Dist. LEXIS 142137 (S.D.N.Y. Sept. 1, 2017).** Plaintiff, a spa worker, brought a putative class action against Defendant alleging Defendant failed to pay minimum wage and overtime compensation in violation of the FLSA and New York Labor Law ("NYLL"). *Id.* at *1. Plaintiff also alleged that Defendant violated the spread-of-hours provisions, failed to provide proper wage statements, and neglected to issue wage & hour notices as required by NYLL. *Id.* at *2. Additionally, Plaintiff alleged that she was subject to a racially hostile work environment as Hispanic employees were spoken to "harshly" and expected to do work that the Chinese employees were not required to do. *Id.* Plaintiff moved for: (i) certification of the class as to the state law claims; and (ii) summary judgment on both the FLSA and state law claims. *Id.* The Court granted the motion for class certification and denied the motion for summary judgment. *Id.* The parties agreed that Plaintiff worked 10 hours a day; however, Defendant maintained that Plaintiff was given as many snack breaks as she wanted as well as a meal break, resulting in an eight-hour workday and no overtime. *Id.* at *8. Plaintiff and other employees were paid in cash without any wage statements, but some employees were paid "on the books." *Id.* Defendant maintained that it provided oral notice to employees that Defendant would be taking a tip credit and employees could keep all of their tips. *Id.* Plaintiff disputed this. *Id.* The Court declined to consider the declarations of five current employees that Defendant relied upon because: (i) Defendant did not demonstrate that the declarants were on notice of their rights; (ii) the weight of case law authority was against considering such declarants; and (iii) their content was of little evidentiary value. *Id.* at *14. The Court found that all elements were satisfied as to Rule 23. The Court rejected Defendant's argument that numerosity was not satisfied because most of the class lived in New York, and thus judicial economy was better served when class certification is granted in cases involving a tandem FLSA class claim. *Id.* at *24. The Court also rejected Defendant's argument as to commonality, noting that the objections went to the merits of the claims and not to whether the violations derived from the same wage policies. *Id.* at *28. The Court likewise rejected Defendant's argument that typicality and adequacy were not met because Plaintiff was paid in cash while some employees received checks. The Court reasoned that other employees were also paid cash and this did not change the contention that all employees were subject to the same course of conduct. *Id.* at *30. The Court further rejected Defendant's argument that Plaintiff did not qualify to be class representative because her separate race discrimination claim would divide Hispanic and Chinese employees, as the claim was against Defendant and not against other Chinese employees. *Id.* at *31. The Court ruled that the predominance and superiority requirements were satisfied and certified the class. *Id.* at *37. The Court denied Plaintiff's motion for summary judgment, noting that it was not procedurally improper to file for summary judgment simultaneously with a motion to certify. *Id.* at *39. However, the Court determined that there was substantial support for the proposition that it would be unfair to Defendant to grant summary judgment in favor of Plaintiff before § 216(b) notices were sent. *Id.* at *40. Accordingly, the Court denied Plaintiff's motion for summary judgment and certified the class.

***Birdie, et al. v. Brandi's Hope Community Services, LLC,* 2017 U.S. Dist. LEXIS 91330 (S.D.N.Y. June 23, 2017).** Plaintiff, a direct support professional ("DSP"), brought a collective action alleging that Defendant violated the overtime provisions of the FLSA. DSPs were responsible for providing assistance and care to disabled adults living in group homes operated by Defendant. Since these group homes were staffed at all times, DSPs were often required to stay with residents overnight. Plaintiff claimed that she frequently worked the night shift, which ran 17 hours from 3:00 p.m. to 8:00 a.m., and was required to clock-out between 10:00 p.m. and 6:00 a.m. but remain at the facility throughout the night. *Id.* at *2. Plaintiff alleged that Defendant violated the FLSA by requiring her and other similarly-situated DSPs to work over 40 hours a week without overtime compensation. *Id.* Plaintiff filed a motion for conditional certification of a collective action of all DSPs employed by Defendant since February 24, 2014. *Id.* at *3. Defendant did not oppose certification, but proposed that the scope of the proposed collective action be limited. Plaintiff asserted that Defendant subjected all DSPs to the same pay structure, the same training, and all performed the same duties in caring for Defendants' customers. *Id.* at *5-6.

Plaintiff further maintained that she observed and spoke with other DSPs and that, based on her experience and knowledge, she discerned that others would be interested in joining in her suit. *Id.* at *6 The Court was therefore satisfied that Plaintiff demonstrated a factual nexus binding her and potential collective action members together as victims of a particularly alleged policy or practice. *Id.* Defendant requested that the collective action be limited to all DSPs employed by Defendant since February 24, 2014, who were required to stay on the employer's premises overnight. *Id.* at *6-7. Acknowledging that only those DSPs staying with clients overnight were subject to Defendant's "sleep time" policy, Plaintiff indicated that she was amenable to modifying her proposed collective action definition. *Id.* at *7. The Court therefore determined that the pleadings supported the case theory that all DSPs who stayed overnight with patients were subject to the same pay structure and policy. *Id.* Based on the allegations, the Court ruled that Plaintiff satisfied her low burden at the notice stage under 29 U.S.C. § 216(b) and thereby granted Plaintiff's motion for conditional certification.

***Brown, et al. v. Barnes & Noble*, Case No. 16-CV-7333 (S.D.N.Y May 1, 2017).** Plaintiffs, a group of former managers, alleged that Defendant's policies violated the FLSA and the New York Labor Law ("NYLL"). Plaintiffs alleged that they, and others similarly-situated, were misclassified as exempt, and they sought unpaid overtime and other pay. Two months after filing the complaint, and before conducting any discovery, Plaintiffs moved for conditional certification of their FLSA claim. Plaintiffs argued that, because the café managers had been uniformly classified as exempt, were all reclassified as non-exempt, work under the same job description, and because Defendant maintained detailed policies, procedures, and rules that control how the café managers, regardless of location, performed their work, that all such managers were "similarly-situated" to the named Plaintiffs. The Magistrate Judge first dispelled three oft-cited theories advanced by Plaintiffs to obtain conditional certification, including: (i) that a uniform classification of exempt status, standing alone, can satisfy the low threshold for conditional certification under 29 U.S.C. § 216(b); (ii) that the employer's reclassified of a position from exempt to non-exempt showed that the position was uniformly misclassified previously; and (iii) that a common job description means the position is the same everywhere. As to the first contention, the Magistrate Judge held that a uniform classification of exempt status was not sufficient, in and of itself, to establish the commonality required for conditional certification. The Magistrate Judge stated that as to the second point, "there could be many legitimate business reasons for an employer to reclassify employees." *Id.* at 11. On the third point, the Magistrate Judge reasoned that "a common job description does not mean that conditional certification is *per se* warranted in every case." *Id.* The Magistrate Judge determined that here, the job description "is of little utility…when, under Plaintiffs' own theory of the case, [it] did not accurately reflect the duties they personally performed." *Id.* at 12. The Magistrate Judge therefore held that based on the evidence before the Court, she could not "infer that Defendant had *de facto* policies of requiring all 1,100 café managers to perform non-exempt work based on the personal experiences of the nine people who have joined this suit" and "nor can it infer such a policy from general assertions" and "cookie-cutter declarations." *Id.* at 17-18. Accordingly, the Magistrate Judge found that Plaintiffs failed to meet even the lenient standard for conditional certification, and denied Plaintiffs' motion.

***Cabrera, et al. v. Stephens*, 2017 U.S. Dist. LEXIS 160044 (E.D.N.Y. Sept. 28, 2017).** Plaintiffs, a group of assistant managers at a 7-Eleven convenience store, filed a collective action alleging that Defendants failed to pay minimum wage and overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs asserted that they were required to clock-in and clock-out at the start and end of each shift; however, Plaintiffs claimed that Defendants routinely altered timesheets in order to make it appear that they worked fewer hours. *Id.* at *4. Plaintiffs further contended that Defendants failed to pay the mandated overtime premium for any hours worked over 40 per week. *Id.* Plaintiffs also asserted that others were similarly-situated and that the same wage & hour violations occurred at Defendants' other store locations. *Id.* at *5. Plaintiffs argued that they satisfied the low evidentiary burden applicable to conditional certification of a collective action under the FLSA by submitting declarations identifying putative opt-in Plaintiffs and substantiating a factual nexus between the wage violations that Plaintiffs allegedly suffered and those potentially suffered by other similarly-situated employees. *Id.* at *6. Defendants contended that Plaintiffs could not show an unlawful common policy because they had only submitted sworn statements of two employees that were primarily composed of boilerplate conclusory language. *Id.* The Court granted Plaintiffs' motion for conditional certification with respect to all of Defendants' 7-Eleven stores. The Court found that Plaintiffs substantiated through their pleadings and submitted affidavits establishing

the requisite factual nexus between the named Plaintiffs' claims – *i.e.*, Defendants failing to make minimum wage and overtime payments as required under the FLSA and the NYLL – and the potential claims of similarly-situated employees. *Id.* at *13. The Court held that named Plaintiff declared that she and other non-managerial employees, several of which were identified by name, had similar duties, were subject to the same pay practices, and were also compensated at a rate below the minimum wage and in violation of the overtime requirements with respect to all the hours that they worked per week. *Id.* at *15. Additionally, the Court found that affidavit of opt-in Plaintiff Sinchi corroborated the named Plaintiff's allegations of the same or similar unlawful practices. Further, the Court stated that the additional sworn declaration from a former employee of Defendants confirmed the allegation that the Defendants' wage violations extended beyond the store in which they worked to Defendants' other locations as part of a common scheme to regulate the pay practices of the stores to promote a certain cost-to-sales ratio. *Id.* at *16-17. The Court therefore found that certification was appropriate as to all of Defendants' locations. Accordingly, the Court concluded that Plaintiffs satisfied their minimal burden at the first conditional certification stage and established a factual nexus supporting the contention that Plaintiffs and the putative collective members were similarly-situated. *Id.* at *19. The Court thereby granted Plaintiff's motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b).

***Canelas, et al. v. World Pizza,* 2017 U.S. Dist. LEXIS 50615 (S.D.N.Y. Mar. 31, 2017).** Plaintiffs, a group of restaurant employees, brought a class and collective action alleging that Defendant violated the overtime and minimum wage provisions of the FLSA and the New York Labor Law ("NYLL"). The parties stipulated to conditional certification a collective action of the FLSA claims. Plaintiffs subsequently filed a motion for class certification of their NYLL claims pursuant to Rule 23, which the Court granted. Plaintiffs sought to certify a class and two sub-classes, consisting of: (i) all non-exempt persons, including pizza makers, waiters, bus boys, dishwashers, cooks, delivery persons, and counter persons, who were employed by Defendants on or after September 24, 2008, the date six years preceding the filing of the complaint (the "class"); (ii) members of the class who were tipped employees, including waiters, delivery persons, and bus boys (the "tipped sub-class"); and (iii) members of the class who were delivery persons (the "delivery sub-class"). *Id.* at *8-9. The Court found that Plaintiffs submitted sufficient evidence to reasonably infer that the class exceeded 40 members, and therefore met the numerosity requirement. *Id.* at *10. Further, the Court stated that joinder of all class members would be impracticable in light of their limited resources and language barriers. *Id.* at *11. Because all of Plaintiffs' claims derived from the same wage & hour policies, the Court found a number of questions common to the class, including: (i) whether Defendant had a policy of paying non-exempt employees regular hourly rates, rather than overtime rates, for overtime hours worked; (ii) whether Defendant had a policy of rounding employees' hours, and whether that policy systematically deprived them wages for hours worked; (iii) whether Defendant failed to pay spread of hours compensation; and (iv) whether Defendant failed to provide employees with proper wage notices and statements. *Id.* at *12-13. The Court also held that questions common to the tipped sub-class, including whether Defendant was entitled to claim tip credits against the minimum wage, as well as questions common to the delivery sub-class, including whether Defendant had a policy of requiring delivery persons to cover their own costs. *Id.* at *13. The Court also opined that all class members' claims arose from the same policies and practices, and the arguments Plaintiffs made in support of Defendant's liability were typical of those that would be made by others in the class. *Id.* at *14. In light of the fact that Plaintiffs' alleged injuries were identical in kind to those of the class, the Court found that Plaintiffs' interests and the class members' interests were aligned and therefore Plaintiffs met the adequacy requirement. *Id.* at *15. The Court further determined that Plaintiffs met the requirements of Rule 23(b). The Court stated that common questions of law and fact predominated because the principal issue was the legality of Defendant's various wage & hour practices and policies, which were subject to generalized, rather than individual, proof. *Id.* at *16. Finally, the Court concluded that Plaintiffs met the superiority requirement because Plaintiffs' NYLL claims arose out of the same nucleus of operative facts as their FLSA claims. *Id.* at *17. Accordingly, the Court granted Plaintiffs' motion for class certification of their NYLL claims.

***Cazares, et al. v. Ava Restaurant Corp.*, 2017 U.S. Dist. LEXIS 50834 (E.D.N.Y. Mar. 31, 2017).** Plaintiffs, a group of restaurant employees, filed a class and collective action alleging that Defendants failed to pay overtime and minimum wages in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs also alleged that Defendants violated the spread of hours and wage notice provisions of the NYLL. Plaintiffs filed a motion for

class certification of their NYLL claims pursuant to Rule 23, and the Court granted the motion. Plaintiffs asserted that Defendants never paid overtime premiums to any of their employees, and paid the vast majority of their employees at rates significantly below the minimum wage. Further, Plaintiffs contended that Defendants never paid any of their employees a spread-of-hours premium for working a shift of more than 10 hours, nor did Defendants provide their employees with accurate wage notices or wage statements as required under New York law. *Id.* at *3. For numerosity, Plaintiffs relied on payroll spreadsheets comprised of 60 employees working in the same positions as the alleged class members. Accordingly, the Court found that numerosity was satisfied. Defendants argued that Plaintiffs had not carried their burden because they relied on payroll spreadsheets produced by Defendants. *Id.* at *8. The Court found Defendants' arguments meritless. It stated that Defendants produced the spreadsheet in response to Plaintiffs' document requests for relevant documents, and Plaintiff should be entitled to rely on them. *Id.* at *9. As to the commonality requirement, the Court held that the declaration of opt-in Plaintiff Vega and the payroll spreadsheets collectively provided evidence of a common pattern or policy of Defendants paying wages below the minimum wages, and failing to pay overtime premiums and spread-of-hours premiums. *Id.* at *10. The Court further stated that Plaintiffs and the class members also shared in common the question of whether they received wage statements and whether any wage notices received were accurate and whether Defendants' practices and policies violated the law. The Court also determined that the alleged harms suffered by Plaintiffs were typical of those of the class they sought to represent. The Court noted that all class members were employed by Defendants and allegedly were subjected to the same allegedly unlawful employment practices and policies. *Id.* at *11. As to adequacy of representation, Defendants argued that Plaintiffs were "untrustworthy" and not adequate class representatives because one of the named Plaintiffs allegedly "tricked" an employee into joining the lawsuit and Plaintiffs' counsel failed to explain certain forms to the employee. *Id.* at *15. Defendants also cited inconsistencies between the named Plaintiffs' depositions and the declarations submitted in support of this motion. The Court held that Defendants' argument failed because inconsistencies or inaccuracies in the named Plaintiffs' statements may reflect either a misunderstanding, or may raise an issue as to Plaintiffs' credibility, but did not necessarily disqualify them as adequate class representatives. The Court noted that named Plaintiffs' conduct showed that they were able to prosecute this action vigorously. Plaintiffs retained experienced and competent counsel, who had spent significant time and work preparing the action for litigation. Accordingly, the Court was satisfied that Plaintiffs met the requirement of Rule 23(a). As to Rule 23(b), the Court determined that Plaintiffs alleged that Defendants' employment policies and practices were unlawful, and the issues of whether they received the required overtime premium, and whether they received wage notices and wage statements, as well as spread-of-hours pay predominated over all individualized inquiries. *Id.* at *19. The Court also found that Plaintiffs met the superiority requirement. The Court reasoned that where the proposed class is significantly numerous and possesses relatively small individual claims and many potential class members are foreign-born, have limited reading and writing skills, and may fear reprisal from Defendants, a class action is both cost-efficient and fair and likely the only device by which many of the proposed class members would obtain relief. *Id.* at *20. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Contrera, et al. v. Langer*, 2017 U.S. Dist. LEXIS 165536 (S.D.N.Y. Oct. 5, 2017).** Plaintiffs, a group of superintendents, porters, and handymen in residential buildings, filed a collective action alleging wage & hour violations by Defendant under the FLSA. Plaintiffs moved for conditional certification of a collective action. *Id.* at *6. The Court granted Plaintiffs' motion in part and denied it in part. *Id.* Defendants objected, claiming that Plaintiffs were using an improper "integrated enterprise" theory to identify their employer for FLSA purposes, as four individuals alleged over 160 corporate entities were Plaintiffs' employers. *Id.* at *22. The Court rejected this argument and declined to decide if all Defendants were employers of Plaintiffs, as this was a fact-specific inquiry that could not be resolved at this stage of the litigation. *Id.* at *20, 23. The Court ruled that Plaintiffs met their modest burden at the conditional certification stage to show that one or more Defendant commonly owned and managed the buildings. *Id.* at *24. As to the superintendents, the Court found that Plaintiffs were not similarly-situated to superintendents who worked at properties outside of the Bronx location as no declarant worked at a building outside of these areas or claimed to have information from employees of Defendants outside of the area. Accordingly, the Court authorized notice only to all superintendents who operated out of the property in Bronx, New York. *Id.* at *36. As to the porters, Plaintiffs did not allege that they had any conversations with other porters about their pay or work schedule. *Id.* at *36. However, they testified that they never received overtime pay despite working an average of 70 hours a week. *Id.* at *37. The Court considered this testimony with the

testimony of the superintendents and found that they were similarly-situated as they performed substantially the same duties, and the Court authorized notice to all porters who operated out of the Bronx location. *Id.* at *38. As to the handymen, they testified that they worked with a team of 30 handymen and they were not paid overtime. *Id.* at *39. The Court found that the group of handymen were similarly-situated to these Plaintiffs and authorized notice to all handymen who operated out of the Bronx location, as there was no evidence of any handymen employed outside of this area. *Id.*

***De Carrasco, et al. v. Life Care Services, Inc.*, 2017 U.S. Dist. LEXIS 206682 (S.D.N.Y. Dec. 15, 2017).** Plaintiff, a home healthcare aide ("HHA"), brought an action alleging violations of the FLSA, the New York Labor Law ("NYLL"), breach of contract, and unjust enrichment. Plaintiff sought to certify two FLSA collective actions and five New York state law class claims pursuant to Rule 23. The Court granted conditional certification of an FLSA collective action and class certification of a New York state law class on the overtime issue alone. The Court denied the remainder of the request for collective action and class action certification on all other issues. In support of her motion for certification, Plaintiff submitted a declaration from herself and another HHA, stating that in her capacity as an HHA, Plaintiff was sent to clients' homes to provide care, and that she frequently worked 24 hour shifts. Plaintiff asserted that during 24 hour shifts, she often did not receive meal breaks or get five hours of uninterrupted sleep, she frequently worked more than 40 hours a week, and that when she worked more than 40 hours, she was not always paid time and one half, the minimum wage, or time and one half of her standard rate after January 1, 2015. *Id.* at *2-3. The Court noted that although the FLSA has several express statutory exemptions from the overtime pay requirement, including for companionship employees, the U.S. Department of Labor ("DOL") issued an interpretive regulation – called the "Third-party Employment" regulation – which stated that "Third-party employers of [HHAs] may not avail themselves of the minimum wage and overtime exemption provided by section 213(a)(15) of the Act." *Id.* at *8-9. Plaintiff claimed she was a victim of Defendants' policy to pay only time and a half the minimum wage for overtime between January 1, 2015 and October 13, 2015, the date on which the Third-party Employment Regulation took effect. Defendants' primary argument was that the DOL regulation did not take effect until October 13, 2015. The Court found that the DOL regulation took effect on January 1, 2015, and that Plaintiff met the light burden required at this stage, and therefore it certified a collective action as to Plaintiff's overtime claims after January 1, 2015. *Id.* at*19. As to class certification of the NYLL state law overtime claims, the Court found that the class was sufficiently numerous at approximately 40 members, and that Plaintiff's allegations of commonality, typicality, and adequacy were simple, strong, and virtually unchallenged. *Id.* at *20. As to the Rule 23(b)(3) requirements, Plaintiff asserted that both predominance and superiority were established, since the main legal issue, whether Defendants violated New York state law by not paying time and one half the regular rate for overtime hours, was subject to generalized proof. *Id.* at *21. Moreover, Plaintiff contended that a class action was the superior method for resolution. The Court found that common questions predominated over individualized ones for the period of January 1, 2015 through October 13, 2015. Therefore, the Court certified a New York state law class of employees who were not paid overtime after January 1, 2015. *Id.* at *22. Plaintiff also moved to certify a New York state law class of employees not paid a full 24 hours for 24 hour shifts. The Court found that under New York law, an employee should only be paid 24 hours if she, in fact, was not receiving appropriate meal and sleep breaks. *Id.* at *23. As a result, the Court determined that individualized inquiries would predominate, and accordingly, a class action was not the superior method of adjudication for the 24 hour claim. *Id.* The Court also denied certification for each of Plaintiff's other proposed classes.

***Durling, et al. v. Papa John's International, Inc.*, Case No. 16-CV-3592 (S.D.N.Y. Mar. 29, 2017).** Plaintiffs, five delivery drivers who worked at restaurants owned by independent franchisees of Defendant, alleged that Defendant and the franchisees under-reimbursed delivery drivers for wear and tear, gas, and other vehicle expenses in violation of the FLSA. Plaintiffs asserted that Defendant's control over its franchisees was such that it was the "joint employer" of Plaintiffs. Plaintiffs filed a motion for conditional certification of a collective action, which the Court denied. Plaintiffs averred that they were paid $6 per hour plus $1 per delivery, which, at an average rate of five deliveries per hour, amounted to wages of approximately $11 per hour. Applying the IRS standard mileage rate, Plaintiffs claimed that they paid $13.50 per hour for upkeep on their vehicles, resulting in a net loss of $2.50 per hour. Accordingly, Plaintiffs asserted that they earned less than minimum wage in violation of the FLSA and corresponding state minimum wage laws. Defendant owns and operates approximately 700 of over 3,300 Papa John's restaurants in the United States, and the rest of the restaurants

are franchisees. Although four of the five named Plaintiffs worked for franchisees, they did not sue any franchisees in this litigation (but only sued Defendant under their joint employer theory). Plaintiffs alleged that Defendant disseminated policies to the franchisees that caused the drivers to be under-reimbursed in a uniform way. Plaintiffs supported this theory with purported evidence that all stores, both corporate and franchise-operated, use the same point-of-sale ("POS") technology to record deliveries and calculate reimbursements, and use the same logos and uniforms. In denying Plaintiffs' motion for conditional certification, the Court found that Plaintiffs failed to satisfy even the modest standard generally used in step one for conditional certification motions under 29 U.S.C. § 216(b). The Court also declined to decide whether Defendant was in fact a joint-employer, finding this to be a merits issue. In framing the conditional certification issue, however, the Court reasoned that Plaintiffs could show that they were similarly-situated with the other members of the proposed collective action in two ways, either: (i) by demonstrating that Defendant dictated a common reimbursement policy for all delivery drivers working at both corporate and franchise-owned restaurants; or (ii) by showing that a common policy existed across the entire population of drivers of the proposed collective action. As to the first issue, the Court found that while Defendant admitted that it reimbursed the drivers it employed at corporate-owned stores by paying them a specific amount per delivery (without conceding that the rate was so low as to violate the FLSA), Plaintiffs failed to offer any evidence that Defendant was involved in its franchisees' policies for reimbursing delivery drivers. According to the Court, the mere use of the same POS system, with the corresponding ability to access data on how drivers are paid, in no way indicated that Defendant dictated a nationwide delivery driver payment policy. In analyzing the question of whether Plaintiffs could show a common policy across the population of drivers of the collective action that would bind them together, the Court answered it in the negative. The Court rejected Plaintiffs' attempt to show common policies regarding issues wholly unrelated to the purported practice of under-reimbursement. The Court reasoned that offering common policies such as wearing the same uniforms, or use of the Papa John's logo, or even the general use of personal vehicles to make deliveries, was not sufficient to demonstrate a common policy with respect to the payment of drivers. The Court determined that while Plaintiffs arguably had made a modest showing of a common policy across Defendant's corporate-owned stores and the two franchises for which Plaintiffs work, this evidence was insufficient to infer a nationwide policy. The Court rejected Plaintiffs' conclusory averments that other franchisees had the same policy, observing that witnesses as to this claim lacked personal knowledge. The Court also found that Plaintiffs failed to offer evidence of a common policy that violated the FLSA, noting that while the evidence showed that a few more franchisees did not use the IRS reimbursement rate, there was no evidence that the franchisees did not pay a rate reasonably related to driving and wear and tear costs, or that what they pay was so low that the drivers end up getting less than the minimum wage. The Court also opined that it had found no similar cases where Plaintiffs succeeded in certifying a nationwide collective action involving hundreds of franchisees where the declarations offered descriptions of only two stores, and no evidence existed that the franchisor dictated the policy at issue to all franchisees. Thus, even recognizing Plaintiffs' modest burden at the conditional certification stage, the Court declined to certify the collective action by inferring from the policy of two franchisees that a nationwide group of over 780 other franchisees reimbursed delivery drivers on a per-delivery basis that resulted in compensation below the minimum wage. Consequently, the Court denied Plaintiffs' motion for conditional certification of a nationwide collective action, holding that Plaintiffs failed to meet their modest burden of showing that delivery drivers were similarly-situated.

***Escamilla, et al. v. Uncle Paul's Pizza & Café Inc.*, 2017 U.S. Dist. LEXIS 206731 (S.D.N.Y. May 18, 2017).** Plaintiff, a restaurant worker, filed a collective action alleging that Defendants, the operators of two restaurants, violated the overtime and minimum wage requirements of the FLSA. Plaintiff alleged that Defendants failed to pay him and other employees the statutory minimum wage, spread of hours premium, and required overtime; improperly took tip credits from tipped employees; and failed to provide notice of legally mandated pay rate and wage statements. *Id.* at *3. To support these allegations, Plaintiff submitted a sworn declaration in which he stated that during his employment with Defendants, he was required to work at Paul's on Times Square on an as-needed basis, and that Defendants' other employees were interchangeable and shifted between the two restaurants as needed. *Id.* Plaintiff also asserted that based on his personal observations and conversations with these other employees, all other non-managerial employees employed by Defendants were subject to the same wage practices and policies. *Id.* at *4. Defendants submitted declarations that stated that Plaintiff never worked at Paul's on Times Square. Defendants contended, therefore, that Plaintiff was not similarly-situated to the employees of Paul's on Times Square. *Id.* at *5. Defendants also argued that Plaintiff's single declaration

was vague and insufficient "to justify the size and scope of Plaintiff's requested collective action group," especially in light of the fact that Plaintiff only worked at Uncle Paul's Pizza. *Id.* at *8-9. The Court stated that it could not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations at the conditional certification stage. *Id.* at *9. The Court further opined that a single Plaintiff's affidavit may, in some circumstances, be sufficient to support conditional certification. The Court held that while Plaintiff's declaration was sparse, it averred that Plaintiff regularly was required to work overtime, was not paid for hours worked in excess of 40 hours each week, was not paid minimum wage, was not paid the spread of hours premium, and did not receive proper wage statements or wage, hour, and tip credit notices. *Id.* at *10. In addition, Plaintiff stated that he had specific conversations about wage violations with four other employees who he identified by first name and position. The Court found that these assertions were sufficient to show that there may be similarly-situated non-exempt employees subject to the same alleged pay policies and violations as Plaintiff at both locations. *Id.* Defendants also argued that Plaintiff's proposed collective action was overly broad because it included non-exempt employees who did not share the same positions as Plaintiff. The Court reasoned that at the conditional certification stage, however, the proper inquiry was whether Plaintiff and the putative collective action members were similarly-situated with respect to the allegations that the law has been violated. *Id.* at *14. Accordingly, the Court concluded that Plaintiff had met his modest burden to show that non-exempt employees at both restaurants were similarly-situated, and it granted Plaintiff's motion for conditional certification.

***Galicia, et al. v. 34th St. Coffee Shop Inc.*, 2017 U.S. Dist. LEXIS 140402 (S.D.N.Y. Aug. 30, 2017).** Plaintiff, a busboy, filed a collective action alleging that Defendant failed to pay overtime wages and minimum wage in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. During his employment, Plaintiff was paid approximately $240 per week in cash for working approximately 69 hours per week. Plaintiff alleged that he observed several other employees, who were employed as waitresses and delivery persons, not being paid proper wages. *Id.* at *3. In support of his motion, Plaintiff submitted an affidavit that identified by name other employees at Defendant who were employed in similarly-situated jobs and whose working hours and pay would have constituted sub-minimum wages and unpaid overtime hours similar to Plaintiff's situation. *Id.* at *5. The Court noted that at this stage of the litigation, Plaintiff needed only to present a modest showing under 29 U.S.C. § 216 (b), and that Plaintiff thereby met this burden. Defendants contended that Plaintiff's showing did not establish that similarly-situated putative collective action members existed or establish any wrong-doing. *Id.* at *6. Defendant attached exhibits in support of its argument. The Court, however, found that Defendant's reliance on materials outside Plaintiff's submissions asked the Court to consider facts and make merits determinations that were "improper at this preliminary stage." *Id.* at *7. Further, the Court held that unlike the authority cited by Defendants, Plaintiff submitted an affidavit in support of his complaint and provided details in support of his allegations, such as names and a conversation with a similarly-situated employee. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Gomez, et al. v. Lace Entertainment,* 2017 U.S. Dist. LEXIS 5770 (S.D.N.Y. Jan. 6, 2017).** Plaintiff, a waitress, filed a putative class action and collective action alleging that Defendants violated various provisions of the FLSA and the New York Labor Law ("NYLL"). The Court previously granted Plaintiff's motion for conditional certification of the proposed FLSA collective action and 13 individuals opted-in to the action. Thereafter, Plaintiff filed a motion for class certification of the NYLL claims pursuant to Rule 23, which the Court also granted. Plaintiff alleged that Defendants: (i) required waitresses to participate in a tip share that included non-service employees; (ii) took an illegal 15% deduction from credit card gratuities; (iii) failed to compensate for expenses related to maintaining their uniforms; (iv) failed to provide an annual notice or accurate wage statements detailing all tips and/or deductions taken by Defendant; and (v) improperly took a tip credit against the minimum wage of its waitstaff. *Id.* at *4. The Court found that Plaintiff met the numerosity requirement, because deposition testimony showed that the number of waitresses employed by Defendant during the class period who did not sign arbitration agreements was between 100 and 150. *Id.* at *14. The Court further opined that Plaintiff's claims and the claims of putative class members arose from alleged common wrongs, including Defendants' failure to comply with the NYLL's minimum wage requirements, tip sharing restrictions, and wage statement and uniform maintenance expense rules. *Id.* at *15. The Court thus held that the evidence that Plaintiff produced was sufficient to demonstrate that Defendants had (or at relevant times had) common policies concerning these

issues, which affected all the proposed class members. *Id.* at *18. The Court determined that the proposed class was ascertainable as it was comprised of all waitresses employed by Defendant on or after April 29, 2009. *Id.* at *22. The Court stated that Plaintiff's affidavit indicated that she agreed to act as class representative and that Plaintiff had provided several declarations and testified at an evidentiary hearing in this matter, making her an adequate class representative. *Id.* at *24. The Court also found that Plaintiff's attorneys had ample experience litigating class actions, including wage & hour class actions, and were qualified to represent the proposed class. As to predominance, the Court held that common questions of liability predominated over individual inquiries. Finally, the Court concluded that class action was the superior method of adjudication of Plaintiff's claims, and thereby granted Plaintiff's motion for class certification.

***Griffin, et al. v. Aldi, Inc.,* Case No. 16-CV-354 (N.D.N.Y. Feb. 22, 2017).** Plaintiffs, a group of store managers, filed a collective action alleging that Defendant misclassified managers as exempt employees and thereby failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs asserted that they were scheduled to work 50 hours per week and often ended up working 60 to 70 hours per week without overtime pay. *Id.* at 3. Plaintiffs alleged that they spent 90% of their time "unloading supply trucks, stocking shelves, operating cash registers, cleaning the store, setting up displays, and helping customers." *Id.* Plaintiffs further alleged that these duties were identical to the duties of hourly employees. In support of their motion, Plaintiffs submitted deposition transcripts and declarations of five opt-in Plaintiffs from other states, as well as the job description of store managers, and documents from two other lawsuits where similar FLSA claims against Defendant were conditionally certified. *Id.* at 4. Plaintiffs contended that they established that all store managers were classified as exempt, all worked over 40 hours per week, all were denied overtime compensation, and all exercised little, if any, discretion in the performance of their duties as store managers. *Id.* at 9. The Court concluded that Plaintiffs made the requisite showing to warrant conditional certification under the FLSA. *Id.* at 11. The Court found that Plaintiffs alleged a common plan of trying to control labor costs to meet productivity figures by having store managers work well above their scheduled 50 hours per week and perform manual labor that otherwise could have been performed by non-exempt employees. *Id.* at 12. The Court held that the deposition testimony and declarations from store managers working in other states supported Plaintiffs' contentions that they frequently performed routine manual tasks. *Id.* at 15-16. The Court stated that this evidence was sufficient to support the modest showing required to justify conditional certification under 29 U.S.C. § 216(b). The Court further opined that, although conditional certification of Defendant's store managers in other related actions was not binding precedent on the Court, the findings that store managers were similarly-situated with respect to the identical misclassification claims supported Plaintiffs' motion. *Id.* at 23. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Gucciardo, et al. v. Titanium Construction Services, Inc.,* Case No. 16-CV-1113 (S.D.N.Y. Aug. 30, 2017).** Plaintiff, a construction supervisor, brought a putative class and collective action against Defendant alleging a failure to pay overtime compensation in violation of the FLSA and New York Labor Law ("NYLL"). *Id.* at 1. The Court had previously granted Plaintiff's motion for conditional certification of his FLSA claims. Plaintiff subsequently filed a motion for class certification of his NYLL claims pursuant to Rule 23(b)(3). The Court granted Plaintiff's motion. *Id.* Plaintiff and five others testified during depositions that they often worked more than 40 hours per week, and that Defendant failed to pay overtime compensation on those occasions. *Id.* at 3-4. In opposition to Plaintiff's motion for class certification, Defendant submitted deposition testimony from its managing director and superintendent, each of whom testified that employees rarely or never worked overtime. *Id.* at 4. The Court found that Plaintiff's motion should be granted because he met all the requirements of Rule 23. First, the proposed class included at least 50 individuals, making joinder impractical. *Id.* at 5. Second, the Court ruled that common questions of law and fact were capable of class-wide resolution because the claims arose from Defendant's alleged overtime compensation policy, including whether at least some employees worked over 40 hours per week and whether Defendants had a policy of paying overtime wages in cash and at the regular rate. *Id.* at 6-7. Third, the Court also noted that Plaintiff was a typical and adequate class representative. Plaintiff and each of the proposed class members alleged the same type of injury, *i.e.*, loss of overtime wages resulting from a single, common policy. *Id.* at 8. Further, although Defendant argued that Plaintiff was not an adequate class representative because of past arrests and unexcused absences, the Court opined that this did not touch upon the prosecution of the lawsuit. *Id.* at 10. The Court also stated that the class

was ascertainable, because the class was sufficiently definite such that no subjective criterial was required to determine class membership. *Id.* at 11-12. As to Rule 23(b)(3), the Court held that Plaintiff met the predominance requirement because Plaintiff alleged and offered evidence that construction workers employed by Defendant were subject to a common, illegal, overtime compensation policy. *Id.* at 13. The Court concluded that Plaintiff also met the superiority requirement because potential class members were aggrieved by the same policies, the damages suffered were small relative to the expense of individual litigation, and some potential class members were currently employed by Defendant. *Id.* at 14. Accordingly, the Court granted Plaintiff's motion for class certification of his NYLL claims.

***Guevara, et al. v. Sirob Imports, Inc.,* Case No. 15-CV-2895 (E.D.N.Y. Nov. 3, 2017).** Plaintiffs, a group of food packaging employees, filed a collective action alleging that Defendant violated the FLSA and state wage & hour laws by failing to pay them for time spent donning and doffing at the beginning and end of the workday, subjected them to rounding of time records, and failed to pay for break time. Plaintiffs filed a motion for conditional certification of a collective action relative to their FLSA claims and for class certification of their state law claims pursuant to Rule 23, which the Court granted in part. At the beginning of their shifts, Plaintiffs were required to remove jewelry, wash their hands, and don a white coat, gloves, and a hairnet without being paid. *Id.* at 2. At the end of the day, Plaintiffs had to remove their work gear and retrieve their belongings, again without pay. Plaintiffs also contended that Defendant rounded their time punches down to the nearest quarter-hour. *Id.* at 3. Plaintiffs likewise asserted that Defendant offered 20-minute breaks, but then removed 20-minutes of pay from Plaintiffs' paychecks even if they did not take the breaks. *Id.* at 3-4. The Court held that Plaintiffs submitted substantial evidence sufficient to demonstrate that Plaintiffs met the requirement for Rule 23 certification and for conditional certification under 29 U.S.C. § 216 (b). However, the Court determined that the evidence demonstrated that Plaintiffs' donning and doffing claims were *de minimis*, and therefore it denied certification as to those claims. *Id.* at *8. As a result, the Court granted Plaintiffs' motions for conditional certification and class certification for all claims except the donning and doffing claims.

***Hotaranu, et al. v. Star Nissan, Inc.*, 2017 U.S. Dist. LEXIS 56801 (E.D.N.Y. April 12, 2017).** Plaintiffs, a group of car sales representatives, alleged that Defendant violated the FLSA and the New York Labor Law ("NYLL") by failing to pay minimum wage. Plaintiffs alleged that Defendant's sales representatives were paid pursuant to a commission agreement, plus a flat rate of $100 per week, regardless of hours worked. Plaintiffs further alleged that, although they worked more than 40 hours per week, often sales representatives earned no commissions during a given pay period, or did not earn enough commissions to satisfy the applicable minimum wage. *Id.* at *3. Plaintiffs filed a motion for conditional certification of their FLSA claims, and the Court granted the motion. Plaintiffs' proposed collective action consisted of all sales representatives who worked or have worked at Defendant's dealership since July 12, 2013. *Id.* at *7. The Court stated that the record demonstrated that Plaintiffs satisfied their modest burden of demonstrating that Defendant's sales representatives were subjected to a common policy that allegedly deprived them of minimum wages. *Id.* at *7-8. Plaintiffs submitted declarations evidencing Defendants' common policy of paying auto sales representatives a flat weekly rate of $100, plus commissions earned, regardless of hours worked, and asserting that, at least during certain pay periods, they did not earn commissions and thus did not receive the applicable minimum wage. *Id.* at *8. Three of the four declarants also asserted that they recalled certain pay periods when they earned only small commissions that they thought were insufficient to constitute the minimum wage. *Id.* Additionally, Plaintiffs' declarations included the full names of seven other sales representatives who they asserted "were paid a flat weekly rate" and Plaintiffs further asserted that Defendants never notified them of their entitlement to the applicable minimum wage for all hours worked. *Id.* at *9. Plaintiffs also submitted pay stubs as evidence that indicated that they were paid less than the applicable minimum wage during the relevant time period. *Id.* Defendant principally argued that Plaintiffs had not established the existence of a common unlawful policy because "commissions earned in a given period can be applied to the minimum wage for other periods" and there was no evidence that "when accounting for commissions earned in other pay periods, Plaintiffs were paid less than the applicable minimum wage." *Id.* at *9-10. The Court stated that it could not address Defendant's contention at this stage, as it involved a merits-based determination as to how minimum wages should be calculated, and further required an opportunity for the parties to exchange discovery and for a full record to be developed. *Id.* at *10. Similarly, Defendant argued that Plaintiffs failed to account for commissions paid directly to them by Nissan Motor Corporation USA pursuant to various sales incentive programs. The Court found that it

also could not entertain this factual argument at the conditional certification stage without the benefit of a full record. *Id.* at *11. Defendant further contended that determining whether the commissions earned by Plaintiffs were sufficient to satisfy Defendant's minimum wage obligation required an "individual inquiry and analysis." *Id.* at *12. The Court was not persuaded that such an analysis should bar conditional certification in light of the calculations routinely undertaken in wage & hour actions and the remedial nature of the statute. Accordingly, the Court held that conditional certification was appropriate at this stage of the litigation, and granted Plaintiffs' motion pursuant to 29 U.S.C. § 216(b).

***Hypolite, et al. v. Healthcare Services Of New York,* 2017 U.S. Dist. LEXIS 97897 (S.D.N.Y. June 23, 2017).** Plaintiff, a home healthcare aide, brought a collective action alleging that Defendant failed to pay minimum and overtime wages in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action consisting of all current and former employees: (i) who are or were formerly employed by Defendant as home health aides at any time since June 24, 2010 to the entry of judgment in this case; and (ii) who were non-exempt employees within the meaning of the FLSA who were not paid minimum wages and/or overtime wages at rates not less than one and one-half times their regular rate of pay for hours worked in excess of 40 hours per workweek. *Id.* at *3. Plaintiff alleged that home health aides worked 24 hour shifts, but were only compensated for 13 of those hours, that home health aides who worked for more than one client in a shift were not compensated for any travel time, that she had to eat her meals on-the-job, for which she was not compensated, and that she was not properly compensated for sleeping time because she could not sleep for five uninterrupted hours without being awakened by her clients. *Id.* at *7. Plaintiff contended that her duties included "cleaning the entire house" (including dusting, vacuuming, scrubbing, and mopping), cooking, doing laundry, preparing three meals a day and snacks, making the bed, cleaning pots and pans, loading/unloading the dishwasher, and garbage removal. *Id.* at *7-8. Plaintiff claimed that she spent at least 30% of her time working in a "maid capacity" by performing such household work. *Id.* at *8. The Court noted that prior to January 1, 2015, home health aides were excluded from the FLSA's overtime provisions unless the aide could show that the aide's general household work exceeded 20% of the total weekly hours worked. *Id.* at *9. Further, the Court stated that home health aides employed by third-party employers were exempt from the FLSA. *Id.* at *9-10. The Court explained that the home health aide exemption has since been narrowed, which brought more home health aides within the scope of the FLSA. The Court found that Defendants did not attempt to comply with the revised regulation on January 1, 2015, and only began to comply by paying health care aides overtime in accordance with the revised regulation on October 13, 2015. Therefore, the Court held that for the period of January 1, 2015 to October 13, 2015, Plaintiff demonstrated that she and others like her were treated in a similar fashion under a common policy, *i.e.*, Defendant's refusal to apply the revised home health aide exemption. *Id.* at *15. However, the Court stated that for the period before January 1, 2015, Plaintiff failed to demonstrate the factual nexus between herself and the proposed collective action of potential opt-in Plaintiffs. The Court found although Plaintiff asserted that Defendant "employed at least 40 other individuals, like Plaintiff, in positions as home health aides/maids," she provided no basis from which to conclude that any other potential opt-in Plaintiffs were similarly-situated with respect to the home health aide exemption. *Id.* at *17. Based on the submissions, the Court held that there was no feasible way to determine which potential opt-in Plaintiffs would be subject to the pre-January 1, 2015 exemption. The Court further opined that Plaintiff did not even provide a basis to determine whether she herself spent in excess of 20% of her time performing the type of "heavy cleaning" activities that would make her exempt from the exemption because she failed to distinguish between "heavy cleaning" activities and other types of "household" activities. *Id.* at *18. The Court noted that Plaintiff's declaration and pleadings were self-focused and offered no basis to assess Defendant's compensation practices only with respect to any other home health aide. *Id.* Accordingly, the Court granted Plaintiff's motion for conditional certification with respect to home health aides employed by Defendant from January 1, 2015 to October 13, 2015.

***In Re Doria/Memon Discount Stores Wage & Hour Litigation,* 2017 U.S. Dist. LEXIS 167658 (S.D.N.Y. Oct. 10, 2017).** Plaintiffs, a group of retail workers, filed suit alleging Defendant violated the FLSA and the New York Labor Law ("NYLL") for failure to pay minimum wage, overtime, and spread-of-hours premium pay, in addition to failure to comply with wage statement and pay rate notifications. *Id.* at *2. Plaintiffs moved to certify a proposed class pursuant to Rule 23 and the Court granted the motion. As Plaintiffs' motion for certification was brought almost three years after the filing of the complaint, Defendants objected, asserting that Plaintiff's motion

was untimely, caused an undue delay of litigation, and was fundamentally unfair to Defendants. *Id.* at *8. The Court rejected Defendant's argument on the basis that Rule 23 does not set a specific time-frame and Plaintiffs' complaint described its allegations as a class action and mentioned their intention to seek certification under Rule 23. Furthermore, Plaintiffs had already moved for collective certification of their FLSA claims. Accordingly, Defendants were on notice of these case theories and could not claim surprise. *Id.* at *9. Furthermore, class certification would not prejudice Defendant's case or unduly delay the litigation, as discovery was still on-going. *Id.* at *10. Defendants did not dispute that Rule 23(a)'s requirements were satisfied and the Court ruled as such. *Id.* at *12. First, numerosity was satisfied as Plaintiffs identified over one hundred members and at a minimum, over 40 similarly-situated workers. *Id.* at *13. Commonality and typicality also were met because the allegations of the proposed class arose from the common company-wide policies and practices of Defendant's failure to pay minimum wage, overtime, and spread of hours premium pay. *Id.* at *14. Further, there was no dispute that the proposed class representatives' claims were typical of the class members. *Id.* at *15. Adequacy as to the proposed class representatives and class counsel was also satisfied. *Id.* at *17. The Court ruled that ascertainability was established as Plaintiffs had already assembled a list of prospective class and sub-class members by name, and class membership could be ascertained by objective documentation, such as payroll records and individuals identified by Defendants as non-exempt workers during discovery. *Id.* at *17, 18. The Court also found that Rule 23(b)(3)'s predominance and superiority requirements were satisfied, as the overarching issues at play concerned matters of common policy and practice in Defendant's stores regarding pay, record-keeping, and notification obligations under the NYLL. *Id.* at *20. The Court noted that wage claims were especially suited to class litigation despite differences in hours worked, wages paid, and wages due, because all putative class members were allegedly harmed by a common practice. *Id.* The Court determined that class action was the superior method of adjudication given the common questions to all putative class members, the small amount of damages in relation to the expense of litigation for each individual Plaintiff, and because Plaintiffs' FLSA action had already been conditionally certified. *Id.* at *21. Accordingly, the Court concluded that a simultaneous class action over the NYLL claims would allow for cost-efficient litigation of common disputes. *Id.*

***Lora, et al. v. To-Rise LLC,* 2017 U.S. Dist. LEXIS 112644 (E.D.N.Y. July 18, 2017).** Plaintiffs brought an action against Defendant alleging violations of the FLSA and state law. *Id.* at *2. Plaintiffs alleged that Defendant: (i) failed to pay overtime; (ii) failed to pay "spread of hour" wages; (iii) made unlawful deductions from Plaintiffs' wages for traffic violations; and (iv) failed to provide proper wage statements. *Id.* at *5. Plaintiffs filed a motion for conditional certification of a collective action. The Magistrate Judge recommended that the Court grant Plaintiffs' motion on the grounds that Plaintiffs sufficiently alleged that they were victims of an unlawful policy and as Plaintiffs were similarly-situated. *Id.* at *19. Plaintiffs alleged that Defendant instructed its payroll staff to reduce hours of other employees so as to pay them less than what they were owed and to make illegal deductions. *Id.* at *21. Defendant filed counterclaims against the named Plaintiffs alleging a breach of duty of loyalty and conversion and asserted that the counterclaims created a conflict within the membership of the collective action. *Id.* at *22. The Magistrate Judge rejected Defendant's argument that counterclaims against the proposed class representatives created an inherent conflict, and thus should not preclude conditional certification at this stage of litigation. *Id.* at *25. The Magistrate Judge recommended denial of Plaintiffs' request that the statute of limitations be tolled until they send notices, noting that it was not clear whether any potential opt-in Plaintiffs would even be time-barred. *Id.* at *28. Defendant made several objections to the content of the notice. Defendant asserted that the notice should contain a statement about Defendant's position on the claims and the Magistrate Judge agreed that some statement describing Defendant's position should be included as well as a statement and there has not been an adjudication on the merits. *Id.* at *35. However, the Magistrate Judge stated that Defendant's proposed language mentioning counterclaims should not be included as it might dissuade potential collective action members. Defendant also objected to the consent form being printed on color paper so as to look like an advertisement. The Magistrate Judge found that there was no issue with the format or color of the notice and consent. However, the Magistrate Judge recommended that the notice disclose the responsibilities of opt-in Plaintiffs if they decided to join the suit, but the language should minimize any dissuasive effects. *Id.* at *40. The Magistrate Judge agreed with Defendant that the notice also should disclose the fee arrangement of Plaintiffs' counsel. *Id.* at *41. The Magistrate Judge also agreed that Defendant should be given opportunity to review the Spanish translated version of the notice. *Id.* at *37. Furthermore, the Magistrate Judge recommended that Plaintiffs be allowed to post the notice in Defendant's place of business

and send a reminder notice, so long as it did not to infer that the Court encouraged individuals to join the lawsuit. *Id.* at *49. The Magistrate Judge further recommended that Defendant be required to comply with Plaintiffs' request for names, mailing addresses, and telephone numbers to assist in notice of opt-in Plaintiffs, but denied the Plaintiffs' request for social security numbers and rates of compensation of potential opt-in Plaintiffs. *Id.* at *53. In sum, the Magistrate Judge recommended that the Court grant conditional certification of the collective action and approval of the notice and consent forms as modified. *Id.* at *58.

***Lora, et al. v. To-Rise LLC*, 2017 U.S. Dist. LEXIS 151164 (E.D.N.Y. Sept. 15, 2017).** Plaintiffs, a group of former employees, filed a collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action. The Magistrate Judge recommended granting the motion in part. On Rule 72 review, Defendants objected to the Magistrate Judge's report and recommendation, and argued that their counterclaims against Plaintiffs created a conflict of interest, which precluded the named Plaintiffs from securing conditional certification. *Id.* at *3. The Court found that Defendants had not cited any case law holding that counterclaims against proposed representatives of a FLSA collective action create an inherent conflict between the named Plaintiffs and potential opt-in Plaintiffs, such that conditional certification of a collective action was precluded. *Id.* at *3-4. The Court held that Defendants merely reiterated their arguments from their original opposition to conditional certification, and they offered no reason why the Magistrate Judge's ruling was clearly erroneous or contrary to law. *Id.* at *4. The Court further noted that arguments about conflicts of interest would be better raised during the second stage of certification. Accordingly, the Court ruled that Defendants failed to demonstrate that the Magistrate Judge's report and recommendation was clearly erroneous or contrary to law. The Court thereby adopted the Magistrate Judge's findings, and granted Plaintiffs' motion for conditional certification in part.

***Lynch, et al. v. City Of New York*, 2017 U.S. Dist. LEXIS 178855 (S.D.N.Y. Oct. 27, 2017).** Plaintiffs, a group of principle administrative associates level 1 ("PPA 1"), filed a collective action alleging that Defendants failed to pay overtime compensation and overnight premium pay in violation of the FLSA. Previously the Court conditionally certified a collective action. Subsequently, Defendants filed a motion to decertify the collective action, and the Court granted Defendants' motion. Defendants argued that: (i) Plaintiffs were not similarly-situated with respect to their job duties; (i) that Plaintiffs were not similarly-situated with respect to the impact of the City's overtime policies; and (iii) that the differences between Plaintiffs lent themselves to individualized defenses. *Id.* at *10. Plaintiffs argued that the circumstances in which the jobs were performed was similar enough, that individual defenses did not predominate, and that fairness considerations tilted the balance toward certification. *Id.* However, the Court noted that Plaintiffs failed to address Defendants' argument as to the factual differences between employees and their supervisors with respect to the overtime policies. *Id.* at *11. The Court found that Defendants offered evidence in support of a number of differences between the opt-in Plaintiffs, including varying levels of responsibility, times that employees were on and off-site, and different supervisors. The Court reasoned that the role of the supervisor would lead to differences between collective action members that would be incapable of collective action treatment. The Court also found that Plaintiffs' depositions further indicated critical differences in what supervisors told employees about overtime, ranging from those who said directly that Plaintiffs would not be paid for overtime due to "budgetary" concerns, those who said "no overtime" unless the employees were working on "special projects," to those whose supervisors regularly approved requests for overtime even after the overtime was worked. *Id.* at *12. In light of these variations, the Court held that decertification was appropriate. The Court also opined that the City's defenses likely would be highly individualized, as its knowledge of the alleged uncompensated time could vary from Plaintiff to Plaintiff, supervisor to supervisor, and unit to unit. *Id.* at *13-14. However, while the Court found that the certification of the entire § 216(b) collective action was not appropriate, it stated that nevertheless there may be groups, or sub-classes of Plaintiffs, for whom collective resolution of their claims would be efficient. *Id.* at *15. The Court therefore invited the parties to confer as to whether such groups existed. Accordingly, the Court granted Defendants' motion for decertification.

***Masoud, et al. v. 1285 Bakery Inc.,* 2017 U.S. Dist. LEXIS 14927 (S.D.N.Y. Jan. 26, 2017).** Plaintiff, a banquet server, filed a putative class action and collective action alleging that Defendants violated various provisions of the FLSA and the New York Labor Law ("NYLL"). Specifically, Plaintiff alleged that Defendants failed to pay banquet servers overtime wages in violation of the FLSA, and illegally retained banquet servers' tips, failed to

pay banquet servers a spread-of-hours premium, and failed to give banquet servers adequate wage statements and notices in violation of the NYLL. *Id.* at *2-3. Plaintiff moved for class certification of the NYLL claims pursuant to Rule 23 and conditional certification of a collective action for the FLSA overtime claim pursuant to 29 U.S.C. § 216(b). The Court granted Plaintiff's motion. Plaintiff's proposed class was comprised of all banquet servers employed by Defendant on or after September 18, 2009. *Id.* at *11. The Court determined that class membership was easily ascertainable as Defendant provided a list of all banquet servers during the relevant time period. The Court stated that the class satisfied the numerosity requirement because the list identified more than 50 individuals. *Id.* at *12. The Court found that Plaintiff met the commonality and typicality requirements because Plaintiff's claims all arose from Defendants' alleged illegal activities, *i.e.*, failure to comply with overtime pay requirements; failure to distribute the entire service charge, a purported gratuity, to banquet servers; failure to pay Plaintiff a spread-of-hours premium; and failure to give Plaintiff adequate wage statements and notices. *Id.* at *14. The Court further determined that there was sufficient evidence that Defendant had compensation policies common to all banquet servers, and therefore the policies which allegedly adversely affected Plaintiff equally affected all the banquet servers. *Id.* The Court opined that Plaintiff's counsel was qualified to represent the proposed class as they had extensive experience litigating class actions. *Id.* at *16. The Court also found that Plaintiff was prepared to act as a class representative and was familiar with the case's facts, including Defendants' allegedly illegal activities. The Court opined that common issues predominated and that any factual variations in the number of hours worked or the share of the service charge received would be relevant only for the issue of damages if the class prevailed. Thus, the Court found that Plaintiff satisfied the predominance requirement. *Id.* at *18. The Court also held that the size of the potential class suggested that a single class action was the superior form of adjudication. *Id.* at *19. As to Plaintiff's FLSA overtime wage claims, the Court found that Plaintiff's satisfaction of the Rule 23 requirements was sufficient to demonstrate that conditional certification of the FLSA collective action was also warranted. *Id.* at *21. Accordingly, the Court granted Plaintiff's motion for class certification of her NYLL claims and conditional certification of her FLSA claims.

***McEarchen, et al. v. Urban Outfitters, LLC*, 2017 U.S. Dist. LEXIS 33335 (E.D.N.Y. Mar. 7, 2017).** Plaintiffs, a group of department managers ("DMs"), brought an action alleging that Defendant violated federal and state wage laws by misclassifying them and other DMs as managerial employees exempt from the laws' requirement to pay premium wages for overtime hours. The Court had previously conditionally certified a collective action under the FLSA. *Id.* at *3. Plaintiffs subsequently sought final certification of a collective action of "all persons who are or were formerly employed by [Urban] in the United States at any time since June 24, 2010 . . . as DMs and individuals holding comparable salaried positions." *Id.* at *3-4. At the same time, Defendant moved to decertify the collective action. The Magistrate Judge recommended that the Court deny Plaintiffs' motion and grant Defendant's motion. *Id.* at *4. DMs performed some non-exempt, non-managerial work. Defendant acknowledged that DMs performed at least some such work, and all Plaintiffs who gave depositions testified that they performed the same type of work as hourly employees. Defendant, however, contended that Plaintiffs and the opt-in Plaintiffs had widely varying duties arising from the differences in location and the structure of the stores in which they worked, and therefore could not be similarly-situated. Defendant asserted that named Plaintiffs spent much less time on managerial work than the opt-in Plaintiffs, that DMs performed vastly different types of work, and that several variables THAT produced differing work experiences for different DMs with respect to the supervision of and delegation of tasks to staff; training employees; interviewing and hiring employees; issuing discipline; creating schedules; making business decisions; and overall managerial authority. *Id.* at *14-15. Plaintiffs responded that any differences in employment settings were immaterial, because all of them had limited managerial authority and "performed predominantly non-exempt manual labor and customer service-related tasks" subject to Urban's uniform corporate policies. *Id.* at *5. The Magistrate Judge determined that the record showed that Plaintiffs and the opt-in Plaintiffs were not similarly-situated sufficient to grant final certification. For example, Plaintiffs uniformly testified that they played little to no role in the hiring and firing process of hourly employees, and that their opinions were given very little weight. *Id.* at *17. In contrast, several opt-in Plaintiffs described being active participants in the hiring and firing process. *Id.* Further, Plaintiffs were denied any meaningful involvement in training, but the opt-in Plaintiffs generally acknowledged some role in training. *Id.* at *20. There was also little uniformity among DMs with respect to their scheduling authority. *Id.* at *21. The Magistrate Judge stated that several Plaintiffs and opt-in Plaintiffs also testified to a range of disciplinary authority. *Id.* at *23. The Magistrate Judge found that all these factors favored decertification of the collective action. Additionally, the Magistrate Judge opined that the Plaintiffs' divergent duties and

responsibilities made it unduly difficult for Defendant to rely on representative proof to counter Plaintiffs' claims. *Id.* at *28. The Magistrate Judge held that the pertinent differences among the various Plaintiffs as to their duties and authority would inefficiently require mini-trials for over a hundred claimants. *Id.* at *29-30. Such inefficiency weighed heavily in favor of decertification. Accordingly, the Magistrate Judge recommended that the Court deny Plaintiffs' motion for final certification of a collective action and grant Defendant's motion for decertification.

***McEarchen, et al. v. Urban Outfitters, LLC*, 2017 U.S. Dist. LEXIS 144203 (E.D.N.Y. Sept. 6, 2017).** Plaintiffs, a group of department managers ("DMs"), brought an action alleging that Defendant violated federal and state wage laws by misclassifying them and other DMs as managerial employees exempt from the laws' requirement to pay premium wages for overtime hours. The Court had previously conditionally certified a collective action under the FLSA. After discovery, Defendant sought to decertify the collective action, and the Magistrate Judge recommended that the Court grant Defendant's motion. *Id.* at *4. On Rule 72 review, the Court agreed that the collective action should be decertified, and adopted the Magistrate Judge's report and recommendation. The Court found that the record reflected significant variations among the named and opt-in Plaintiffs, as to both the amount of exempt work they performed and the level of managerial authority they exercised. *Id.* at *7. The Court determined that the variations made it unduly difficult for Defendant to counter the claims against it using "representative" proof. *Id.* Finally, the Court held that the differences in various Plaintiffs' duties and levels of authority would require inefficient mini-trials for over a hundred claimants, such that a collective action would not enhance fairness or procedural economy. *Id.* at *8. Accordingly, the Court adopted the Magistrate Judge's report and recommendation decertifying the collective action.

***Miranda, et al. v. General Auto Body Works, Inc.,* 2017 U.S. Dist. LEXIS 172563 (E.D.N.Y. Oct. 18, 2017).** Plaintiff, an auto body worker, filed a collective action alleging that Defendants misclassified him and others similarly-situated and thereby failed to pay all wages in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. In support of the motion, Plaintiff submitted a declaration in which he alleged that during his five years of employment as an auto body worker and mechanic, Defendants regularly failed to pay him for overtime hours. *Id.* at *3. Plaintiff further claimed that Defendants did not accurately track employees' work hours, and intentionally omitted overtime hours from his paystub. *Id.* Plaintiff also identified two other auto body workers and mechanics, who claimed that Defendants failed to pay them overtime compensation for hours worked over 40 hours. *Id.* at *3-4. Defendants argued that Plaintiff's declaration and complaint did not meet the minimal evidentiary burden required for conditional certification. *Id.* at *4. The Court disagreed and stated that while it was true that mere allegations are not enough to justify conditional certification, there were numerous case law authorities granting conditional certification based on pleadings and a single affidavit by a Plaintiff. *Id.* The Court found that Plaintiff's affidavit – based on personal observation and conversations with a small collective of co-workers who share the same duties and responsibilities – was enough to show a "factual nexus" supporting a "common discriminatory scheme." *Id.* Furthermore, the Court noted that Defendants themselves suggested evidence of inadequate overtime and notice policies by requesting all members of the potential collective action to sign release waivers of all NYLL claims in exchange for a $400 "settlement." *Id.* at *5. Accordingly, the Court found that Plaintiff sufficiently demonstrated the possibility of a similarly-situated group of employees, and granted Plaintiff's motion for conditional certification of a collective action.

***Murray, et al. v. City Of New York,* 2017 U.S. Dist. LEXIS 130594 (S.D.N.Y. Aug. 16, 2017).** Plaintiffs, a group of employees of the Department of Homeless Services ("DHS"), filed an action asserting that Defendant violated various overtime provisions of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court denied. In support of their certification motion, Plaintiffs submitted seven declarations from declarants with various job titles assigned to different facilities. The Court opined that the seven declarations used overbroad, virtually identical language to describe why declarants believed that similarly-situated employees have been denied the protections of the FLSA. One declarant, Monique Murray, stated that she had the job title of community coordinator, and that she had been assigned to work in two different DHS facilities since she began her employment in 2013. Murray stated that she had a formal work schedule of 9 a.m. to 5 p.m., including one hour of unpaid meal time, and that outside of her formal schedule, she "often performed work activities" before and after her shift, and over her unpaid meal break. *Id.* at *19. Murray averred that she performed these tasks after logging-in to Defendant's time-recording system, but before and after her paid shifts.

The Court found that although Murray described her own work responsibilities and compensation, the descriptions of similarly-situated employees were overbroad and conclusory in nature. *Id.* The Court noted that Murray's declaration repeatedly invoked "knowledge and experience" or "experience and observations" regarding other employees, with no factual elaboration. *Id.* at *20. The Court held that the invocations of "knowledge and experience" and "experience and observations" failed to make a minimal showing that similarly-situated employees were subject to a common policy or practice. *Id.* The Court further noted that the other six declarations also broadly referenced knowledge, observations, and experience to assert that "all" employees with their same job titles were required to work through meal periods and perform uncompensated pre-shift and post-shift tasks. *Id.* at *21-22. The Court therefore found that because Plaintiffs had not come forward with facts showing that similarly-situated DHS employees were subject to a common policy in violation of the FLSA, Plaintiffs' motion for conditional certification should be denied.

***Perez, et al. v. La Abundancia Bakery & Restaurants, Inc.,* 2017 U.S. Dist. LEXIS 123550 (E.D.N.Y. Aug. 4, 2017).** Plaintiffs, a group of former restaurant employees, filed an action asserting that Defendant violated the overtime and minimum wage provisions of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs alleged that Defendant had a policy and pattern of failing to pay the minimum wage for all hours worked up to 40 hours per workweek and failing to pay an overtime premium of one and one-half the employees' hourly rate for all hours worked beyond 40 hours per workweek. Plaintiffs further alleged that Defendant did not have a system in place to track employees' hours and failed to provide Plaintiffs with accurate wage statements. Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court granted in part. Defendants argued that Plaintiffs failed to identify any employees who were similarly-situated to them since many of the employees whom Plaintiffs sought to represent worked at different locations and held positions different from those held by Plaintiffs. *Id.* at *13. Defendant noted that the three named Plaintiffs were two dishwashers and a waitress/counter attendant, who worked at only two of Defendant's restaurants. Defendants further attacked Plaintiffs' submitted affidavits of individuals who had already settled their claims with Defendant, and were therefore ineligible to join the collective action. *Id.* The Court found that the pleadings and affidavits submitted by Plaintiffs satisfied the requisite modest factual showing that there are other similarly-situated employees. *Id.* at *13-14. The Court noted that Plaintiffs submitted sufficient evidence that Defendant's waiters, dishwashers, bussers, prep cooks, and kitchen workers at certain locations were subject to the same policy and practice of being denied overtime pay. Plaintiffs submitted affidavits from two waitresses, two dishwashers/cooks, and one busser – in addition to the allegations contained in the complaint pertaining to an additional dishwasher/cook and one waitress – all stating that they were subject to the same policies and procedures regarding their work schedule, the failure of Defendant to record their hours, Defendant's failure to provide them with wage notices, and Defendant's failure to pay overtime. *Id.* at *15. Accordingly, the Court found that Plaintiff had made a sufficient showing with respect to restaurant locations in New York City, but not any location outside of New York. *Id.* at *16. The Court further determined that Plaintiffs failed to establish that there were similarly-situated workers who were denied minimum wages. *Id.* at *21. The Court stated that only one Plaintiff alleged that she was denied the required hourly minimum wage. The Court held that absent any evidence of a common scheme to deprive Plaintiffs of the minimum wage, the Court denied Plaintiffs' request to include such a claim in its notice to potential collective action members. *Id.* at *22. As to Plaintiffs' requested time scope, the Court noted that since the complaint alleged willful conduct by Defendant, the Court agreed that the three-year statute of limitations for FLSA claims should apply. *Id.* at *23. Accordingly, the Court granted Plaintiff's motion for conditional certification in part.

***Rojas, et al. v. Kalesmeno Corp*., 2017 U.S. Dist. LEXIS 112491 (S.D.N.Y. July 19, 2017).** Plaintiffs, a group of restaurant employees, filed a class and collective action alleging that Defendants violated the minimum and overtime provisions of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs filed a motion for conditional certification of their FLSA claims, and the Court granted the motion in part. Plaintiffs alleged that throughout their employment they were paid fixed, cash salaries below the minimum wage. Plaintiffs further asserted that their salaries did not account for overtime, although Plaintiffs worked over 40 hours per week. Furthermore, Plaintiffs alleged that Defendants took an improper tip credit, as Plaintiffs received neither proper notice that Defendants were taking a tip credit, nor statements informing them of the amount of this credit. In addition to the restaurant at which Plaintiffs worked, The Flame Diner, Plaintiffs sued several individual Defendants and three other restaurant locations. Plaintiffs sought to conditionally certify a collective action consisting of "all non-exempt

employees, including servers, bussers, delivery persons, porters, food preparers, dishwashers, cooks and cashiers, employed by Defendants at each of their restaurants within the last six years." *Id.* at *5. Defendants opposed the motion on the grounds that Plaintiffs failed to demonstrate that the prospective collective action members were similarly-situated to the named Plaintiffs. In support of their motion, Plaintiffs submitted their own declarations asserting that they were not paid overtime premiums, nor provided wage & hour notices, notices of a tip credit, or wage statements. Further, Plaintiffs each stated that they had learned that other employees were subject to these policies through personal observation and conversations with those employees and provided a list of 12 fellow employees to whom they spoke regarding pay polices. *Id.* at *8. The Court found that at this stage of the litigation, Plaintiffs' declarations were sufficient to establish that similarly-situated individuals existed at the restaurant at which Plaintiffs worked. *Id.* at *9. However, the Court opined that Plaintiffs did not claim to know the payroll systems and policies at Defendants' other restaurants. The Court determined that Plaintiffs' mere belief that the policies were the same at the other restaurants was insufficient to justify collective action certification. *Id.* at *13. The Court held that Plaintiffs' declarations provided no additional information tending to demonstrate a common policy across all locations. Accordingly, the Court granted conditional certification of the FLSA claims, but limited the scope to only Defendants' restaurant location at which Plaintiffs worked.

***Roseman, et al. v. Bloomberg L.P.,* 2017 U.S. Dist. LEXIS 156413 (S.D.N.Y. Sept. 25, 2017).** Plaintiffs, a group of analytics representatives, filed a class action alleging that Defendant violated various provisions of the New York Labor Law ("NYLL") and the California Labor Code ("CLC"). The Court had previously issued an order granting Plaintiffs' motion to certify a class pursuant to Rule 23 in connection with the NYLL claims. Plaintiffs subsequently moved to certify a class of all California-based representatives in the analytics department in California who were not paid time and one-half for hours over 40 worked in one or more weeks or hours over 8 hours in one or more days at any time within the four years preceding the filing of the complaint. *Id.* at *2. The Court granted the motion. The Court stated that it was undisputed that over 100 current and former employees were putative class members. Defendant argued that the administrative exemption applied to California-based analytics representatives. The Court noted that unlike the NYLL, the CLC exemptions do not precisely mirror the criteria set forth in the FLSA. *Id.* at *3. While the CLC sets out its own definition of the exemption, it also requires the exemption to be construed in accordance with the relevant FLSA regulations. *Id.* The Court found that despite the differences between the NYLL and the CLC, the same analysis that justified certifying the New York class compelled certification of a California class. *Id.* at *4. As the Court described in its previous opinion, Plaintiffs had shown that the issues pertinent to Defendant's affirmative defense would be resolved through common proof at trial, and those issues far outweighed any individualized determinations that must be made. *Id.* The Court found that Defendant made no arguments unique to California law, and the Labor Code does not require anything beyond the analysis in the Court's previous order granting certification of the New York class in order to certify the California class. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Ruiz, et al. v. Citibank, N.A.*, 2017 U.S. App. LEXIS 6399 (2d Cir. April 14, 2017).** 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 ("NYLL"). Plaintiffs moved for class certification of their state law claims under Rule 23. The District Court denied Plaintiffs' motion for class certification. The District Court found that the state law classes lacked questions of law or fact common to the class under Rule 23(a)(2). The District Court observed that 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. The District Court found that the evidence was insufficient to demonstrate either common direction or a common mode of exercising discretion. Therefore, it ruled that the commonality requirement was not satisfied. On Plaintiffs' appeal, the Second Circuit affirmed the District Court's ruling. The Second Circuit stated that the District Court's opinion was well-reasoned and comprehensive. The Second Circuit found that the District Court clearly explained at length why the evidence presented by Plaintiffs failed to demonstrate sufficient uniformity in the Defendant's exercise of managerial discretion. *Id.* at *2. The Second Circuit concluded that this failure was fatal to the Plaintiffs' ability to carry their burden with respect to commonality under Rule 23(a)(2), and that class certification was therefore not appropriate. The Second Circuit also found that District Court had correctly concluded that even if the commonality requirement had been satisfied, the predominance requirement of Rule 23(b)(3) was not met. *Id.* The Second Circuit also stated that the District Court provided lucid and accurate analysis and carefully explained why Plaintiffs' position rested on a misapprehension of the burden that

the law imposes on them at the class certification stage. *Id.* at *3. The Second Circuit held that the District Court had explained that under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the "rigorous analysis" required at the class certification stage "will [frequently] entail some overlap with the merits of the plaintiff's underlying claim." *Id.* The District Court also correctly analyzed the Rule 23 issues by recognizing that the burden borne by a party seeking class certification "is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement." *Id.* The Second Circuit therefore agreed with the District Court's ruling and found there was no abuse of discretion. The Second Circuit accordingly affirmed the District Court's ruling denying class certification of Plaintiffs' state law claims.

***Samaniego, et al. v. Titanium Construction Services,* 2017 U.S. Dist. LEXIS 109727 (S.D.N.Y. July 14, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant violated the FLSA and the New York Labor Law ("NYLL") by failing to maintain proper time-keeping records. The Court had previously conditionally certified Plaintiff's FLSA collective action claims. Plaintiffs subsequently sought certification of their NYLL claims pursuant to Rule 23. Defendant also filed a motion to decertify Plaintiffs' collective action. The Court granted Plaintiffs' motion and denied Defendant's motion. The parties did not dispute that the proposed class included at least 50 individuals; therefore, the Court found the numerosity requirement was satisfied. *Id.* at *8. The Court also determined that common issues of fact and law that were capable of a class-wide resolution existed, including; (i) whether at least some employees worked over 40 hours per week; (ii) whether Defendant had a policy of paying overtime wages in cash and at the "regular" hourly rate without the required premium for hours worked over 40 per week; and (iii) whether Anthony O'Donnell, the individual Defendant, was personally liable for failure to pay overtime compensation. *Id.* at *9. The Court stated that the named Plaintiffs' claims were typical and that they were adequate class representatives. First, the named Plaintiffs and each proposed class member alleged the same type of injury, *i.e.*, lost overtime wages resulting from a single, common policy. *Id.* at *11. The Court noted that the record included the deposition testimony of five employees, in addition to the named Plaintiffs, each of whom testified that, when he worked more than 40 hours per week, he was paid his regular wages in cash. *Id.* Plaintiffs also submitted declarations of three employees, each stating that they were paid at his regular hourly rate regardless of how many hours they worked, and that they received cash payments for hours worked over 40 per week. *Id.* The Court found that this evidence was sufficient to satisfy the typicality requirement. The Court also held that the class was ascertainable, because it included all individuals that Defendant employed as construction workers at New York City job-sites since February 2010, and was sufficiently definite. *Id.* at *14. The Court ruled that Plaintiffs had shown that, as Rule 23 requires, common questions of law or fact predominated over any questions affecting only individual members. *Id.* at *17-18. Plaintiffs alleged, and offered evidence, that construction workers employed by Defendant were subject to a common, illegal overtime compensation policy. As to superiority, the Court stated that case law authorities in the Second Circuit regularly find that superiority is satisfied where, as here, "potential class members are aggrieved by the same policies, the damages suffered are small relative to the expense and burden of individual litigation, and some potential class members are currently employed by the defendants." *Id.* at *19. Accordingly, the Court granted Plaintiffs' motion for class certification. The Court also denied as moot Defendant's motion to decertify the collective action because Plaintiffs withdrew the consent to join forms of all opt-in Plaintiffs.

***Sanchez, et al. v. New York Kimchi Catering Corp.,* 2017 U.S. Dist. LEXIS 100357 (S.D.N.Y. June 28, 2017).** Plaintiff, a food server, brought a class and collective action alleging that Defendant violated various provisions of the FLSA and the New York Labor Law ("NYLL"). Plaintiff filed a motion for class certification of their NYLL claims pursuant to Rule 23, which the Court granted in part. Plaintiff sought certification "on behalf of all non-exempt employees employed by Defendant at New York Kimchi located at 16 West 48th Street, New York, NY, 10036 on or after the date that is six years before the filing of the initial complaint." *Id.* at *5. Plaintiff also sought to certify a sub-class of tipped employees "including but not limited to waiters, bussers and delivery persons " related to the alleged minimum wage violations. *Id.* at *6. As to the overtime claim and spread of hours claim, Plaintiff's proposed class definition of all non-exempt employees dating back to 2010 was denied without prejudice to renewal. For both claims, the Court found that Plaintiff's proposed classes failed because of lack of commonality or typicality. *Id.* at *7. For the overtime claim regarding Defendants' alleged policy of paying the regular hourly rate for all hours worked, the Court noted that the only evidence Plaintiff adduced was his own declaration, and three pages of timesheets of two individuals who were delivery persons. *Id.* The Court found that these submissions were insufficient to show by a preponderance of the evidence either an explicit or *de*

facto restaurant-wide policy of paying regular hourly rate instead of overtime rate. Although commonality and typicality could be established based on employee declarations, the Court opined that Plaintiff's sole declaration was of minimal value. The Court explained that Plaintiff, who worked in a single position, broadly stated that all other non-managerial employees were paid regular hourly rates rather than an overtime rate; however, he did not testify regarding who or what he personally observed nor did he identify to whom he spoke or when he spoke to them. *Id.* at *8. The Court concluded that these conclusory statements could not sustain Plaintiff's assertion of a restaurant-wide policy dating back to 2010. *Id.* at *9. As to the timesheets Plaintiff submitted, the Court found that they did not reflect that workers were consistently paid at the regular hourly rate rather than the overtime rate. To the contrary, the Court determined that the timesheets showed that, at least for some weeks, individuals were at times paid at an overtime rate. *Id.* at *9-10. The Court also noted that Plaintiff's evidence was temporally limited as he sought a class dating back to 2010, but his affidavit and timesheets concerned only part of 2014 and roughly two months in 2015. *Id.* at *10. Further, the Court noted that Defendant testified that it paid employees an overtime rate rather than a regular rate for hours worked in excess of 40 hours. *Id.* Accordingly, the Court held that Plaintiff failed to show by a preponderance of the evidence commonality and typicality for the overtime claim on behalf of a class of all non-exempt employees dating back to 2010. *Id.* Similarly, as to the spread of hours premium, the Court determined that Plaintiff's only evidence was a conclusory statement in his affidavit and a single week in a "punch clock record" for which Plaintiff argued the corresponding timesheet revealed no spread of hour premiums were paid*. Id.* The Court stated that the punch clock record and timesheet were of limited value because Plaintiff offered no deposition testimony or other evidence explaining what the punch clock record reflected. *Id.* at *11. Therefore, the Court ruled that, as to his spread of hours claim, Plaintiff failed to carry his burden to show commonality and typicality for a proposed class of all non-exempt employees who worked for Defendants from 2010 to the filing of the complaint. *Id.* Accordingly, the Court denied Plaintiff's motion for class certification.

***Santiago, et al. v. The Tequila Gastropub, LLC*, 2017 U.S. Dist. LEXIS 52058 (S.D.N.Y. April 5, 2017).** Plaintiff, a former employee of Defendants' restaurant called Daisy, brought a collective and class action alleging the Defendants violated the overtime and minimum wage requirements of the FLSA and the New York Labor Law ("NYLL"). Plaintiff moved to certify a collective action of all non-exempt employees employed by Defendants during the six years prior to the filing of the complaint. *Id.* at *2. The Court granted in part Plaintiff's motion. The Court stated that at this stage of the litigation, Plaintiff only had to make the modest factual showing that he and potential opt-in Plaintiffs together were victims of a common policy or plan that violated the law. *Id.* The Court found that many, if not most, of Defendants' arguments for denying certification went to the merits of the case and thus did not present a basis to deny certification. *Id.* *2-3. However, the Court held that Plaintiff fell short of satisfying his burden to certify a collective action that included employees of Defendants' two restaurants locations called Agave and Mojave. *Id.* at *3. The Court explained that Plaintiff never worked at Mojave, and only asserted that "[d]uring his employment" at Daisy, he was "also required to work" at Agave, without providing any information concerning the timing, duration, terms, or conditions of such work. *Id.* Further all employees Plaintiff identified as potential collective action members all worked at Daisy; only one was identified as having also worked at Mojave and only one was identified as having also worked at Agave, and there was no information concerning the timing, duration, terms, or conditions of that work either. *Id.* The Court therefore determined that Plaintiff's allegations were too general and conclusory to support a finding that the employees of Agave and Mojave were similarly-situated to the employees at Daisy. *Id.* at *4. Accordingly, the Court granted Plaintiff's motion for conditional certification with respect to employees at Daisy only, and denied it with respect to employees at Agave and Mojave.

***Schucker v. Flowers Foods, Inc.,* 2017 U.S. Dist. LEXIS 136178 (S.D.N.Y. Aug. 24, 2017).** Plaintiffs, a group of delivery distributors, brought a class and collective action alleging that Defendant misclassified them as independent contractors in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs filed a motion for conditional certification of a collective action, and the Court denied the motion. Defendants argued that Plaintiffs' motion should be denied as duplicative and unnecessary because conditional certification and notice already had been granted and issued in pending cases raising the same claims in *Neff v. Flowers Foods, Inc.*, Case No. 15-CV-254, and *Carr v. Flowers Foods, Inc.*, Case No. 15-CV-6391. Furthermore, Defendant stated that 94 of the 95 distributors in Plaintiffs' proposed FLSA collective action already received notice and an opportunity to join in either the *Neff* litigation or the *Carr* litigation, and 19 distributors received notice in both

actions. *Id.* at *16. Defendant contended that where the same group of individuals received at least one chance to join a collective action, conditionally certifying a second (or third) collective action and issuing notice again would serve no purpose and waste the resources of the Court and the parties. The Court agreed and ruled that of the 95 individuals on Plaintiffs' proposed notice list, only one had not previously received notice through *Neff* or *Carr*. The Court found that there was no dispute that Plaintiffs raised the same claims as other distributors in New York and across the country, and thus there was no concern that certification was needed here to vindicate the rights of any distributor. *Id.* at *18. The Court therefore found no purpose would be served by allowing the FLSA claims to proceed as a collective action considering the concurrent cases and the attendant increased expense for Defendant, the risk of confusing potential collective members about their legal options, the possibility of inconsistent rulings, and the waste of judicial resources. *Id.* In addition, the Court noted that distributors who have not yet opted-in to a collective action would not be prejudiced as those individuals could bring their own individual actions or they could choose to do nothing and they would not be bound by any judgment. Accordingly, the Court denied Plaintiffs' motion for conditional certification.

***Strauch, et al. v. Computer Sciences Corp.,* 2017 U.S. Dist. LEXIS 102560 (D. Conn. June 30, 2017).** Plaintiffs, a group of systems administrators, filed an action alleging that they were misclassified as exempt employees resulting in overtime violations under the FLSA and the state laws of California, Connecticut, and North Carolina. *Id.* at *3. The Court had previously conditionally certified the FLSA collective action and Plaintiffs moved to certify the three state law classes under Rule 23. *Id.* at *4. The Court granted in part and denied in part Plaintiffs' motion for class certification. *Id.* Plaintiffs' proposed class for each state encompassed two sub-classes consisting of: (i) associate professional systems administrators; and (ii) senior professional systems administrators. *Id.* at *63. The Court ruled that the North Carolina class was preempted by the FLSA and denied the motion to certify either of the proposed sub-classes. *Id.* at *65. As to the Connecticut and California sub-classes, Defendant argued that Plaintiffs lacked standing as the class definitions included employees who did not work more than 40 hours per workweek, and therefore, suffered no injury. *Id.* at *67. Plaintiffs responded that this was not an issue of standing, but rather an issue of damages, and class certification should not be denied on the basis of damages. *Id.* The Court agreed and redefined the classes to include only those who worked more than 40 hours per week. As to commonality, the Court ruled that the evidence regarding the actual job duties of individual senior professional administrators undermined Plaintiffs' claims of commonality because the evidence suggested that some performed tasks that were largely non-exempt, while others performed enough exempt tasks to treat them as exempt, and there was also a wide array of tasks performed. *Id.* at *82. Accordingly, the Court ruled that the proposed sub-class of senior professional systems assistants lacked commonality and it declined certification as to those California and Connecticut sub-classes. *Id.* The Court certified the proposed sub-classes of associate professional system administrators, and ruled that they satisfied the requirements of predominance and superiority. *Id.* at *83. In sum, the Court denied the motion to certify the North Carolina classes and the proposed California and Connecticut senior professional system administrators' sub-classes. *Id. at* *89. The Court certified the California and Connecticut sub-classes comprised of associate professional systems administrators who worked more than forty hours per week. *Id.*

***Strauch, et al. v. Computer Sciences Corp.,* 2017 U.S. Dist. LEXIS 172655 (D. Conn. Oct. 18, 2017).** Plaintiffs, a group of associate professional and professional system administrators, filed a class action alleging that Defendant violated various provisions of the California Labor Code. Plaintiffs had previously filed a motion for class certification, which the Court granted in part. Defendant subsequently moved to decertify the class on the basis that the named Plaintiff was not an adequate class representative of the class he wished to represent. The Court denied the motion. Defendant asserted that Plaintiffs were not an adequate class representative for California-based employees pursuing meal and rest break claims, because they worked from home and did not allege that Defendant denied them a meal or rest break. *Id.* at *7. Second, Defendant argued that Plaintiffs worked mostly as senior professional systems administrators. Defendant noted that the Court previously had held that the senior professional sub-class lacked sufficient commonality and thus could not be certified because of the wide array of tasks performed, and Defendant argued that if Plaintiffs could not establish commonality between Plaintiffs and their senior professional peers, it followed that they could not do so between Plaintiffs and the professional and associate professional SAs they purported to represent. *Id.* at *8. Plaintiffs stated that they no longer intended to pursue class-wide meal and rest break claims for the certified California sub-class. Plaintiffs further argued that Plaintiffs' job title had no bearing on their ability to serve as class representatives for

professional and associate professional SAs because they worked in the position in California during the class period, had no conflicts with the class, and were therefore adequate class representatives. *Id.* In the alternative, Plaintiffs requested that if the Court accepted Defendant's arguments as to Plaintiffs, that Plaintiffs be permitted to substitute a new sub-class representative. *Id.* at *9. The Court stated that to conform Plaintiffs' briefing to their representation that they no longer intended to pursue class-wide meal and rest break claims for the certified California sub-class, it directed Plaintiffs to file an amended complaint in conformity with this position. *Id.* at *10. As to Plaintiffs' job duties and titles, the Court stated that the gravamen of Defendant's legal argument was that a putative class representatives could not be adequate where, despite being a member of the class with no apparent conflicts of interest, their typicality was established by individualized evidence in addition to common evidence. *Id.* at *11-12. The Court found that Defendant cited no binding or persuasive legal authority that stood for this proposition, and the position itself was unsupported in the text of Rule 23. The Court opined that under Rule 23, "it is settled that the mere existence of individualized factual questions with respect to the class representative's claim will not bar class certification." *Id.* at *16-17. Further, in the Court's order granting class certification and based on Plaintiffs' deposition testimony, it held that Plaintiffs' actual job duties largely fit the job functions inferable from the professional SA job description. Accordingly, the Court denied Defendant's motion to decertify. *Id.* at *18.

***Strauch, et al. v. Computer Sciences Corp.*, 2017 U.S. Dist. LEXIS 197290 (D. Conn. Nov. 30, 2017).** Plaintiffs, a group of systems administrators, filed a class action alleging that they were misclassified as exempt employees resulting in overtime violations under the FLSA and the laws of California, Connecticut, and North Carolina. *Id.* at *3. The Court had previously conditionally certified the FLSA collective action and granted certification of Connecticut and California Rule 23 sub-classes of professional and associate professional system administrators ("SAs"). *Id.* at *2. Defendant then sought to appeal the District Court's order pursuant to Rule 23(f). The Court of Appeal, however, found that an appeal was unwarranted, and denied Defendant's request. *Id.* at *4. During the pendency of the petition for interlocutory review, Defendant moved to decertify the California class of associate professional and professional system administrators due to the purported inadequacy of Plaintiff Strauch as a class representative. *Id.* at *5. The Court denied the motion. Defendant subsequently filed another motion, arguing that both the California and Connecticut classes both should be decertified due to a legally deficient trial plan submitted by Plaintiffs. Defendant claimed that Plaintiffs' trial plan was inadequate because it called for an insufficient and arbitrarily-selected sample size of testifying witnesses, failed to account for variances among class members, failed to account for SAs in the certified classes who performed exempt job duties, and risked violating the parties' due process and Seventh Amendment rights. *Id.* at *6. Plaintiffs argued that: (i) Defendant was attempting to relitigate the class certification order by making the same arguments, as it did not raise previously pertinent case law or evidence; (ii) Plaintiffs intended to make their case primarily based on direct, common evidence such that they did not need to present a statistical sample of class members' live testimony; and (iii) Plaintiffs' trial plan posed no due process risks for either party. *Id.* at *6-7. The Court stated that in granting class certification, it considered and addressed Defendant's contentions that Plaintiffs' purported lack of a viable trial plan made class certification inappropriate. As the Court noted in its findings on superiority under Rule 23(b)(3), Defendant "devoted one paragraph to arguing that a class action was not superior" because, among other reasons, "Plaintiffs lacked a trial plan." *Id.* at *7. The Court rejected this argument again, noting that Plaintiffs had submitted a trial plan, and found that notwithstanding Defendant's objections, "the class action was a superior method of adjudicating the merits of the sub-class of Associate Professional and Professional SAs," given the common questions and common evidence, as well as the interests in uniformity of decision and cost-efficiency. *Id.* The Court found that Plaintiffs' initial trial plan set forth the common evidence that Plaintiffs propose to use for each of the common issues, while Plaintiffs' pre-trial memorandum and its exhibits set forth the specific witnesses Plaintiffs intend to call and exhibits upon which Plaintiffs intend to rely. Plaintiffs further refined this trial plan by offering their amended witness and exhibits lists, as well as their pre-trial disclosures. *Id.* at *8. The Court noted that the evidence on hours worked and damages had been stipulated by the parties, based on Defendant's time-keeping records, so the primary legal issue that would be decided by the jury at trial was whether class members were properly classified as exempt. *Id.* at *10. The Court concluded that Plaintiffs' trial plan relied primarily on common evidence to prove their case and only secondarily on class members' testimony and the Court's resolution of the majority of pre-trial motions filed up to this point. Accordingly, the Court denied Defendant's second motion to decertify.

***Surdu, et al. v. Madison Global LLC*, 2017 U.S. Dist. LEXIS 142175 (S.D.N.Y. Sept. 1, 2017).** Plaintiffs, a group of employees, filed a collective and class action alleging that Defendants failed to pay minimum wage, misappropriated gratuities, and failed to provide wage statements in violation of the FLSA and the New York Labor Law ("NYLL"). The parties settled the matter and then filed a motion for class certification for purposes of the settlement. The Court granted the motion. Plaintiffs requested that the Court conditionally certify a class consisting of individuals who worked as servers, runners, bussers and bartenders and who received tips at Defendant from August 19, 2009 through the date of the Court's order on the motion. *Id.* at *8. The Court found that Plaintiff identified 82 members of the putative class, thereby meeting the numerosity requirement. *Id.* at *9. The Court held that Plaintiffs identified several questions common to the putative class, including whether Defendants paid minimum wages and whether Defendants misappropriated tips. The Court determined that Plaintiffs' evidence was sufficient to satisfy the commonality requirement. Further, the Court stated that Plaintiffs satisfied the typicality requirement of Rule 23(a) because their claims arose from the same factual and legal circumstances that form the bases of the putative class members' claims. *Id.* at *12. Specifically, the Court noted that Plaintiffs and members of the putative class worked as tipped employees for Defendants and claimed that they were subjected to the same minimum wage and tipping practices. *Id.* at *12-13. For the adequacy requirement, the Court observed that Plaintiffs' counsel cited five recent multi-Plaintiff cases for which he has served as the attorney of record. *Id.* at *14. Additionally, the Court opined that there was no evidence that named Plaintiffs had any conflicts with any of the class members. *Id.* The Court also found the class was ascertainable because both Plaintiffs and Defendants produced extensive documentation, including pay stubs and schedules, from which class members could be identified. *Id.* at *15. As to Rule 23(b), the Court concluded that Defendants' alleged failure to pay minimum wages and misappropriation of Plaintiffs' tips were the central issues in the litigation and related to the general practices of Defendants with respect to their tipped employees, and therefore met the predominance requirement. *Id.* at *16. The Court also stated that Plaintiffs met the superiority requirement because litigation by way of a class action was more economically feasible due to the putative class members' limited financial resources. *Id.* at *17. Further, the Court noted that class adjudication, as opposed to multiple individual actions, would conserve judicial resources and avoid the waste and delay of repetitive proceedings on the same issues. Accordingly, the Court granted Plaintiffs' motion for class certification pursuant to Rule 23 for settlement purposes.

***Viriri, et al. v. White Plaines Hospital Medical Center,* 2017 U.S. Dist. LEXIS 88226 (S.D.N.Y. June 6, 2017).** Plaintiff, a registered nurse, filed a class and collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiff filed a motion for conditional certification of the FLSA claims, and the Court granted the motion. Plaintiff and other nurses were compensated on an hourly basis and typically worked three 12-hour shifts each week, with one week each month, including four 12-hour shifts. Plaintiff alleged that although the nurses were paid on an hourly basis pursuant to the pre-determined work schedule, they were required to arrive at least 15 minutes before their scheduled start time, and were regularly required to work one to two hours after their shift ended. *Id.* at *3. Plaintiff alleged that although nurses worked additional hours beyond the hours set forth in the schedule, they were not compensated for that time. Moreover, although nurses regularly worked more than 40 hours per week, Defendant did not pay nurses one-and-a-half times their regular rate of pay for that overtime. *Id.* Defendant argued that conditional certification was inappropriate because Plaintiff relied solely on conclusory allegations, based on his "observations" and "understandings," which was an approach that had been rejected in the Second Circuit. *Id.* at *8. In support his motion, Plaintiff submitted a declaration stating that "based on conversations with other registered nurses in the medical surgical unit as well as personal observations," he and the other nurses were not compensated for all hours worked and were not paid overtime. *Id.* at *9. Plaintiff also identified two other nurses, and stated that they had the same experiences as Plaintiff. The Court stated that it was not persuaded that Plaintiff's allegations were so bare and conclusory as to fail to meet the modest burden for conditional certification under 29 U.S.C. § 216 (b). *Id.* The Court held that while Plaintiff submitted only his own declarations, Plaintiff did not allege simply that he was under-paid for the work he performed, but that he alleged the specific manner and operation by which such under-payment was effected. *Id.* at *11. The Court agreed with Defendant that Plaintiff could have supplemented his declaration with more details about the alleged policy, but that the failure to provide that detail was not sufficient to defeat conditional certification. *Id.* at *12-13. Defendant further argued that Plaintiff failed to set forth a policy or practice of Defendant that violated the FLSA. *Id.* at *13. The Court stated that at this stage, Plaintiff need only provide some evidence that he and others

"together were victims of a common policy or plan that violated the law." *Id.* The Court noted that the allegations in the complaint and Plaintiff's declarations established that Plaintiff and potential opt-in Plaintiffs, despite working additional time before and after their scheduled shifts, were compensated solely on the hours set forth in the pre-determined schedule. *Id.* at *14. The Court found that therefore Plaintiff alleged a policy of Defendant of not compensating employees for actual time worked, but only for time reflected in the pre-determined schedules, which was sufficient to meet Plaintiff's burden to show that he and others were victims of a common policy or plan in violation of the FLSA. *Id.* Defendant additionally argued that Plaintiff failed to established that he was similarly-situated to the other registered nurses. The Court disagreed and found that regardless of what the other nurses' rates-of-pay were, they were entitled to full payment for hours worked and for overtime payment for hours worked in excess of 40 hours per week. *Id.* at *15-16. The Court further noted that Plaintiff had not sought to include any members in the proposed collective action except the nurses working in the medical surgical unit, and thus the titles or job descriptions of the potential opt-in Plaintiffs were irrelevant to finding that they were similarly-situated. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Williams, et al. v. The Bethel Springvale Nursing Home*, 2017 U.S. Dist. LEXIS 147523 (S.D.N.Y. Sept. 12, 2017).** Plaintiffs, a group of nurses, brought a collective action asserting that Defendant failed to pay overtime or break time compensation in violation of the FLSA. Specifically, Plaintiffs alleged that they regularly worked through their breaks due to their heavy workloads and were told by their superiors to work in excess of their scheduled 37.5 hour workweek without overtime pay. *Id.* at *2. The Court had previously granted Plaintiffs' motion for conditional certification. Defendant subsequently moved to decertify the collective action. The Court denied Defendant's motion. Plaintiffs contended they were often asked to "clock-out" but to continue their work until it was completed. *Id.* at *3. Plaintiffs also provided numerous examples of instances where the records showed work in excess of 40 hours for a week but the pay for that period did not include commensurate overtime compensation. Defendant argued that Plaintiffs were not similarly-situated and that individualized issues precluded proceeding as a collective action. The Court found that the differences between Plaintiffs and the collective action members were insufficient to warrant decertifying the class. *Id.* at *11. The Court noted that the nurses testified to the existence of a generally applied policy on the part of Defendant to not pay and/or approve overtime that supervisors required, and to ignore complaints regarding the inability of staff to take their meal breaks. The Court opined that this evidence showed common liability issues. *Id.* Furthermore, the Court reasoned that just as individualized damages inquiries would not defeat class certification in the more stringent Rule 23(b) context, they did not do so in an opt-in FLSA collective action either. Accordingly, the Court denied Defendant's motion for decertification of the collective action.

(iii) Third Circuit

***Gordon, et al. v. Maxim Healthcare Services,* 2017 U.S. Dist. LEXIS 113736 (E.D. Pa. July 21, 2017).** Plaintiff, on behalf of a group of home healthcare workers, brought a putative class and collective action alleging that Defendant failed to timely pay for hours worked pursuant to the FLSA and state law. *Id.* at *2. After the Court conditionally certified a collective action under 29 U.S.C. § 216(b), Plaintiff moved to certify the class pursuant to Rule 23. *Id.* at *1. At the same time, Defendant for moved to decertify the conditionally certified collective action and for summary judgment. *Id.* at *1. The Court denied Plaintiff's motion and granted both of Defendant's motions. *Id.* at *53. Plaintiff alleged that Defendant's policy of requiring timesheets to be hand delivered caused late payment of wages. *Id.* at *12. Evidence was presented that supervisors permitted time reporting in different manners, including by fax, text, and mail. *Id.* at *13. The Court found that the commonality requirement was not met because there were lawful reasons why employees were paid for some hours in subsequent weeks. *Id.* at *19. The Court also determined that the typicality requirement was not met because the claims did not arise from the same practices and course of events as there were various mean of time reporting. *Id.* at *22. Defendant had a variety of means of accepting timesheets and some class members were paid on the regularly scheduled payday per scheduled hours and were then paid additional amounts in later paychecks if their timesheets reflected additional time worked. *Id.* at *22. Because commonality and typicality requirements were not met, the Court found that Plaintiffs' request for class certification failed. *Id.* at *23. The Court also concluded that common issues of fact did not predominate, because individual determinations would need to be made as to whether Defendant had knowledge of actual hours worked. *Id.* at *37. The practice was such that the amount of time worked was often different from an employee's scheduled time due to the need of

clients. *Id.* In such cases, payroll would not know of the change until timesheets were submitted. *Id.* at *37. As such, the Court reasoned that Plaintiff failed to meet the predominance requirement. *Id.* at *40. Because the individual issues associated with payment would render managing the class untenable, Plaintiff also failed to meet superiority requirement. *Id.* at *40. The Court decertified the collective action because Plaintiff failed to show that the opt-in Plaintiffs were similarly-situated to her as there was no overarching policy as to how employees were to report their time. *Id.* at *44. The Court also granted Defendant's motion for summary judgment because the FLSA precludes coverage for employees in domestic servitude employment who provide companionship services for an individual. *Id.* at *46. There were no genuine issues of material fact that Plaintiff provided any services other than companionship services. *Id.* at *53. Accordingly, the Court denied Plaintiff's motion for class certification and granted Defendant's motions to decertify the conditionally certified collective action and for summary judgment. *Id.*

***Herzfeld, et al. v. 1416 Chancellor, Inc.*, 2017 U.S. Dist. LEXIS 88732 (E.D. Pa. June 9, 2017).** Plaintiff, an exotic dancer, filed a class and collective action alleging that Defendant improperly classified dancers as independent contractors and thereby failed to pay minimum and overtime wages in violation of the FLSA and state wage & hour laws. Plaintiff filed a motion for conditional certification of her FLSA claims, and for class certification of her Pennsylvania claims pursuant to Rule 23. The Court granted Plaintiff's motions. First, the Court noted that Plaintiff alleged that Defendant applied the same policies to her and other dancers, and misclassified her and other dancers as independent contractors. Plaintiff produced evidence that Defendant classified all dancers as independent contractors and used the same lease agreement, same regulations, and same fee and tip requirements for the dancers. *Id.* at *8. Based on these factors, the Court found that Plaintiff made a modest factual showing at the conditional certification stage because all potential collective action members: (i) worked at the same location; (ii) shared the same "dancer" job duties and responsibilities; and (iii) have been classified as independent contractors. *Id.* at *8-9. Plaintiff also alleged that Defendant violated Pennsylvania's Minimum Wage Act by improperly classifying her as an independent contractor and Pennsylvania's Wage Payment and Collection Law by taking her tips to cover its business expenses. The Court found that Plaintiff met Rule 23(a)'s requirements, as: (i) Defendant's corporate designee estimated that "a couple hundred" dancers signed Defendant's lease agreement and became independent contractors; (ii) the proposed class shared common legal questions; (iii) Plaintiff's claims were typical of the class because all class members were misclassified as independent contractors; (iv) Plaintiff and Plaintiff's counsel were adequate to represent the class. *Id.* at *19-21. The Court determined that Plaintiff met Rule 23(b)(3)'s predominance requirement because the predominant questions of fact and law for the class related to how Defendant misclassified its dancers as independent contractors and impermissibly required the dancers to tip-out other employers. *Id.* at *22-23. Further, the Court noted that Defendant used the same classification policy, fee policies, and tip-out requirements for all dancers and they shared the same causes of action as Plaintiff. *Id.* at *23. The Court noted that class action was superior method for resolving the dispute because many dancers worked at the club for a brief period of time and "for these dancers, the costs of pursuing an individual action would almost certainly outweigh any potential recovery." *Id.* Accordingly, the Court granted Plaintiff's motions for conditional certification of her FLSA claims and class certification of her state law wage & hour claims.

***Koenig, et al. v. Granite City Food & Brewery, Ltd.*, 2017 U.S. Dist. LEXIS 71809 (W.D. Pa. May 11, 2017).** Plaintiff, a tipped employee, brought an action alleging that Defendant failed to give her sufficient notice of its use of the tip credit under the FLSA. Plaintiff further alleged that Defendant violated Pennsylvania's Minimum Wage Act ("MWA") by: (i) failing to meet tip credit notification requirements; (ii) failing to pay tipped employees the full minimum wage when they performed non-tipped work; (iii) claiming a tip credit in excess of amounts permitted by Pennsylvania law; and (iv) forcing tipped employees to forfeit tips when customers walked out or the employee had a cash shortage. *Id.* at *2. Plaintiff moved to conditionally certify a collective action under the FLSA and to certify a class of Pennsylvania employees under Rule 23 for Defendant's alleged violations of the MWA, which the Court granted. Defendant argued that Plaintiff adduced no evidence that her allegations and injuries were consistent with other employees at the five locations at which she alleged violations occurred. The Court found that Plaintiff provided evidence that Defendant had the same tip credit policies and procedures for tipped employees at its five locations, including testimony from Defendant's corporate designee stating that all five locations utilized the tip credit provision for its tipped employees so the employees were similarly-situated for compensation purposes. *Id.* at *5. The Court also determined that Plaintiff made a modest factual showing

that all tipped employees at Defendant's five locations were "similarly-situated" because it used the same procedure to inform tipped employees and used the same employee handbooks at its five locations. *Id.* at *6. Defendant argued that its local management personnel provided proper oral notice of the tip credit policy to some tipped employees and attached supporting declarations from those employees. Defendant argued that the existence of employees who received proper oral notice defeated a finding that tipped employees were similarly-situated for a collective action. *Id.* at *7. The Court stated that Defendant's actions in creating a written tip credit in 2016 and implementing a mandatory electronically signed policy in 2017 suggested there was a flawed policy of oral notification. The Court further found that Defendant's argument was more appropriate for a summary judgment motion at the second tier of review. As to Plaintiff's motion for class certification of the MWA claims under Rule 23, the Court held that Defendant's payroll data showed approximately 220 former and current tipped employees, and typically was therefore met. The Court further determined that the commonality requirement was satisfied because Defendant used standardized policies to notify tipped employees of the tip credit and standardized procedures to calculate their tip credit for payroll purposes, thereby evidencing tipped employees shared common factual allegations and legal theories for recovery. *Id.* at *8. The Court found Plaintiff's claims were typical of the class because all class members were tipped employees like Plaintiff. Further, the Court stated that Defendant used the same employee handbook and compensation policy for Plaintiff and the class members, paid Plaintiff and the class members under the same tip credit provision, and used the same payroll system. *Id.* at *10. The Court opined that Plaintiff's counsel was qualified, experienced, and able to conduct the litigation, and Plaintiff had no interests antagonistic to the class and was adequate to represent the class. *Id.* at *11. As to Rule 23(b), the Court reasoned that predominance was satisfied because Defendant used the same policies and procedures for all tipped employees and they shared the same cause of action under the MWA. *Id.* at *13. Further, the Court held that as each tipped employee's recovery would be relatively small, a class action was the superior method for adjudication of the minimum wage claims. *Id.* at *13-14. Accordingly, the Court granted Plaintiff's motion for FLSA conditional certification and class certification under Rule 23.

***Reinig, et al. v. RBS Citizens, N.A.*, 2017 U.S. Dist. LEXIS 134094 (W.D. Pa. Aug. 2, 2017).** Plaintiffs, a group of mortgage loan officers ("MLOs") alleged that Defendant failed to pay them all compensation due by: (i) devising a compensation plan whereby commission payments were calculated by subtracting the hourly wages of the MLO from the "gross commissions;" and (ii) maintaining an "unofficial policy" to discourage MLOs from fully reporting overtime hours worked in violation of the FLSA and corresponding state laws. *Id.* at *1-2. The Court had previously conditionally certified Plaintiffs' FLSA claims. Plaintiffs subsequently filed a motion for class certification of their state law claims pursuant to Rule 23. At the same time, Defendant filed a motion to decertify the FLSA collective action. The Special Master appointed to the case recommended granting Plaintiffs' motion for class certification and denying Defendant's motion. The Special Master noted that there was substantial testimony from numerous MLOs that Defendant enforced an unofficial policy that discouraged MLOs from reporting all of the hours they worked *Id.* at *38. This evidence of an unofficial policy discouraging the reporting of overtime hours was evidence of "a common employer practice that, if proved, would help demonstrate a violation of the FLSA." *Id.* Moreover, the Special Master found that Plaintiffs' timesheets were generally consistent with their testimony. Furthermore, the Special Master held that the similarities between the named Plaintiffs and opt-in Plaintiffs and the efficiencies to be had by litigating the claims on a collective basis, contrasted against the result of decertification, weighed strongly in favor of certification. *Id.* at *50. As to class certification of Plaintiffs' state law claims, the Special Master noted that the key point of dispute between the parties was whether the circumstances of each MLO's employment were so dissimilar that class treatment is inappropriate under Rule 23(a) and (b)(3). Plaintiffs argued they had identified a common question of fact or law of whether Defendant maintained a policy and practice of not allowing MLOs to report overtime commensurate with the amount of overtime MLOs were actually working, and that this policy was applied to all MLOs throughout Defendant's mortgage division. *Id.* at *52. The Special Master agreed with Plaintiffs that when an off-the-clock claim rests on an alleged unofficial policy requiring off-the-clock work, the resolution of whether such a policy exists drives the resolution of the claims of the entire class. *Id.* at *53. Plaintiffs contended that their claims were typical of the class members' claims because each of the named representatives were discouraged from seeking overtime compensation for hours actually worked in excess of 40 hours in a workweek in a manner typical to all class members. *Id.* at *54. The Special Master held that therefore the class claims depended on the same factual and legal theories as Plaintiffs' claims. Thus, to prove their own off-the-clock claims, Plaintiffs had

to establish the same elements as class members, including the existence of an unofficial policy discouraging the reporting of all hours worked. *Id.* at *56. The fact that damages might vary between class members did not change the fact that Plaintiffs' claims were "typical, in common-sense terms, of the class." *Id.* at *57. The Special Master found that none of the factual differences Defendant identified caused the interests of Plaintiffs to diverge from those of the class. *Id.* at *58. The Special Master also concluded that Plaintiffs demonstrated that the unofficial policy upon which their off-the-clock claims were predicated was amenable to common proof and that this common question would predominate over any individualized questions. *Id.* at *59-60. Accordingly, the Special Master recommended granting Plaintiffs' motion for class certification and denying Defendant's motion for decertification.

***Reinig, et al. v. RBS Citizens, N.A.,* 2017 U.S. Dist. LEXIS 134144 (W.D. Pa. Aug. 22, 2017).** Plaintiffs, a group of mortgage loan officers ("MLOs") alleged that Defendant failed to pay them all compensation due by: (i) devising a compensation plan whereby commission payments were calculated by subtracting the hourly wages of the MLO from the "gross commissions" (the "recapture claims"); and (ii) maintaining an "unofficial policy" to discourage MLOs from fully reporting overtime hours worked (the "off-the-clock" claims) in violation of the FLSA and corresponding state laws. *Id.* at *1-2. The Court previously had conditionally certified Plaintiffs' FLSA claims and approximately 350 Plaintiffs opted-in to the collective action. *Id.* at *3. Plaintiffs subsequently filed a motion for class certification pursuant to Rule 23. At the same time, Defendant filed a motion to decertify the FLSA collective action. A Special Master appointed to the case recommended granting Plaintiffs' motion for class certification and denying Defendant's motion. The Court approved the Special Master's recommendation. Defendant argued that Plaintiffs failed to establish adequacy and typicality concerning the New York and Massachusetts sub-classes. The Court noted that it previously granted leave for Plaintiffs to file a second amended complaint to substitute opt-in Plaintiffs to serve as named Plaintiffs and class representatives for those sub-classes in order to treat the alleged deficiencies. *Id.* at *5-6. As to Defendant's motion for decertification of Plaintiffs' FLSA claims, the Court found that Defendant's argument that opt-in and named Plaintiffs were not similarly-situated was without merit. As the Special Master had detailed, the MLOs shared the same job description with similar job duties, were paid pursuant to the same compensation plans, were subject to the same policies, and asserted the same claims for unpaid off-the-clock overtime wages in this lawsuit. *Id.* at *6. Accordingly, the Court adopted the Special Master's report and recommendation granting Plaintiffs' motion for class certification and denying Defendant's motion for decertification of the collective action.

***Sloane, et al., et al. v. Gulf Interstate Field Services, Inc.,* 2017 U.S. Dist. LEXIS 43088 (M.D. Penn. Mar. 24, 2017).** Plaintiffs, natural gas pipeline inspectors, brought a putative collective action under the FLSA and a nationwide class action alleging that they were paid a day rate and were denied overtime wages. *Id.* at *3. Plaintiffs moved to certify the collective action and the class action and the Court denied both motions. *Id.* at *4. Previously, Plaintiffs had failed to obtain nationwide certification on a related matter pending before the U.S. District Court for the Southern District of Ohio. *Id.* at *3. At the outset, the Court noted multiple features of this litigation that were fatal to certification, including: (i) significant disparities existed among the putative class members, their worksites, their responsibilities, and their clients; (ii) individualized inquiries as to the applicability of certain exemptions would overwhelm collective resolution; (iii) applicable payroll records revealed that the class members were likely paid a salary; and (iv) the pay letters at issue were ambiguous and indicated the possibility that the workers actually received a salary guarantee. *Id.* at *2. Since Plaintiffs had engaged in significant discovery for three years, the Court ruled that Plaintiffs had to offer something more than a modest factual showing to obtain collective action certification. *Id.* at *18. The Court required that Plaintiffs make at least an intermediate showing that any opt-ins were similarly-situated to the named representatives. *Id.* at *26. The Court ruled that the named Plaintiffs and opt-in Plaintiffs were not similarly-situated as required by § 216(b) of the FLSA. The Court reasoned that the named Plaintiffs and opt-in Plaintiffs were not similarly-situated because they held different positions, worked for different clients, and had different supervisors on different projects in different states pursuant to local policies and individualized salary agreements. The Court opined that because the members of the putative collective action were so diverse, resolution of Defendant's exemption defenses would require significant individualized fact-finding. Accordingly, the Court declined to certify the collective action. For similar reasons, the Court denied the motion to certify the class pursuant to Rule 23. *Id.* at *58. The Court ruled that the commonality requirement was not satisfied because determining eligibility for class membership would require particularized, factual inquiries into each worker's employment circumstance and

answers common to the class did not predominate over individual ones. *Id.* at *59. The Court also concluded that the named Plaintiffs were inadequate representatives. *Id.* at *71. Accordingly, the Court denied both motions for certification and dismissed the putative opt-in Plaintiffs with prejudice. *Id.*

***Wang, et al. v. Chapei LLC,* 2017 U.S. Dist. LEXIS 132501 (D.N.J. Aug. 18, 2017).** Plaintiffs, a group of restaurant cooks, brought an action alleging that Defendant violated the minimum and overtime provisions of the FLSA and the New Jersey Wage & Hour Laws ("NJWHL"). Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court denied. Plaintiffs sought conditional certification of a collective action of all hourly paid, non-managerial employees of Defendant, including chefs, waiters, kitchen workers, dishwashers, delivery persons or any other equivalent employee, who previously worked, or were currently working at one of Defendant's restaurants during the past three years. *Id.* at *2-3. At the outset, the Court stated that although the "modest factual showing" standard is appropriate at the "notice stage" of litigation when little or no discovery has taken place, a stricter standard is more appropriate when Plaintiffs move for conditional certification near or after the close of discovery. Here, the parties were near the close of discovery when Plaintiffs filed their original motion to certify the collective action, and discovery had since closed. *Id.* at *4. The Court therefore determined that the "stricter" standard should apply at this stage of litigation. *Id.* The Court also noted that after approximately one year of discovery, Plaintiffs submitted only two affidavits in support of their motion for conditional certification. Plaintiffs claimed that they worked from 9:00 a.m. until 7:00 p.m. for six days per week, totaling 60 hours per week, and that their day off from work fluctuated. *Id.* at *7. Plaintiffs also claimed that they spoke with five additional individuals who allegedly worked for Defendant as food preparers and cooks for 60 hours per week, receiving a starting salary ranging from $1,300 to $1,900 per month with occasional raises. However, Plaintiffs did not submit any affidavits or certifications to the Court from these alleged co-workers. *Id.* at *8. The Court further determined that Plaintiffs asserted that they were assigned to different locations at different times throughout their employment, but provided no information regarding the dates that they worked at these various locations. Furthermore, Plaintiffs provided no evidence concerning whether their alleged co-workers worked at various locations, and if so, whether each location employed the same policies. Despite having ample discovery, the Court found that Plaintiffs failed to produce evidence beyond pure speculation of a factual nexus between the manner in which the employer's alleged policy affected Plaintiffs and the manner in which it affected other employees. *Id.* The Court therefore determined that Plaintiffs failed to meet their burden under the stricter second stage certification standard. Accordingly, the Court denied Plaintiffs' motion for collective action certification.

(iv) Fourth Circuit

***Brown, et al. v. Rapid Response Delivery, Inc.,* 2017 U.S. Dist. LEXIS 606 (D. Md. Jan. 4, 2017).** Plaintiffs, a group of delivery drivers, filed a collective action on behalf of themselves and those similarly-situated alleging that Defendant misclassified drivers as independent contractors and thereby denied them minimum wages and overtime wages in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, and the Court denied the motion finding that Plaintiffs were not similarly-situated. Defendant operated a delivery service and employed drivers to make deliveries in Maryland and surrounding states. Plaintiffs worked as drivers for Defendant and were assigned to drive exclusively for two of Defendant's clients. Plaintiffs alleged that Defendant compensated Plaintiffs with "a set amount for each delivery completed dependent on the mileage of the delivery," and that they received no other compensation. *Id.* at *3. Plaintiffs performed deliveries from 8:00 a.m. to 6:00 p.m., Monday through Friday, plus at least one 7:00 a.m. to 4:00 p.m. Saturday shift per month. *Id.* Plaintiffs alleged that they regularly worked more than 40 hours per week and that Defendant did not pay Plaintiffs additional compensation for overtime work and did not pay Plaintiffs the minimum wage for every hour of work performed. *Id.* at *4. Defendants contended that Plaintiffs were independent contractors, because they had the ability to set their own schedules, were permitted to take days off as they wished, and to not work or work only days that they choose. *Id.* Defendants further asserted that neither they nor the drivers maintained records of the time that Plaintiffs spent working. The Court determined that although Plaintiffs demonstrated that the approximately 30 putative Plaintiffs performed similar work, the actual work performed by each collective action member varied substantially. *Id.* at *7. The Court reasoned that while all potential collective action members performed a common function of making deliveries on behalf of Defendant, the work varied in terms of the number of deliveries made, the destination of the deliveries, and the time taken to make the deliveries. *Id.* The Court further found that Plaintiffs were not compensated based on their time spent working, but only for the

distances traveled to make their deliveries. *Id.* at *8-9. The Court opined that there was no indication that Plaintiffs' work hours even existed because nowhere in Plaintiffs' briefs or in the accompanying affidavits did they suggest that they maintained such records, and Defendants affirmatively asserted that they did not have that information. *Id.* at *9. The Court found that because of the individualized determinations that would be required for each collective action member, and the need for "speculative reconstruction" of each Plaintiff's work hours, Plaintiffs were not similarly-situated so as to warrant conditional certification of a collective action under 29 U.S.C. § 216(b). The Court accordingly denied Plaintiffs' motion.

***Harbourt, et al. v. PPE Casino Resorts Maryland, LLC,* 2017 U.S. Dist. LEXIS 9229 (D. Md. Jan. 23, 2017).** Plaintiffs, a group of trainees, brought a collective action and class action seeking unpaid wages for the time they spent training to become table game dealers for Defendant, a Maryland casino. Defendant created a "dealer school" to train about 830 employees to operate table games such as blackjack, poker, craps, and roulette, before its opening in 2013. *Id.* at *2-3. In mid-November of 2012, Defendant began advertising employment opportunities for table game dealers. Plaintiffs, as well as approximately 1,000 other people, applied for those advertised positions. *Id.* at *3. Defendant explained to applicants that the course was free, lasted 12 weeks, and would teach them how to conduct table games. The dealer school consisted of four hours of daily instruction Monday through Friday, offered in four time periods, and was scheduled to run for 20 hours per week for 12 weeks. *Id.* In 2014, Plaintiffs filed an action asserting violations of the FLSA, the Maryland Wage & Hour Law ("MWHL"), and the Maryland Wage Payment and Collection Law ("MWPCL"). *Id.* at *5. Defendant filed a motion to dismiss, which the Court granted, finding that Plaintiffs failed to show that the primary beneficiary of their attendance at the training was Defendant rather than themselves. *Id.* In 2016, the dismissal order was reversed on appeal. After remand, Plaintiffs subsequently filed motions for conditional certification of a FLSA collective action and class certification of their state law claims pursuant to Rule 23. Plaintiffs also petitioned the Court to toll the statute of limitations under the FLSA beginning November 11, 2014, the date that Defendant's motion to dismiss was filed. *Id.* at *6. The Court held that Plaintiffs failed to demonstrate that equitable tolling should be granted under the narrow circumstances under applicable circuit case law has permitted, and therefore denied Plaintiffs' motion. Because the motion for equitable tolling was denied, and more than three years passed since the conclusion of the dealer school, the Court determined that Plaintiffs' motion for conditional certification of a collective action also must be denied. *Id.* at *7. Plaintiffs' motion for class certification proposed a class consisting of all persons that attended Defendant's twelve week dealer course at Marley Station between January 7, 2013, the date that the course began, and April 1, 2013, the date the course ended. *Id.* at *10. Defendant objected to the proposed scope of the class, and argued that the class should be limited to persons who completed all twelve weeks of the dealer school, were hired as table game dealers by Defendant, and actually worked as table game dealers. *Id.* at *11. The Court found that Plaintiffs met the numerosity requirement, as there were over 800 members of the proposed class that attended at least part of the dealer school. *Id.* at *12-13. The Court opined that Plaintiffs met the commonality requirement because all proposed class members suffered the same alleged injury of non-compensated work, and determining the common question of law, *i.e.,* whether or not Plaintiffs' duties and class members' duties constituted compensable work, would resolve the contentions of each class member. *Id.* at *14. The Court also held that Plaintiffs shared the same factual and legal claims as the rest of the members of the proposed class, and therefore they had established the typicality requirement. The Court further determined that Plaintiffs were adequate representatives of the class. *Id.* at *15. As to Rule 23(b), the Court found that the common issues of compensation for participation in PPE's dealer school predominated over individual issues relative to the length of participation. *Id.* at *16. The Court stated that the proposed class of dealer school participants was sufficiently cohesive to warrant class adjudication because, although recovery for each class member would vary, their claims involved almost identical facts and the same legal issues. *Id.* Additionally, the Court concluded that a class action was a superior method for fair and efficient adjudication because with over 800 members in the proposed class, individual adjudication of the legal issues would be duplicative and inefficient. Accordingly, the Court granted Plaintiffs' motion for class certification of their state law claims under Rule 23. *Id.* at *17.

***Hart, et al. v. Barbeque Integrated, Inc.*, 2017 U.S. Dist. LEXIS 176755 (D.S.C. Oct. 25, 2017).** Plaintiff, a food server and bartender, filed a collective action alleging that Defendant failed to pay minimum wages in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part and denied in part. Plaintiff alleged that Defendant, while taking advantage of the FLSA's tip

credit provision, required her and putative collective action members to perform non-tipped side work that was not related to their tipped occupations as servers and bartenders, as well as requiring that Plaintiff and putative collective action members spend more than 20% of their shifts performing non-tipped side work that was related to their tipped occupations. *Id.* at *2. Additionally, Plaintiff alleged that she and putative collective action members were required to pay Defendant out of their tips when a customer walked out, were required to purchase additional t-shirts with their tips, and were never notified that Defendant was paying them less than minimum wage pursuant to the FLSA's tip credit provision. *Id.* at *2-3. Plaintiff sought conditional certification of a nationwide collective action of servers and bartenders who worked at any of Defendant's 67 restaurant locations across the country. Defendant opposed conditional certification and the breadth of the proposed collective action in the event that the Court granted conditional certification. Plaintiff argued that the members of the proposed collective action were similarly-situated because they were all subject to the same policies and duties. Plaintiff further asserted that Defendant maintained uniform policies across each of its restaurants. As support for this assertion, Plaintiff pointed to the corporate nationwide job descriptions for servers and bartenders, which included descriptions of the side work that servers and bartenders were expected to perform. *Id.* at *17. Plaintiff contended that the job descriptions, coupled with the declarations she submitted from servers and bartenders at three different restaurants in three different states, were more than enough to demonstrate that all servers and bartenders were sufficiently similarly-situated to surmount the low bar for conditional certification. *Id.* at *18. The Court agreed and found that conditional certification of a nationwide collective action of servers and bartenders was warranted. *Id.* at *19. The Court held that Plaintiff produced evidence of nationwide job descriptions for servers and bartenders that on their face required side work. The Court noted that requiring side work did not necessarily violate the FLSA, but Plaintiff made a sufficient showing that Defendant's nationwide side work policy potentially caused FLSA violations for servers and bartenders. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action of servers and bartenders as it pertained to violations of the dual-jobs regulation and the 20% rule. *Id.* The Court, however, declined to conditionally certify Plaintiff's other claims, including Defendant's failure to notify the putative collective action members that it was paying them a reduced minimum wage pursuant to the tip credit provision, Defendant's purported requirement that Plaintiff and the putative collective action members use their tips to reimburse Defendant for customer walk-outs, and Defendant's purported requirement that Plaintiff and the putative collective action members pay for additional t-shirts out of their tips. *Id.* at *20. The Court held that unlike Plaintiff's side work claims, the other claims were individual to Plaintiff, and that Plaintiff failed to show that the claims arose out of a corporate policy. The Court noted that Defendant provided evidence that it hung Department of Labor posters in each of its locations, that it orally told Plaintiff and all other employees that they were being paid using the tip credit provision, and that the tip credit provision was explained in its employee handbook. *Id.* The Court also determined that Plaintiff was the sole person to allege that she had to compensate the restaurant when a customer walked out without paying. *Id.* Further, only two declarants of five stated that they purchased additional restaurant shirts with their tips. The Court concluded that each of these claims was insufficient to justify conditional certification of a nationwide collective action. Accordingly, the Court granted in part and denied in part Plaintiff's motion for conditional certification of a collective action.

***Hollis, et al. v. Alston Personal Care Services, LLC,* 2017 U.S. Dist. LEXIS 122043 (M.D.N.C. Aug. 3, 2017).** Plaintiff, a home healthcare worker, brought a collective action alleging that Defendants failed to pay overtime wages in violation of the FLSA and the North Carolina Wage & Hour Act. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff's proposed collective action consisted of all current or former home healthcare workers employed by Defendants from January 1, 2015 to the present. *Id.* at *3. Defendants argued that Plaintiff failed to show that Defendants had a common policy or plan that violated the law or that she was similarly-situated to the proposed members of the collective action that she sought to represent. *Id.* at *5. Defendants objected to Plaintiff's declaration submitted in support of her allegations, and contended that it constituted "blatantly inadmissible hearsay." *Id.* at *6. Although the Court agreed that Plaintiff's affidavit included facts which were clearly hearsay, Plaintiff claimed to have spoken to other, similarly-situated employees, making their claims of failure to pay overtime within the knowledge of Plaintiff. *Id.* Because Plaintiff's source of the relevant information was her own personal knowledge of the alleged statements of other employees, the Court determined that it may consider evidence contained in Plaintiff's declaration that may otherwise constitute hearsay. *Id.* The Court therefore found that there were employees in similar positions to Plaintiff who worked more than 40 hours in certain workweeks and who were not paid any overtime. *Id.* at *7.

Further, the Court determined that Plaintiff's declaration alleged a policy or plan that Defendants allowed employees to work more than 40 hours in a workweek without paying overtime wages to her or to other employees working in her role or in roles with job descriptions similar to hers. *Id.* at *8. Defendants argued that Plaintiff "has not presented any evidence showing that she and these unidentified individuals are similarly-situated to her" and that "Plaintiff's [claim] and the putative class members' supposed claims would necessitate personalized and fact-specific inquiries into each individual's claims to determine both lability and damages." *Id.* The Court noted that by Defendants' own admission, 34 employees did work more than 40 hours per week, at least according to the time-cards submitted. *Id.* at *10. Defendants did not allege that they paid overtime wages to any of the 34 employees who worked over 40 hours in a week. *Id.* The Court therefore found that Plaintiff had made the relatively modest factual showing that a common policy, scheme, or plan that violated the law existed. *Id.* at *10-11. As a result, the Court ruled that conditional certification was appropriate. However, the Court declined to include all of Defendants' employees in the collective action and limited it to the 34 employees who submitted time-cards reflecting more than 40 hours of work in one week. *Id.* at *12. Accordingly, the Court granted in part Plaintiff's motion for conditional certification of a collective action.

***Hood, et al. v. Uber Technologies, Inc.*, Case No. 16-CV-998 (M.D.N.C. July 12, 2017).** Plaintiffs, a group of drivers, filed a collective action alleging that Defendant violated various provisions of the FLSA. Defendant contended that Plaintiffs' claims were subject to an arbitration agreement. Plaintiff subsequently filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs sought to certify a collective action of all "persons who have worked or who continue to work as an Uber Driver anywhere in the United States and who have opted out of arbitration." *Id.* at 1. The Court reviewed Plaintiffs' evidence and concluded that the claims of the putative collective action members were sufficiently similar to merit notice to the collective action members pursuant to 29 U.S.C. § 216(b). The Court further determined that Plaintiff met the modest requirements for conditional certification, and granted Plaintiffs' motion.

***Kirkpatrick, et al. v. Cardinal Innovations Healthcare Solutions*, 2017 U.S. Dist. LEXIS 141783 (M.D.N.C. Sept. 1, 2017).** Plaintiff, an intellectual/development disability care coordinator ("I/DD coordinator") brought a collective action alleging that Defendant failed to pay her and other I/DD coordinators overtime compensation in violation of the FLSA. Plaintiff brought a motion for conditional certification of a collective action, and the Court granted the motion. In support of her motion, Plaintiff submitted eight almost-identical declarations from herself and seven putative opt-in Plaintiffs. Plaintiffs declared that they routinely worked over 40 hours per week without overtime compensation, that they lacked the academic and professional credentials that would make them exempt "learned professionals," that they routinely performed tasks that did not require specialized skills or training, and that their positions shared the same title, job descriptions, and compensation and billing procedures. *Id.* at *3. Defendant opposed conditional certification primarily on two grounds. First, Defendant asserted that Plaintiff failed to demonstrate the existence of a common unlawful policy necessary to support a collective action. The Court noted that much of Defendant's contention on this issue amounted to a merits argument that Defendant's exemption policy complied with the FLSA. *Id.* at *13. The Court stated that at this stage, Plaintiff need not demonstrate conclusively that Defendant's policy was unlawful. *Id.* at *13-14. Second, Defendant argued that Plaintiff had not offered any factual support for her contention that the I/DD coordinators were misclassified. The Court disagreed, finding that Plaintiffs submitted eight declarations from I/DD coordinators in support of the motion. The Court determined that each declaration contained detailed factual assertions about the mechanics of the I/DD position and the coordinators' duties and limitations. Defendant argued that the declarations were form documents that were similar if not identical, and were little more than conclusory allegations that added no factual support to Plaintiff's argument that she was misclassified. *Id.* at *15. The Court held that attacks on the declarations are, in the end, challenges to their credibility and thus are factual matters the Court need not resolve at this point in the litigation. *Id.* at *16. Defendant also asserted that Plaintiff was not similarly-situated to her co-workers because she had "failed to show that all I/DD care coordinators exercise the same duties and responsibilities." *Id.* at *18. The Court opined that Plaintiff need not make such a showing at this stage. The Court determined that Plaintiff offered evidence that I/DD coordinators had the same job descriptions and titles and worked an average of over 40 hours per week without overtime compensation. *Id.* at *19. Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Mayhew, et al. v. Loved Ones In Home Care, LLC,* 2017 U.S. Dist. LEXIS 197979 (S.D.W. Va. Dec. 1, 2017).** Plaintiffs, a group of home health care workers, filed a collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. In support of their motion, Plaintiffs filed declarations stating that between early 2016 and May 2017, Defendants made out two distinct paychecks for each workweek with straight-time compensation on each check without regard for hours on the other, did not pay overtime despite including all the time on a single paycheck, and were told that the practices were "legal and proper because they paid hours by individual funding sources." *Id.* at *4. Defendants subsequently amended their overtime pay policy in 2017 and began to pay overtime compensation in accordance with the FLSA. The named Plaintiff Mayhew complained to the U.S. Department of Labor ("DOL") in early 2017, seeking overtime pay she was owed. *Id.* at *5. The DOL informed Mayhew of the its on-going investigation and preliminary opinion that Defendants had engaged in similar conduct that violated the FLSA with respect to 70 other employees in another office location. *Id.* at *7. Plaintiffs cited the May 2017 change of Defendants' approach to overtime pay as evidence that there was an illegal practice that covered Defendants' employees generally. The Court found that the fact that Defendants were in the midst of settling the DOL investigation of these overtime pay practices that was designed to determine the amount the workers should recover firmly supported the conclusion that such an illegal overtime practice existed. *Id.* at *9. Defendants argued that Plaintiffs failed to present evidence of similarly-situated employees, as required by statute for the collective action to proceed. The Court disagreed, finding that Mayhew's affidavit was sufficient insofar as it stated that other employees were subject to the same overtime pay policy. The Court determined that Plaintiffs' contentions were sufficient to carry their burden at this first stage of conditional certification. *Id.* at *9-10. Defendants also argued that conditional certification should be denied because they were "in the midst of an on-going DOL investigation," which was "nearly complete" and would "moot" the collective action claims. *Id.* at *11. Defendants argued that with the DOL having already calculated preliminary figures of wages owed, judicial efficiency would not be served by certifying the collective action. *Id.* The Court stated that Defendants did not cite, and it was not aware of, any case law authorities holding that collective actions under the FLSA should not be allowed to proceed when there were on-going DOL investigations into similar claims. *Id.* Therefore, the Court opined that it was within its discretion to promote judicial efficiency by facilitating notice to potential Plaintiffs in the collective action, and Plaintiffs presented enough evidence of similarly-situated employees to proceed with conditional certification. *Id.* at *12. Moreover, the Court reasoned that an administrative settlement with DOL would not result in the same recovery and would not vindicate all the rights at issue. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Reagan, et al. v. City Of Hanahan,* 2017 U.S. Dist. LEXIS 58678 (D.S.C. April 18, 2017).** Plaintiffs, a group of firefighters, alleged that Defendant violated the overtime provisions of the FLSA and the South Carolina Payment of Wages Act ("SCPWA"). Plaintiffs filed a motion for conditional certification of their FLSA collective action, and the Court granted the motion in part. The City of Hanahan employed Plaintiffs as firefighters and emergency medical services ("EMS") personnel. Plaintiffs alleged that the City administered two payment plans that violated the FLSA. The first payment plan, which was in place through July 2015, allegedly incorporated illegal sleep time and meal time deductions. The City implemented a new payment plan in July 2015. Under this plan, Plaintiffs alleged that the City did not compensate them for overtime work as required under the FLSA because it inappropriately took advantage of the overtime exception available under 29 U.S.C. § 207(k) for employees responsible for fire protection. Plaintiffs sought conditional certification of two groups relative to their FLSA claims, including: (i) all individuals employed by Defendant in its Fire Department, who were non-exempt employees and who did not receive overtime compensation of at least one and one-half times their regular hourly wage for all overtime hours from three years prior to their joining the lawsuit through July 1, 2015; and (ii) all individuals employed by Defendant in its Fire Department, but were assigned to EMS, who were non-exempt employees and who worked over 40 hours in any given workweek, but who did not receive overtime compensation of at least one and one-half times their regular hourly wage for all overtime hours from July 1, 2015 to the present. *Id.* at *2-3. Defendant consented to the first proposed collective action, but objected to conditional certification of the second collective action on the grounds that the pay plan in place from July 2015 to the present did not violate the law. Defendant argued that Plaintiffs' allegations were not sufficient to demonstrate that they were subject to an illegal policy or plan because they are subject to the increased overtime threshold under 29 U.S.C. § 207(k), which applied to employees "in fire protection activities." *Id.* at *4.

Because most Plaintiffs indicated that their duties included fire suppression, Defendant asserted that they were subject to the overtime exemption in § 207(k). The Court agreed that most Plaintiffs indicated that their duties included fire suppression, and that they were expected to and dispatched to fight fires as part of their jobs; as a result, they fell within the overtime exemption under § 207(k). *Id.* at *7. Accordingly, the Court granted Plaintiffs' motion as to the first collective action one and denied it as to the second collective action.

***Turner, et al. v. Republic Services,* 2017 U.S. Dist. LEXIS 123907 (D.S.C. Aug. 7, 2017).** Plaintiff, a waste disposal driver, filed a collective action alleging that: (i) Defendant miscalculated his and other drivers' regular rate of pay, paying them overtime at an illegally low rate of pay; and (ii) Defendant automatically deducted a 30 minute meal break each shift even though drivers regularly worked through the meal period, thus failing to pay all owed overtime in violation of the FLSA. Plaintiff filed a motion for conditional certification, which the Court granted. Defendant provided 18 driver declarations to support its position that potential members of the proposed collective action differed in whether they routinely worked through their meal breaks. *Id.* at *19. Defendant argued that drivers who worked through their meal breaks did so, if at all, because of decisions of individual supervisors as opposed to a company-wide policy or plan directing those enforcement decisions. *Id.* The Court first noted that Defendant never argued that Plaintiff failed to show that he was similarly-situated to other drivers in the way that Republic calculated his regular rate of pay. Further, the Court stated that it was unclear if Defendant objected to collective action certification on the regular rate claim or solely on the meal break claim, as its briefing focused solely on the meal break claim. *Id.* at *19-20. Regardless, the Court found that Plaintiff's FLSA overtime claim was premised on two adequate and independent grounds, including: (i) that Defendant improperly calculated the regular rate for the payment of overtime; and (ii) that Defendant improperly instructed drivers to routinely work through their meal breaks. *Id.* at *20. The Court held that Plaintiff's theory – that Defendant improperly calculated the regular rate because there was no "clear, mutual understanding" that compensation was for hours worked each workweek – was enough for the survival of the FLSA overtime claim. The Court stated that it would not delve into the merits of the meal break claim at this time. Further, the Court found that Plaintiff submitted sworn declarations and other evidence to establish that he and other drivers were similarly-situated in the way that Defendant calculated their regular rate for overtime purposes. *Id.* at *20-21. The Court therefore determined that Plaintiff satisfied the modest factual burden of showing that the proposed collective action of residential waste disposal drivers were similarly-situated. *Id.* at *21. Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Sheffield, et al. v. BB&T,* 2017 U.S. Dist. LEXIS 68099 (E.D.N.C. May 4, 2017).** Plaintiff, a call center employee, filed a collective action alleging that Defendant violated the FLSA when it failed to pay for pre-shift work. Plaintiff alleged that Defendant required call center employees to report to their workstations 10 minutes prior to beginning their shifts in order to start and log-in to their computers and computer programs and applications, but were not compensated for this time. Plaintiff alleged that as a result, Plaintiff and other call center employees were scheduled to work more than 40 hours per week and were not paid for overtime. *Id.* at *1. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Defendant did not challenge Plaintiff's assertion that she and the other call center employees were similarly-situated for purposes of conditional certification. Further, Plaintiff and Defendant conferred and stipulated to the form of the notice and consent to sue form under 29 U.S.C. § 216(b), and also agreed that the statute of limitations on the notice should reference three years prior to the date the notice was sent. *Id.* at *4. The Court agreed that Plaintiff and the putative collective action members were similarly-situated for purposes of conditional certification. Accordingly, the Court granted Plaintiff's motion to conditionally certify a collective action consisting of "all Collections Representatives I and II employed by Branch Banking and Trust Company, its subsidiaries, or other related entities at its Lumberton, North Carolina call center, who were not paid for the overtime hours they worked off-the-clock prior to the start of their shifts from [three years prior to the date court-ordered notice is sent] through completion of this litigation." *Id.* at *5. The Court further found that the notice and forms submitted by Plaintiff were appropriate.

***Szalczyk, et al. v. CBC National Bank,* 2017 U.S. Dist. LEXIS 3375 (D. Md. Jan. 10, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant failed to pay minimum wage and overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of the collective action, which the Court granted in part. *Id.* at *2. Defendant, an operator of a mortgage division that sells residential

mortgage loan products, employed two types of loan officers to market and sell its mortgage products, including "Inside Loan Officers" ("ILOs") and "Outside Loan Officers" ("OLOs"). *Id.* at *3. Defendant treated ILOs as non-exempt employees for purposes of the FLSA. They were paid on an hourly basis through the submission of weekly timesheets. OLOs, by contrast, worked largely outside of Defendant's offices and were expected to generate their own sales leads. OLOs were exempt employees for purposes of the FLSA, and Defendant did not monitor the amount of time OLOs spent performing sales activities outside of the office. *Id.* at *3. Named Plaintiff Szalczyk worked as an ILO and was told when he commenced his employment that he would earn $15 per hour, plus commissions. Szalczyk also stated that he, along with all other loan officers in his office, were told in a meeting to only report 40 hours per week on the time-keeping system, but were then told to work as much as they could to get sales. Szalczyk also testified that he typically worked 55 hours per week, but was not paid overtime compensation. *Id.* at *3-4. Plaintiffs sought to conditionally certify a collective action of all current and former loan officers employed by Defendant in the preceding three years. *Id.* at *7. Plaintiffs argued that both groups were subject to a common policy denying overtime pay, and thus conditional certification was appropriate under 29 U.S.C. § 216(b). *Id.* at *9. Defendant asserted that ILOs and OLOs were not similarly-situated because the legal and factual issues involved in adjudicating claims by exempt OLOs would be entirely different from the legal and factual issues involved in adjudicating claims by non-exempt ILOs. *Id.* The Court concluded that ILOs and OLOs were not similarly-situated so as to warrant conditional certification of both groups together. *Id.* at *10. The Court determined that the potential application of the FLSA's outside sales exemption would apply to OLOs only, and therefore OLO could not be similarly-situated to ILOs. The Court further opined that ILOs and OLOs were compensated differently, as OLOs were not required to submit weekly timesheets. Finally, the Court found that while both ILOs and OLOs performed similar job functions insofar as they both sold mortgage products, there were significant distinctions between their respective job duties and work locations. *Id.* Thus, the Court agreed with Defendant that the primary legal issue in determining FLSA liability with respect to the OLOs would be whether each individual was properly classified as exempt. *Id.* at *11. The Court therefore held that ILOs and OLOs were not similarly-situated so as to warrant conditional certification of a collective action. However, the Court ruled that Plaintiffs made the required modest factual showing to warrant conditional certification of the claims of the ILOs, as Plaintiffs demonstrated that all ILOs were required to work overtime without being paid overtime compensation and were all subject to the same timesheet policy. *Id.* at *12. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action for ILOs and denied the motion as to the claims of the OLOs.

***Young, et al. v. Act Fast Deliveries,* 2017 U.S. Dist. LEXIS 126792 (S.D. W. Va. Aug. 10, 2017).** Plaintiff, a delivery driver, filed a collective action alleging that Defendant incorrectly classified him as an independent contractor and thereby failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff asserted that Defendant paid delivery drivers based on the number of deliveries made or routes driven in the course of a week rather than by the hour. *Id.* at *4. Plaintiff also alleged that he was required to work more than 40 hours in the course of a week without receiving any overtime pay and was not permitted to negotiate his pay, and that he had no control over the schedule of his workday, the assignation of his deliveries, the specific routes he was to take, or even the order in which he made deliveries. *Id.* at *5. Plaintiff was also required to purchase a uniform with Defendant's logo and wear it during every delivery, the cost of which was deducted from his pay. Plaintiff asserted that he and other delivery drivers were subjected to Defendant's daily control and direction such that the independent contractor classification was incorrect and that he was in an employer-employee relationship with Defendant. Five other former employees also submitted declarations describing the same or similar experiences. Plaintiff sought to certify a collective action of all current and former delivery drivers classified as independent contractors who performed work for the Defendant in West Virginia during the three-year period before the filing of his complaint up to the date of authorized notice under 29 U.S.C. § 216(b). *Id.* at *6. Defendant contended that Plaintiff failed to establish that putative collective action members were similarly-situated, and failed to establish a common scheme or policy that violated the FLSA. *Id.* at *7. Defendant asserted that the independent contractor agreements signed by the potential collective action members did not violate the FLSA, and that the Court would have to analyze every independent contractor agreement of every putative collective action member to determine whether they were similarly-situated to Plaintiff. *Id.* The Court found that the employee declarations indicated that Defendant maintained such control over the delivery drivers that they should have been classified as employees, rather than independent contractors. *Id.* at *8-9. The declarations further

indicated that this incorrect classification allowed Defendant not to pay the drivers minimum wage during some weeks, and further not to pay the drivers overtime pay despite working in excess of 40 hours per week. *Id.* at *9. The Court therefore concluded that the declarations provided the modest evidence necessary to show that a similarly-situated group of potential Plaintiffs existed such that conditional certification was appropriate. Further, the Court stated that it need not examine every single independent contractor agreement separately to determine whether each putative collective action member was similarly-situated. Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Ware, et al. v. AUS, Inc.*, 2017 U.S. Dist. LEXIS 56495 (D. Md. April 13, 2017).** Plaintiff, a former restaurant employee, filed a class and collective action alleging that Defendants violated the FLSA, the Maryland Wage & Hour Law ("MWHL") and the Maryland Wage Payment and Collection Law ("MWPCL"). Plaintiff alleged that Defendants "implemented and enforced a policy and practice of not paying overtime compensation to Plaintiff, and similarly-situated hourly employees who were regularly required to work more than 40 hours per week." *Id.* at *2-3. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Defendants argued that Plaintiff failed to establish that he and the potential collective action members were similarly-situated because Plaintiff only worked at one of Defendants' restaurant locations for four months, and because he failed to allege sufficient facts to show that other workers were subjected to similar wage practices. *Id.* at *3. Thus, Defendants asserted that if conditional certification was granted, it should be limited to only employees who worked at Fat Daddy's 82nd Street location from June 26, 2016 through October 2, 2016. *Id.* at *3-4. The Court noted that Plaintiff submitted two sworn affidavits in support of his allegations, which provided the requisite modest factual showing that there existed a similarly-situated group of potential Plaintiffs who were subject to a common policy, scheme, or plan that may have violated the FLSA. *Id.* at *6. Plaintiff stated that during his employment interview, Defendant Edward Braude told him that the restaurant "[doesn't] pay overtime." *Id.* at *7. The Court found that Plaintiff's affidavits and pay stubs revealed that he was paid on an hourly basis, regularly worked over 40 hours a week, and never received overtime compensation. *Id.* Plaintiff's affidavits further indicated that he spoke with "other workers who similarly did not receive overtime wages" and who "expressed concerns about it but worried about retaliation if they complained." *Id.* The Court determined that the facts supported Plaintiff's allegation that a similarly-situated group of potential Plaintiffs existed who may be able to show that they were victims of a common policy, scheme, or plan that violated the law. Defendants argued that because Fat Daddy's 82nd Street location was wholly owned and managed by Lisa Braude, and Fat Daddy's Baltimore Ave. location was wholly owned and managed by Edward Braude, that limiting the scope of the collective action was appropriate "because the two restaurants are separately owned, and do not share employees, books, accounts, records, scheduling or payroll." *Id.* at *8. However, the Court observed that this fact alone did not preclude the Court from finding a common policy, scheme, or plan carried out by the two restaurants. For purposes of conditional certification, Plaintiff's sworn affidavits sufficiently demonstrate that the two Fat Daddy's restaurants operated as a single enterprise because Plaintiff indicated that there was a substantial amount of interrelated activity between the two Fat Daddy's restaurants. *Id.* at *9. Plaintiff also identified two other employees who worked at both restaurant locations. *Id.* Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

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***Adams, et al. v. All Coast LLC*, Case No. 16-CV-1426 (W.D. La. Nov. 3, 2017).** Plaintiffs, a group of employees, brought a collective action alleging that Defendant violated the FLSA. The parties jointly moved for conditional certification of the FLSA collective action under 29 U.S.C. § 216(b), which the Court granted. The Court appointed the named Plaintiff as the collective action representative and Moore & Associates as counsel. *Id.* at 1. The Court conditionally certified a collective action consisting of all cooks, mates, deckhands, ordinary seaman, and able-bodied seaman employed by Defendant in the last three years, except for those employees who had signed waiver and release agreements. *Id.* The Court ruled that the collective action excluded all captains, training captains, licensed engineers, and unlicensed engineers. The Court further ordered that other than the approved § 216(b) notice and consent form, the parties and their counsel could not affirmatively act to encourage or discourage participation in the matter. *Id.* at 2. Accordingly, the Court granted the parties' joint motion for conditional certification of a collective action.

***Aguirre, et al. v. Tastee Kreme #2, Inc*., 2017 U.S. Dist. LEXIS 83944 (S.D. Tex. April 13, 2017).** Plaintiff, an ice cream delivery driver, filed a collective action alleging that Defendant misclassified its drivers as exempt employees and thereby denied them overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, and the Magistrate Judge recommended that the motion be granted. Plaintiff contended that delivery drivers regularly worked over 40 hours a week with no overtime and were paid a base salary and 5% of the ice cream sales collections on their routes. *Id.* at *2. Plaintiff sought to certify a collective action of "all current and former ice cream delivery drivers or route drivers employed by the Defendants." *Id.* at *3. Defendant argued that Plaintiff had not shown that the putative collective action members were similarly-situated and that there are other aggrieved individuals who want to join the suit. *Id.* at *14. The Magistrate Judge found that Plaintiffs' declarations of other drivers provide substantial allegations that there were others who wished to join the collective action. The Magistrate Judge opined that the declarants put forth detailed information about the nature of their positions as delivery drivers for Defendants, averred that they often worked 40 hours a week and were never paid overtime, and that other delivery drivers were subject to the same policies. *Id.* at *15. The Magistrate Judge ruled that these facts demonstrated the existence of aggrieved individuals who were harmed by Defendants' policy to exempt them from overtime pay. The sworn statements outlined that declarants, including Plaintiff, held the same position, worked similar hours, had the same job responsibilities, and were paid a salary and commission with no overtime. *Id.* at *16. Through this evidence, the Magistrate Judge determined that Plaintiff had shown that putative collective action members were similarly-situated, as they held the same position and were paid a salary with no overtime compensation. Based on the foregoing, the Magistrate Judge concluded that Plaintiff provided substantial allegations demonstrating that the putative collective action members were victims of a uniform policy or plan. The Magistrate Judge thereby recommended the Court grant Plaintiff's motion for conditional certification of a collective action.

***Alverson, et al. v. BL Restaurant Operations LLC*, 2017 U.S. Dist. LEXIS 188705 (W.D. Tex. Nov. 15, 2017).** Plaintiffs, a group of servers and bartenders, filed a collective action alleging that Defendant failed to pay minimum wage in violation of the FLSA. Plaintiffs alleged that Defendant willfully violated the FLSA and improperly claimed the tip credit by: (i) failing to provide employees with adequate notice of Defendant's intent to claim the credit (the "notification claim"); (ii) requiring tipped employees to perform non-tipped side work unrelated to the tipped profession (the "dual-jobs claim"); and (iii) requiring tipped employees to spend more than 20% of their work time engaged in non-tipped "side work" (the "20% claim"). *Id.* at *3-4. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. In support of their motion, Plaintiffs submitted seven declarations from different opt-in Plaintiffs, who were current or former servers or bartenders employed by BL in Texas, Ohio, New Jersey, and Massachusetts. *Id.* at *5. The opt-in Plaintiffs' declarations all stated that they were paid less than the full minimum wage; they spent more than 20% of their time performing non tip-producing side work such as cleaning restrooms, cleaning coolers and shelves, washing dishes, polishing brass, dusting, mopping, and cutting fruit; that they were all subject to the "same policies and procedures," including Defendant's handbook; and that Defendant never explained it was paying them less than the full minimum wage because they were receiving tips or that their tips would be used as a credit against the minimum-wage requirement. *Id.* at *5-6. The Court found that Plaintiffs satisfied the "modest factual showing" required to show that they and other potential Plaintiffs were "similarly-situated" under 29 U.S.C. § 216 (b). *Id.* at *11. The Court noted that Plaintiffs submitted sworn statements indicating that Defendant subjected them to the same policies and procedures that failed to appropriately notify Plaintiffs of the requirements of § 203(m) and that required servers and bartenders to perform side work more than 20% of the time. *Id.* at *12. The Court determined that Plaintiffs also submitted evidence that Defendant paid its servers and bartenders similarly through use of the tip credit and assigned them similar side-work duties. The Court held that the evidence was sufficient to show for conditional certification purposes that Plaintiffs and putative collective action members "performed the same basic tasks as part of their employment and were subject to the same pay decisions, policies, or practices." *Id.* at *13. The Court further reasoned that conditional certification of a collective action with national reach was appropriate because "there is a reasonable basis to conclude that the same policy applies to multiple locations of a single company." *Id.* at *15. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Arceo, et al. v. Omni Hotels Management Corp.*, 2017 U.S. Dist. LEXIS 180689 (N.D. Tex. Nov. 1, 2017).** Plaintiffs, a group of hotel housekeepers, filed an action alleging overtime violations pursuant to the FLSA.

Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Fifteen housekeepers who worked for a staffing agency run by Alfredo Orta, including 12 who were assigned to work at Defendant Omni's hotel in downtown Dallas, claimed that Orta did not pay them for some of the hours they worked and that they were not paid overtime when they worked more than 40 hours a week. *Id.* at *2. Although Omni paid Orta directly for the housekeeping services, Plaintiffs alleged that Omni and Orta acted as joint employers. *Id.* at *2-3. Plaintiffs moved for certification of a collective action comprised of all current and former housekeepers employed by Orta at hotels located in the Dallas/Fort Worth area, including those assigned to work for Omni. *Id.* at *3. The Court found that it was undisputed that Plaintiffs performed similar job duties for similar pay. Omni argued that Plaintiffs were not similarly-situated because they worked at different hotels, so they were subject to different policies and practices that were too individualized for conditional certification to be appropriate. *Id.* at *6. The Court was unpersuaded by Omni's argument, and opined that to succeed at this stage of certification, Plaintiffs were not necessarily required to provide a substantial allegation that the potential collective action members were subject to a common decision, policy, or plan. *Id.* at *6-7. Plaintiffs each averred that Defendants did not pay them overtime for work in excess of 40 hours per week. Although Plaintiffs did not describe the exact scenarios under which Orta and Omni failed to pay overtime compensation to housekeepers, the Court held that no matter what method Defendants allegedly used to deny overtime compensation to housekeepers, each was allegedly part of a single policy or plan, applied to all potential collective action members, not to pay for overtime work. *Id.* at *7. The Court determined that the factual nexus was the alleged practice of Orta's failing to pay overtime to housekeepers who worked more than 40 hours per week. *Id.* The Court concluded that such a showing was sufficient to support conditional certification. *Id.* The Court opined that if discovery demonstrated that certain Plaintiffs were not similarly-situated due to differences in their employers, the Court could decertify the collective action. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Arceneaux, et al. v. Fitness Connection Option Holdings, LLC*, 2017 U.S. Dist. LEXIS 194840 (S.D. Tex. Nov. 28, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant misclassified managerial employees as exempt and thereby denied paying overtime compensation, and required non-exempt employees to perform work off-the-clock without pay in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court denied. Plaintiffs sought to conditionally certify two collective actions, including: (i) a manager collective action comprised of all persons employed by Defendants during the applicable period as Operations Manager, General Manager, Assistant General Manager, General Sales Manager, Membership Manager, District Fitness Manager, Fitness Manager and Assistant Fitness Manager who were declared exempt from FLSA overtime compensation requirements; and (ii) a non-exempt worker collective action containing all persons employed during the applicable period as Fitness Consultants and Private Trainers who were declared non-exempt, but were required to work in excess of 40 hours per week and not paid overtime compensation. *Id.* at *3-4. In support of their motion, Plaintiffs submitted declarations of 15 employees with numerous job titles and descriptions. The Court initially addressed the non-exempt claims. The Court noted that Plaintiffs failed to identify a reasonable basis for believing that other aggrieved individuals existed. *Id.* at *8. The Court found that the proposed collective action consisted of private trainers and fitness consultants, but none of the named Plaintiffs were private trainers. Only Plaintiff Yarbrough was employed by Defendant as a fitness consultant, and although Yarbrough averred in his declaration that he routinely worked over 40 hours per week as a fitness consultant, he did not identify any other fitness consultants who did the same. *Id.* Further, only Yarbrough was allegedly classified as non-exempt at any time during employment with Defendant, and there was no evidence that he was aggrieved by any of Defendant's purportedly improper off-the-clock policies for non-exempt employees. *Id.* at *11-12. Yarbrough did not assert any claims that he was required to work off-the-clock while he was classified as non-exempt. *Id.* at *12. The Court then turned to the proposed manager collective action. The Court determined Plaintiffs met their burden to demonstrate that there was a reasonable basis to believe other aggrieved individuals existed, as Plaintiffs consisted of 17 individuals with "manager" titles and 15 Plaintiffs had submitted sworn declarations averring that there were others interested in joining this lawsuit. *Id.* at *15-16. However, the Court stated that the proposed collective action consisted of employees with eight different job titles, and although Plaintiffs made the conclusory assertion that all individuals with the numerous different job titles were "similarly-situated with respect to their job requirements and with regard to their pay provisions," they failed to cite any competent evidence or authority in support of their position. *Id.* at *17-18. The Court found that, to the contrary, Plaintiffs' own declarations displayed

significant differences in job duties among the distinct job titles encompassed by the proposed manager collective action. The Court opined that while Plaintiffs need not have "identical" job duties to be "similarly-situated," Plaintiffs' proposed manager collective action plainly involved jobs with material distinctions in positions of authority and managerial responsibilities, issues that were at the heart of Plaintiffs' misclassification claim. *Id.* at *19. Accordingly, the Court denied Plaintiffs' motion for conditional certification for both the proposed non-exempt collective action and the proposed manager collective action.

***Baucum, et al. v. Marathon Oil Corp.*, 2017 U.S. Dist. LEXIS 109390 (S.D. Tex. July 14, 2017).** Plaintiff, a health, environment, and safety advisor ("HES"), filed a collective action alleging that Defendant improperly classified him and others similarly-situated as independent contractors and paid them a day rate with no overtime compensation for hours worked in excess of 40 hours in a workweek in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff alleged that he and all the putative collective action members shared the same or similar job requirements and pay provisions, were subjected to the same or similar policies and procedures, worked the same or similar hours, and were denied overtime as a result of the same illegal pay practice. *Id.* at *3. Plaintiff sought to certify a collective action of all persons who worked for Defendant as HES advisors and/or solids control operators who were classified as independent contractors and paid a day-rate with no overtime compensation from 2014 to the present. *Id.* In support of his motion, Plaintiff provided declarations of one HES advisor, Gerald Bounds, and one solids control operator, John Smith, both of whom stated that despite regularly working more than 40 hours per week, they did not receive overtime and were paid a day rate. *Id.* at *11. Bounds and Smith also stated that they knew of other similarly-situated former co-workers who would be interested to learn about their rights and the opportunity to join the action. The Court found that Plaintiff's evidence established that there was a reasonable basis for believing Plaintiff's assertion that other aggrieved individuals existed who worked for Defendant as both HES advisors and solids control operators. *Id.* at *12. Defendant contended that solids control operators were not similarly-situated to HES advisors, and that Plaintiff was not a proper representative for a collective action that included solids control operators because the nature of the relationships between Defendant and the consulting companies that provided HES advisors were very different from the contracts and the relationships between Defendant and the oilfield services companies that provided solids control operators, and the services provided by the HES advisors under these contracts were different from those provided by the solids control operators. *Id.* at *12-13. Defendant further argued that the Court should exclude solids control operators from the proposed collective action because application of the economic realities test would vary depending upon whether the workers to whom it applied were HES advisors or solids control operators, *i.e.*, as the two positions were not similarly-situated. *Id.* at *16-17. The Court found that the declarations submitted by Plaintiffs Bounds and Smith uniformly stated that Defendant scheduled them to work 12 to 14 hour shifts and to be on-call 24 hours a day, provided the equipment necessary for them to perform their jobs, instructed them on how to perform their jobs, supervised their performance, required them to live in Defendant-owned trailers on or near their jobsites, and did not require them to make significant financial investments in their jobs. *Id.* at *17. Accordingly, the Court concluded that Plaintiff carried his burden of showing that HES advisors and solids control operators were similarly-situated in terms of job requirements. *Id.* at *22-23. The Court therefore ruled that conditional certification was appropriate, and it granted Plaintiff's motion.

***Biller, et al. v. RMCN Credit Services,* 2017 U.S. Dist. LEXIS 67210 (E.D. Tex. May 3, 2017).** Plaintiffs, an hourly employee, filed a collective and class action alleging that Defendant violated the overtime provisions of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs moved for conditional certification of a collective action. The Magistrate Judge recommended granting Plaintiffs' motion. Pursuant to Rule 72, Defendant objected to the Magistrate Judge's recommendation. Nonetheless, the Court adopted the Magistrate Judge's report. *Id.* at *2. Plaintiff alleged that Defendant, a credit repair company, required him to be on Defendant's jobsite prior to his scheduled start time in order to perform certain integral and indispensable tasks and therefore he began work 15 or 20 minutes early each day without compensation for the pre-shift activities. *Id.* at *3. The Magistrate Judge's report found that Plaintiff demonstrated: (i) that the employees were similarly-situated for the purposes of first stage certification under 29 U.S.C. § 216(b); (ii) other employees existed who were interested in opting-in to the lawsuit; and (iii) a reasonable basis existed for crediting Plaintiff's assertions. *Id.* at *6. The Magistrate Judge concluded that "Plaintiff meets the low burden required for conditional certification at the first stage of this litigation." *Id.* On Rule 72 review, Defendant contended that Plaintiff failed to meet even the minimal burden of

"presenting preliminary facts to show that there is a similarly-situated group of potential Plaintiffs." *Id.* Defendant argued that Plaintiffs presented only allegations, not evidence, to meet this burden. *Id.* at *7. Defendant also claimed that Plaintiff failed to meet the burden of presenting facts supporting his claim that the hourly employees were similarly-situated because Plaintiff did not provide "a single factual allegation as to the nature of the alleged pre-shift activities." *Id.* The Court agreed with the Magistrate Judge that Plaintiff met the lenient first stage of conditional certification burden. Plaintiff's declaration revealed that Defendant employed Plaintiff on an hourly basis and required Plaintiff as a matter of course to engage in pre-shift activities without compensation and that Defendant required the same of other employees paid by the hour with whom Plaintiff worked and that Plaintiff observed other hourly employees performing similar tasks. *Id.* at *10. Additionally, Plaintiff submitted declarations from three former employees, who each averred Defendant similarly paid them on an hourly basis and required that they engage in pre-shift activities without pay. *Id.* The Court concluded that Plaintiff's allegations, combined with the declarations, were sufficient to carry Plaintiff's burden at the first stage of conditional certification. *Id.* at *11-12. Accordingly, the Court held that the findings and conclusions of the Magistrate Judge were correct and adopted the Magistrate Judge's report and recommendation granting Plaintiff's motion for conditional certification.

***Card, et al. v. Quality Cable Partners, LLC*, 2017 U.S. Dist. LEXIS 213454 (S.D. Tex. Dec. 29, 2017).**
Plaintiff, a foreman for a cable installation company, filed a collective action alleging that Defendants misclassified foreman and helpers as independent contractors and thereby failed to pay them overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part. Defendant, a provider of network cabling products and cable installation services to end-users in various industries, outsourced installation services to several businesses prior to January of 2015. After January of 2015, Defendant directly hired several workers, including Plaintiff. As a foreman, Plaintiff was primarily paid a commission for each project, calculated on a piece-rate basis for the service performed. Helpers who worked on the projects under a foreman' direction were paid by the hour. *Id.* at *3. Plaintiff sought conditional certification of a group of similarly-situated foremen and helpers who worked for Defendant during the relevant time period. The Court found that the evidence accompanying Plaintiff's motion was sufficient to establish that other foremen were similarly-situated to Plaintiff, given that they performed the same duties, were paid on the same piece-rate commission basis, and their pay was subject to certain deductions, including the hourly pay of the helpers on the job. *Id.* Thus, the Court held that while foremen might work at different job-sites, they were all subject to a single pay policy. *Id.* at *4. However, the Court determined that helpers were not similarly-situated to foreman because their job duties were not the same as the foremen who oversaw their work, they were not paid on the same basis as the foremen, and there were the material factual differences between the two jobs that might also give rise to different legal defenses at trial. *Id.* at *4-5. Accordingly, the Court concluded that helpers were not similarly-situated to Plaintiff and other foremen, and should not be included in the collective action. The Court therefore granted Plaintiff's motion in part, with respect to a collective action consisting of foreman only.

***Collier, et al. v. CarePlus Health Services, Inc.,* 2017 U.S. Dist. LEXIS 13649 (E.D. Tex. Feb. 1, 2017).**
Plaintiffs, a group of vocational nurses, filed a collective action alleging that Defendant failed to pay overtime compensation and did not accurately record all nurses' time in violation of the FLSA. Plaintiffs' primary job duties included traveling to patients' homes and providing patients with nursing care. Defendants compensated nurses on a salary basis, on a per visit basis consisting of a set amount of pay for each patient visit, on a salary plus points basis, or on a points only basis. *Id.* at *2. Plaintiffs submitted testimony that they each worked over 40 hours per week without being paid overtime compensation. Plaintiff further asserted that they were aware of other vocational nurses who were not paid overtime compensation. Plaintiffs filed a motion for conditional certification of a collective action. Defendants contend that collective treatment was not appropriate because each nurse's schedule varied based on the "location of the patient, the type of treatment required, the day of the week or the time of the treatment, whether the patient required a nurse who spoke a foreign language, and the individual nurse's patient caseload for that day or week." *Id.* at *5-6. The Court stated that Plaintiffs need only to show that their positions were similar to the potential Plaintiffs. *Id.* at *6. The Court found that Plaintiffs submitted sufficient evidence that each of their primary duties involved traveling to a patient's house and providing nursing care. The Court opined that Plaintiffs performed the same basic tasks and were therefore similarly-situated, even if the time at which Plaintiffs provided nursing care or the language in which Plaintiffs spoke to patients

differed. *Id.* Defendants argued that Plaintiffs were not similarly-situated because Plaintiffs were paid differently and some worked full-time while others worked part-time. However, the Court determined that Plaintiffs alleged that they each often worked over 40 hours a week and were not paid overtime compensation at any point during their employment, and that they are aware of other nurses who were not paid overtime compensation. *Id.* at *7. The Court therefore found that Plaintiffs sufficiently alleged that they were victims of a similar plan under which they did not receive overtime compensation. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action under 29 U.S.C. § 216(b).

***Contreras, et al. v. Land Restoration LLC,* 2017 U.S. Dist. LEXIS 22842 (W.D. Tex. Feb. 17, 2017).** Plaintiffs, a group of manual landscape laborers, filed a collective action alleging that Defendant required them to work for 10 to 12 hours a day and 50 to 60 hours a week, without paying overtime compensation, in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs' proposed collective action consisted of Defendants' current and former employees who worked as manual laborers and were paid an hourly or daily rate at any time during the three year period before filing the lawsuit. *Id.* at *3. Plaintiffs stated that they worked for Defendants from 2012 to 2014 as manual laborers in the areas of landscaping and construction, that neither they nor their co-workers were paid overtime, and that a number of potential collective action members feared both work and immigration status-related retaliation should they come forward and join the lawsuit. *Id.* at *6-7. Plaintiffs asserted that the possibilities of coercion and retaliation merited special consideration in light of the fact that the collective action would be composed of "almost all non-English-speaking immigrant workers who earn low wages, were relatively transient, moving as necessary to find employment, and had legitimate fears of retaliation for asserting their rights under the FLSA." *Id.* at *7. Defendant argued that Plaintiffs' declarations did not demonstrate a reasonable basis to credit the assertion that other aggrieved individuals existed and were not paid overtime pursuant to a single decision, policy, or plan. *Id.* at *8. Defendant further argued that Plaintiffs failed to identify any other individuals who wished to opt-in to the lawsuit. The Court found that there was a reasonable basis for crediting the assertion that aggrieved individuals existed, and that those aggrieved individuals were similarly-situated to Plaintiffs. *Id.* at *13. The Court stated that Plaintiffs worked for Defendants for approximately two years, during which Defendants employed between ten and twenty other employees who performed similar manual labor. *Id.* The Court determined that Plaintiffs stated that they knew their co-workers were paid in the same way as they were and did not receive overtime for hours worked over 40 hours in a week, based on frequent conversations in which they and their co-workers complained about their pay. *Id.* at *14. The Court found Plaintiffs' allegations sufficient to demonstrate that there were other aggrieved employees who were subject to an allegedly unlawful policy or plan. The Court also held that Plaintiffs' allegations were sufficient to demonstrate that the aggrieved individuals were similarly-situated. *Id.* at *15. The Court further opined that Plaintiffs need not specifically show that other aggrieved individuals desired to opt-in at this stage of litigation. *Id.* at *16. The Court therefore granted Plaintiffs' motion for conditional certification of a collective action. The Court also ordered Defendant to distribute Plaintiffs' proposed notice and consent forms with its paychecks to current employees and to post the forms in English and Spanish in a conspicuous place readily and routinely available for review at Defendants' place of business. *Id.* at *25-26.

***Cotiy-Monzon, et al. v. Fu Cheng,* 2017 U.S. Dist. LEXIS 164746 (S.D. Tex. Oct. 4, 2017).** Plaintiffs, a group of restaurant workers, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs argued that they and similarly-situated cooks, food preparers, and dishwashers who worked for Defendant were not paid overtime compensation for hours worked over 40 in a workweek and they were not paid for all hours works. Defendants argued that differences between cooks of Mongolian versus Chinese dishes precluded a finding that Plaintiffs and the opt-in Plaintiffs were similarly-situated. *Id.* at *1-2. The Court disagreed, and ruled that differences between food preparers or cooks and dishwashers could be addressed by sub-classes if necessary. *Id.* at *2. The Court found that Plaintiffs' evidence was sufficient for conditional certification. The Court stated that Plaintiffs could mail the requested notice to potential opt-in collective action members. The Court ordered Defendant to provide Plaintiffs with names and addresses of all cooks, dishwashers, and food preparers employed by Defendant during the three years before the filing of the action. *Id.* Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Ecoquij-Tzep, et al. v. Hawaiian Grill,* 2017 U.S. Dist. LEXIS 95458 (N.D. Tex. June 21, 2017).** Plaintiff, a cashier and server, brought a collective action asserting claims under the FLSA for unpaid overtime and minimum wage. Plaintiff alleged that he worked an average of 70 hours per week and was paid in lump sum payments regardless of the actual number of hours worked. *Id.* at *1-2. Plaintiff further alleged that he was not paid the extra half-time rate for any overtime hours worked above 40 hours per week and was paid an average effective hourly rate below the applicable minimum wage. *Id.* at *2. Plaintiff filed a motion for conditional certification under 29 U.S.C. § 216(b), which the Court granted. Plaintiff's proposed collective action consisted of hourly employees employed by Defendant from March 5, 2013, to the present, including cashiers, servers, and cooks who were paid a fixed sum regardless of the total hours worked instead of being paid by the hour. *Id.* Plaintiff asserted that the employees were similarly-situated because Defendant had a common policy or practice to pay hourly employees lump sum payments regardless of the actual number of hours worked. *Id.* In support of his allegations, Plaintiff relied on the deposition of Defendant's corporate representative, Shizhong Zhang, who testified that Defendant had a practice of paying fixed sums instead of the minimum wage and overtime to certain hourly employees, including cashiers, servers, and cooks. *Id.* at *3. Zhang testified that Plaintiff was paid bi-monthly and that he was paid a set amount regardless of the hours he worked. Zhang also stated that he knew of at least five others paid bi-monthly in the same manner. *Id.* Defendant argued that a collective action definition based solely on bi-monthly payment was too broad and that cashiers/servers and cooks were not similarly-situated employees because they performed different lines of work and had different job duties, working schedules, and working conditions. *Id.* at *3-4. Defendant also asserted that Plaintiff failed to show how the hourly employees were subject to the same employment practices or common policy as Plaintiff. The parties also disagreed in their interpretations of the Court's previous order, in which the Court concluded that Plaintiff's individual coverage allegations were insufficient to state a claim and dismissed Plaintiff's FLSA claim based on individual coverage with prejudice. *Id.* at *4. Defendant argued that, even if the cashiers, servers, and cooks were similarly-situated to Plaintiff, the Court's order precluded any FLSA claim because, like Plaintiff, the cashiers, servers, and cooks could not state a claim for individual coverage. *Id.* Plaintiff asserted that, like him, they could pursue their FLSA claims under an enterprise coverage theory. *Id.* at *5. The Court ruled that "similarly-situated" did not mean identically situated, and Plaintiff alleged a strong nexus between himself and the potential collective action members that bound them together as victims of an alleged policy or practice, despite the different job duties of cashiers, servers, and cooks. *Id.* at *8-9. The Court determined that Plaintiff demonstrated that there were at least five potential collective action members who were similarly-situated based on Defendant's alleged policy to pay hourly employees on a lump sum basis regardless of the hours worked. The Court stated that the previous order did not preclude granting collective action certification. *Id.* at *9. The Court, therefore, concluded that its prior ruling was consistent and granted conditional certification on Plaintiff's remaining claim.

***Escobar, et al. v. Ramelli Group, LLC,* 2017 U.S. Dist. LEXIS 110361 (E.D. La. July 17, 2017).** Plaintiff, a landscape laborer, brought a collective action asserting that Defendants failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, and the Court granted the motion. Plaintiffs submitted six affidavits along with their pleadings that alleged they and potential collective class members were allegedly employed by Defendants and were not paid overtime for working more than 40 hours per week. *Id.* at *6. The Court noted that Plaintiffs provided sufficient evidence to warrant conditional certification at this stage of the litigation, since the affidavits all alleged that they experienced the same failure to pay overtime wages and knew of dozens of other individuals employed by Defendants who were paid in the same manner. Accordingly, the Court granted Plaintiff's motion for conditional certification. Plaintiff also requested that Defendants provide a computer-readable data file that included the full names, current or last known addresses, email addresses, and phone numbers for current and former employees fitting the description of the conditionally certified collective action. The Court granted the request and ordered Defendants to produce the information. *Id.* at *7. Plaintiffs also requested to send an agreed upon text message to each person's last known telephone number, which the Court also approved. *Id.* at *8. The Court reviewed Plaintiff's proposed notice and found that it adequately apprised potential Plaintiffs of their rights. *Id.* at *9. Finally, Plaintiff requested a 90-day time period after distribution of notice for interested collective action members to file their consents pursuant to 29 U.S.C. § 216(b), which the Court also approved.

***Espinosa, et al. v. Stevens Tanker Division, LLC,* 2017 U.S. Dist. LEXIS 64188 (W.D. Tex. April 27, 2017).** Plaintiff, a dispatcher, filed a collective action alleging that Defendant violated the FLSA when it improperly classified him and other similarly-situated employees as exempt and thereby denied them overtime compensation. The Court had previously granted conditional certification of a collective action comprised of all past or present salaried dispatchers who worked for Defendant any time since October 12, 2012, at any of Defendant's locations, who were not paid overtime compensation. In an unusual procedural motion, Plaintiff subsequently filed a motion to decertify the collective action because "in reviewing the potential claims of numerous opt-ins, it is apparent that their claims are not the same or similar and/or their work situations varied greatly from [Plaintiff]." *Id.* at *3-4. Plaintiff asserted that: (i) the opt-ins performed different job duties; (ii) Defendant had two separate district offices and each office worked under different management; (iii) some dispatchers worked under a dispatch supervisor while others did not; and (iv) some dispatchers were actually titled "senior dispatchers" while others were not. *Id.* at *11-12. As to the first assertion, based on employee affidavits, Plaintiff argued that each opt-in Plaintiff would have a different set of facts regarding alleged job duties, which precluded the opt-ins from being similarly-situated. The Court found that nowhere in the affidavits did it indicate that Plaintiff's job duties differed from those of the other opt-in Plaintiffs. *Id.* at *12. The Court stated that the evidence was actually to the contrary, as the affidavits showed that the job duties of the opt-ins did not differ. *Id.* As to the second assertion, the Court determined that Plaintiff provided no evidence to show that the existence of different locations, offices, "districts," or "district offices" had any meaningful effect on whether Defendant's dispatchers were similarly-situated. *Id.* at *14. As to Plaintiff's third argument, the Court found that the role of dispatch supervisors in advising some opt-ins but not others was also immaterial to the similarly-situated inquiry because their presence did not appear to change the opt-ins Plaintiffs' job duties. *Id.* at *19. Finally, the Court opined that Plaintiff's final argument for decertification, regarding the "senior night dispatch" title, was proven false by deposition testimony showing that the position did not exist. *Id.* at *20. Plaintiff also argued that a detailed determination of each individual opt-ins' job duties would be required in order to determine whether that opt-in was subject to the administrative exemption. *Id.* at *21. The Court disagreed, stated that Plaintiff and two opt-ins Plaintiffs provided declarations stating that they had the same job duties and that other dispatchers had the same duties as well. *Id.* at *21-22. Furthermore, the Court determined that since dispatch supervisors did not materially alter the opt-ins' job duties, their presence was irrelevant for purposes of the administrative exemption. Similarly, Defendant's different locations did not alter the opt-ins' job duties, nor did the "senior night dispatch" title because such a title did not actually exist. *Id.* at *22. Therefore, the Court held that the applicability of the administrative exemption could be determined on a collective basis, as the relevant facts pertaining to job duties appeared to be the same for all members of the collective action. Finally, the Court noted that procedural fairness went against decertification as the case had been on-going for over a year and a half and discovery was nearly closed. *Id.* at *22. Accordingly, the Court denied Plaintiff's motion to decertify the collective action.

***Gomez, et al. v. Mi Cocina Ltd.,* 2017 U.S. Dist. LEXIS 123085 (N.D. Tex. Aug. 5, 2017).** Plaintiffs, a group of waiters, filed a collective action alleging that Defendant violated the minimum wage and overtime provisions of the FLSA. Plaintiffs contended that Defendants: (i) did not pay them for all hours worked; (ii) did not pay them overtime pay for hours worked in excess of 40 hours per week; (iii) required them to work during their breaks; (iv) required them and other tipped employees to work off-the-clock or for $2.13 per hour "to do deep cleaning outside of their normal responsibilities;" (v) deducted cash from earned tips to cover non-paying customers, broken items, or register shortages; (vi) required waiters/waitresses, bus boys, hostesses, and bartenders to participate in a tip-pool; (vii) withheld a percentage of credit card tips to cover transaction costs charged by credit card companies; (viii) required waitresses and waiters to contribute 3% of their tips to a tip-pool that was distributed to bartenders, bus staff, and hostesses; (ix) required a portion of tips to be paid to management and other ineligible employees; and (x) failed to inform them that Defendant intended to take a tip credit. *Id.* at *3-4. Plaintiffs had previously filed a motion for conditional certification of a collective action, which the Court granted. After discovery, Defendant filed a motion to decertify the collective action, arguing that Plaintiffs were not similarly-situated, that individual fact-findings and legal conclusions would inevitably dominate the case and make impossible a determination of any common facts or legal issues, and that Plaintiffs could not propose a manageable trial plan. *Id.* at *6. The Court granted Defendant's motion. The Court found that Plaintiffs provided no evidence of a single express decision, policy, or plan that was illegal and had the same impact on members of the entire collective action. *Id.* at *10-11. The Court held that the evidence showed that Defendants' policies

were, on their face, lawful, prohibited all "off-the-clock" work, and recognized that employees must be paid overtime compensation in accordance with applicable state and federal law. *Id.* at *11. Moreover, the Court determined that opt-in Plaintiffs claims were so factually disparate as to make the case unmanageable as a collective action. Many opt-in Plaintiffs admitted they never worked off-the-clock, that their payroll records were accurate, that they never took breaks, or that they were compensated for breaks taken on-the-clock. *Id.* Similarly, with respect to Plaintiffs' contention that Defendant took a tip credit, those contentions were not susceptible to collective treatment because the Court noted that the collective action members did not have shared experiences. *Id.* Further, as to Plaintiffs' contention that they were deprived a minimum wage as a result of improper deductions, the Court found that the discovery showed that very few opt-in Plaintiffs even complained of having experienced deductions. *Id.* at *12. Further, several opt-in Plaintiffs admitted to rarely working overtime, or stated that they were properly paid for all overtime. *Id.* Finally, the Court held that Plaintiffs have not provided any feasible ways to have a trial of a case with so many factual dissimilarities relating to the opt-in Plaintiffs. The Court opined that the case involved too many different types of employees, working at too many different locations over a long time period, with dissimilar claims, issues and facts. *Id.* at *13. Accordingly, the Court found that decertification of the collective action was appropriate, and granted Defendant's motion.

***Gremillion, et al. v. Cox Communication Of Louisiana,* 2017 U.S. Dist. LEXIS 96393 (E.D. La. June 22, 2017).** Plaintiff, an installation technician, brought a putative collective action against Defendants alleging violations of the FLSA, as well as a putative class action alleging violations of Louisiana wage laws. Plaintiff filed a motion for conditional certification of his FLSA claims, which the Court granted. Plaintiff argued that conditional certification was appropriate because he and the putative collective action members were all subjected to Defendant's policy of being paid on a point system without compensation for overtime work. Plaintiff asserted that all technicians performed work such as driving to the warehouse to pick up equipment and driving to customers' homes, and all technicians were paid on a point system that did not take into consideration the actual time it took to complete a job. *Id.* at *9-10. Plaintiff further alleged that he and other technicians were subject to deductions from their paychecks, causing them to earn less than the minimum wage. *Id.* at *10. Defendant asserted that Plaintiff failed to present any evidence to establish that there were similarly-situated individuals outside of Louisiana. However, the Court noted that Plaintiff was seeking to conditionally certify a class of Louisiana technicians only. *Id.* The Court therefore found that Plaintiff met his burden at the conditional certification stage of showing that he was similarly-situated to the other putative collective action members because it was undisputed that all Louisiana technicians were paid under the same point-based policy that allegedly violated the FLSA. *Id.* Defendant also argued that Plaintiff's motion should be denied because he did not submit affidavits from any potential Plaintiffs, nor did he identify any other potential Plaintiffs. *Id.* at *11. The Court rejected Defendant's argument that Plaintiff's failure to include affidavits of other employees was fatal to his motion for conditional certification. *Id.* at *11-12. The Court determined that Plaintiff identified a common policy that affected all technicians covered by it. Further, the Court stated that Defendant did not dispute its payment method was a policy covering all technicians performing work for customers in Louisiana until November 2016. *Id.* at *12. Defendant also did not claim that individual technicians performing work in Louisiana might be subject to different policies or might display individual differences that would make administration of this lawsuit as a collective action inefficient. *Id.* at *12-13. Accordingly, the Court held that as to technicians performing work for Defendant in Louisiana, Plaintiff established that he and such other technicians were sufficiently similarly-situated. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Hendrix, et al. v. Shipcom Wireless, LLC*, 2017 U.S. Dist. LEXIS 60718 (S.D. Tex. April 21, 2017).** Plaintiffs, a group of blueprinters, filed an action alleging that Defendant violated the FLSA by misclassifying them as exempt and thereby failing to pay overtime. Plaintiffs filed a motion for conditional certification of a collective action of all current and former blueprinters, who were employed by Defendant between September 7, 2013 and the present, and who worked more than 40 hours a week without receiving overtime pay. *Id.* at *4. In support of the motion, Plaintiffs presented seven declarations stating that: (i) each was a blueprinter at Defendant and he/she worked more than 40 hours a week but was not paid overtime; (ii) blueprinters at Defendant were classified as exempt employees; and (iii) blueprinters worked more than 40 hours a week and were not paid overtime. *Id.* at *7. Defendant did not deny that there were other blueprinters classified as exempt and not paid overtime, or that other blueprinters had different responsibilities. *Id.* at *10. However, Defendant asserted that

their exempt classification was proper. *Id.* at *11. The Court stated that whether the classification was proper was a defense to the FLSA claims, but it was not a reason to deny conditional certification. *Id.* at *12. Further, the Court found that Plaintiffs' declarations made a reasonable showing that other aggrieved blueprinters existed. The Court determined that Plaintiffs were similarly-situated to members of the proposed collective action. Plaintiffs were all employed by Defendant as blueprinters with the same basic job responsibilities, including designing and reorganizing supply areas and operating rooms at VA hospitals. *Id.* The Court held that since the blueprinters all had similar job responsibilities, it was reasonable to believe other blueprinters performed the same tasks. *Id.* at *12-13. Therefore, the Court concluded that Plaintiffs established that their jobs were similarly-situated to those of a potential group of blueprinters. The Court opined that Defendant's concession that it classified all blueprinters as exempt employees showed that they were subject to the same pay provisions. *Id.* at *13. Defendant insisted that conditional certification was not appropriate because Plaintiffs "have not provided the substantial allegations necessary to show that any of them . . . were victims of an illegal pay policy under federal law. . . . [but] have merely alleged that their position was misclassified" without supporting evidence. *Id.* at *13-14. The Court ruled that whether Plaintiffs could actually prove their allegations that the complained of classification violated the FLSA did not defeat a showing that potential collective action members were subject to different pay provisions or that conditional certification was inappropriate. *Id.* at *14. Defendant also asserted that certification was not proper because many of the blueprinters were not employed by Defendant, but instead were staffing company contractors. Defendant argued that the potential collective action members were therefore not similarly-situated. The Court noted that Plaintiffs narrowed the potential collective action to "current and former blueprinters employed by Shipcom." *Id.* For that reason, the Court determined that any collective action would include only blueprinters that were employed by Defendant, and not contractors. *Id.* at *15. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Hernandez, et al. v. Morning Call Coffee Stand, Inc.*, 2017 U.S. Dist. LEXIS 166018 (E.D. La. Oct. 6, 2017).** Plaintiff, a kitchen helper, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff alleged that she, and at least 20 co-workers, frequently worked for Defendant more than 40 hours per week and were not paid overtime wages. *Id.* at *2. Plaintiff further alleged that Defendant's unlawful pay practices were commonly applied throughout Defendant's business, and therefore the putative collective action members were similarly-situated such that conditional certification was appropriate. *Id.* at *2-3. In support of her motion, Plaintiff submitted her own written declaration and requests for admission. *Id.* at *3. Defendant subsequently failed to respond to Plaintiff's request for admissions, and they were now deemed admitted by the Court. As a result, Defendant admitted that it employed at least 20 other workers and/or kitchen helpers over the last three years and that Defendant had a company-wide policy of not paying its employees one-and-half times their hourly rate for all hours worked in excess of 40 in a workweek. *Id.* at *7. The Court found that Plaintiff satisfied her burden of demonstrating she was similarly-situated to the purported class. Further, the Court ruled that Plaintiff's proposed notice was "timely, accurate, and informative," and approved the proposed notice, in English and Spanish versions. *Id.* at *8. Finally, in order to facilitate sending the notice and consent forms, the Court ordered Defendant to provide the names and last known addresses of potential collective action members. The Court therefore granted Plaintiff's motion for conditional certification of a collective action.

***Mahrous, et al. v. LKM Enterprises*, 2017 U.S. Dist. LEXIS 97918 (E.D. La. June 26, 2017).** Plaintiffs, a group of current and former hourly employees, brought a collective action asserting that Defendants violated various provisions of the FLSA. Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court granted. Plaintiffs initially filed the same FLSA claims against a related Defendant, and later added the LKM Defendants in a third amended complaint. Defendants operate convenience stores in the New Orleans area. Plaintiffs alleged that Defendants engaged in a deliberate and willful policy and practice of failing to pay non-exempt, hourly employees overtime pay as required by the FLSA. Plaintiffs asserted that they worked 70 to 80 hours per week for but were not paid legally required overtime for hours worked in excess of 40 hours per week. Plaintiffs further asserted that Defendants unlawfully deducted required business expenses from their pay, failed to maintain proper time records as required by law, and failed to compensate Plaintiffs for all hours worked. Plaintiffs sought to certify a collective action of all current and former non-exempt, hourly employees who had been employed by Defendants in Louisiana during the time period of November 28, 2009 through the present. *Id.* at *4. Plaintiffs alleged that members of this proposed collective action were similarly-situated because they

all had similar job positions and requirements, were subjected to similar terms and conditions of employment, and were subjected to common policies and practices that denied them overtime pay and resulted in unlawful deductions of the cost of required uniforms and nametags from their wages. *Id.* Defendants did not oppose conditional certification, but objected to Plaintiffs' proposed definition of the collective action, the form and content of the proposed notice, and aspects of the plaintiffs' request for information. The Court found that Plaintiffs met the standard for conditional certification, as they submitted affidavits alleging that named Plaintiffs and other potential collective action members were subject to common unlawful practices and policies, including refusal to pay overtime wages, a requirement that employees pay for uniforms and nametags out of their wages, a failure to pay the federal minimum wage as a result of unlawful deductions, and a failure to maintain proper time-keeping records. *Id.* at *6. The parties disputed the appropriate time period for the collective action definition. Plaintiffs proposed that the conditionally certified collective action include all current and former non-exempt, hourly employees employed by Defendants in the three years prior to the filing of the original complaint, or in the alternative, a time period beginning three years before the filing of the third amended complaint on June 30, 2015. Defendants asserted that Plaintiffs' definition was overbroad and asked that the collective action be limited to employees who worked for Defendants within three years of the date of this order. *Id.* at *7. The Court stated that this case had a complex procedural history that still presented unresolved issues regarding the statute of limitations and possible tolling. *Id.* at *8. The Court noted that Defendants would have the opportunity at the appropriate time to challenge the timeliness of any claims brought by putative Plaintiffs who wished to opt-in to the litigation. *Id.* The Court therefore granted Plaintiff's motion for conditional certification of a collective action with the liability period beginning on June 30, 2012, *i.e.,* three years before the filing of the third amended complaint adding the LKM Defendants. The Court found that although Plaintiffs argued that the third amended complaint related back to the date of the original complaint, they did not explain how this would affect the statute of limitations for potential opt-in Plaintiffs. The Court thus held that the appropriate reference point to define the collective action was the date the complaint was filed against the LKM Defendants.

***Malaska, et al. v. Saldivar Coastal Services,* 2017 U.S. Dist. LEXIS 60721 (S.D. Tex. April 20, 2017).** Plaintiff, a domestic service provider, filed a collective action alleging that Defendant violated the overtime provisions of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part. Defendant employed domestic service providers to provide in-house care for elderly and infirm patients. Plaintiff asserted that Defendant failed to pay for time traveling to and from patients' houses and attending mandatory meetings, and failed to pay overtime compensation for hours worked over 40 hours in any workweek. Defendant argued that Plaintiff had not established that a group of similarly-situated potential opt-ins Plaintiffs existed. *Id.* at *2-3. Defendant argued that the providers were highly individualized, performed different duties for each of their clients, and were paid differently because they worked different hours. *Id.* at *20. Defendant also argued that Plaintiff was unique in that she reached full-time status due to her hours, but that most providers worked part-time. *Id.* at *21. Finally, Defendant asserted that the practices of supervisors differed across its four offices. In support of her off-the-clock claims, Plaintiff submitted an affidavit and deposition testimony stating that domestic service providers were not compensated for transportation time between client homes. *Id.* at *23. The Court found that Plaintiff provided substantial allegations that potential collective action members were together the victims of a single decision, policy, or plan. *Id.* at *24. Further, the Court noted that the commonality of the facts between Plaintiff and the prospective class members on the off-the-clock issue would not require a fact-intensive inquiry about the nature of their work. *Id.* at *25. The Court also opined that the standard for conditional certification requires that Plaintiff show only that she and the employees in the proposed collective action are similarly-situated in terms of job requirements and similarly-situated in terms of payment provisions. *Id.* While the type of tasks, the number of hours, and other conditions of employment differed among providers, the Court found that the material aspects of the off-the-clock claim were consistent across all 1,400 workers. As to the overtime claims, Plaintiff alleged that Defendant did not pay providers the correct overtime rate of pay or for all overtime hours worked. In support, Plaintiff submitted timesheets purporting to show that she worked more than 40 hours per week in certain pay periods. *Id.* at *29. The Court, however, determined that Plaintiff failed to provide a factual basis for allegations that the other 1,400 providers were not paid appropriate overtime. The Court determined that even if it drew an inference from Plaintiff's allegations and deposition testimony that there were some instances where Defendant did not properly pay other employees overtime, the mere fact that violations occurred was not enough to establish similarity.

Accordingly, the Court granted Plaintiff's motion with respect to her off-the-clock claims and denied it as to her overtime claims.

***Mariena-Rivera, et al. v. Lanston Construction,* 2017 U.S. Dist. LEXIS 99128 (M.D. La. June 27, 2017).** Plaintiff, a construction laborer, filed a collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part. Plaintiff's proposed collective action consisted of all individuals who worked or were working for Langston Construction, LLC or Composite Architectural Design Systems, LLC during the previous three years and who were eligible for overtime pay pursuant to the FLSA, and who did not receive full overtime compensation." *Id.* at *6. Defendants argued that the group was too broad because it would appear to include, for example, office personnel, who were clearly not similarly-situated to Plaintiff, a general construction laborer who installed and fabricated materials and who was paid on an hourly basis. *Id.* at *7. The Court agreed that the proposed collective action was too broad. First, the proposed collective action would likely require the Court to engage in individualized inquiries into whether the Defendants' policy violated the FLSA as to some employees but not others. *Id.* Second, the Court noted that Plaintiff failed to introduce any evidence that other employees, besides manual laborers, were subjected to the alleged illegal policy in which they were not paid time-and-a-half for every hour worked over 40 hours. Accordingly, the Court found that in the absence of evidence about other employees beyond manual laborers, it would not certify such a broad collective action. *Id.* at *8. The Court therefore granted Plaintiff's motion in part, and conditionally certified a collective action consisting of only manual laborers, and not all hourly employees.

***Moreno, et al. v. National Oilwell Varco, L.P.*, 2017 U.S. Dist. LEXIS 196199 (S.D. Tex. Nov. 29, 2017).** Plaintiff, a rig welder, filed a collective action alleging that Defendant misclassified welders as independent contractors and thereby failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part and denied in part. Plaintiff sought to certify a collective action consisting of current and former welders, rig welders, and mechanics who worked at any location during the last three years and were classified as independent contractors. *Id.* at *2-3. Defendant opposed conditional certification and argued that Plaintiff failed to meet his burden of establishing that an employee-employer relationship existed and that similarly-situated individuals existed. Defendant further argued that if the Court granted conditional certification, it should be limited in location and job title. Plaintiff submitted four declarations of rig welders, including his own, in support of his assertion that there were other non-exempt, aggrieved employees who worked at Defendant as welders or rig welders, who were misclassified as independent contractors, and were not paid overtime wages. *Id.* at *4. The Court determined that Plaintiff provided sufficient evidence to credit his assertion that other individuals existed. Defendant asserted that Plaintiff failed to show that welders, as opposed to rig welders, were subjected to an unlawful policy in which Defendant failed to pay them overtime wages. The Court opined that although Plaintiff need only show that the employees performed the same basic tasks, Plaintiff failed to supply evidence of a welder's basic duties, thereby preventing the Court from comparing the two jobs' basic tasks. *Id.* at *8. The Court also found that Plaintiff did not provide sufficient factual support to show that mechanics performed the same job duties as rig welders. Thus, the Court held that Plaintiff's evidence only provided a reasonable basis to believe that there were other rig welders who performed the duties of repairing drilling rigs who were misclassified as independent contractors and were not paid overtime wages. Accordingly, the Court narrowed Plaintiff's proposed collective action to include rig welders only. *Id.* at *9. The Court further determined that Plaintiff provided a reasonable basis for concluding that Defendant's policy of misclassifying rig welders as independent contractors existed at the Galena Park location, but not at any other location, as all of the declarations were from workers who worked at Galena Park. *Id.* at *15. The Court also stated that Plaintiff provided evidence that others sought to join the lawsuit, as six additional opt-in Plaintiffs had filed consents to join the action, and another related action consolidated with this action where 26 opt-in Plaintiffs had joined. Accordingly, the Court granted Plaintiff's motion for conditional certification, but limited the scope of the collective action to rig welders at the Galena Park location.

***Novick, et al. v. Shipcom Wireless, Inc.,* 2017 U.S. Dist. LEXIS 55699 (S.D. Tex. April 12, 2017).** Plaintiffs, a group of trainers, filed a collective action alleging that Defendant violated the FLSA by misclassifying trainers as exempt and thereby failing to pay overtime compensation. Plaintiff filed a motion for conditional certification,

which the Court denied. Plaintiffs alleged that Defendant previously reclassified the trainer position as a non-exempt position. Plaintiff asserted that the fact that Defendant now paid trainers overtime was evidence that Plaintiffs were improperly denied overtime compensation when they were classified as exempt employees. Defendant contended, however, that not all of its trainer positions were reclassified, and that some individuals in that position were still classified as exempt. *Id.* at *3. In support of their motion for conditional certification, Plaintiffs each attached a declaration in which he or she claimed to have worked more than 40 hours a week, but was not paid overtime compensation. *Id.* at *6. The declarations also briefly described each Plaintiffs' job duties, the purported representations about compensation that were made to each worker at the time of hiring, and his or her knowledge that the position was reclassified from an exempt to a non-exempt status. *Id.* The Court found that while all six Plaintiffs filed declarations, not one of them averred that he or she had personal knowledge that there were any other similarly-situated individuals. *Id.* at *12. The Court opined that although it may presume the existence of other aggrieved individuals from circumstantial evidence, it would not do so in the absence of any evidence at all. The Court further determined that Plaintiffs were requesting permission to send notices to trainers, accounts payable clerks/financial analysts, field support engineers, and travel coordinators, but Plaintiffs' own statements showed that each of these jobs had entirely dissimilar duties. *Id.* at *14. The Court held that Plaintiffs did not show that there were other employees in these four job categories who were sufficiently similarly-situated to themselves to warrant conditional certification. Further, the Court ruled that there was a sound reason to require proof there were similarly-situated individuals who wanted to join this litigation, since evidence of other employees who were willing to join the litigation was necessary to ensure that the mechanism for a collective action was being used appropriately to promote judicial efficiency, rather than used as a tool to burden a Defendant and create settlement pressure. *Id.* at *15. The Court noted that Plaintiffs here do not identify anyone else who wished to join, and no other employee came forward to say that they wished to do so. Further, the Court held that if Plaintiffs were employed in several different jobs, as here, they must submit more evidence to demonstrate that other Plaintiffs exist, that they were subject to a similar policy regarding overtime compensation, and that they wished to join the lawsuit. *Id.* The Court therefore denied Plaintiffs' motion for conditional certification of a collective action.

***Ntuk, et al. v. Taylor Smith Consulting, LLC*, 2017 U.S. Dist. LEXIS 60043 (S.D. Tex. April 20, 2017).**
Plaintiffs, a group of on-site supervisors, alleged that Defendants misclassified them as exempt employees under the FLSA and thereby failed to pay overtime compensation. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. In providing full service staffing, contracting, and management consulting to customers, Defendants compensated Plaintiffs with a flat salary on a weekly basis. *Id.* at *2. Defendants regularly required them to work on weekends at the discretion of a supervisor and failed to pay Plaintiffs for any work time exceeding 40 hours per week. All on-site supervisors shared similar responsibilities, keeping a log of the trucks, ensuring that the helpers were properly attired, and verifying payroll. There was no distinction in duties, responsibilities, or obligations between the work Plaintiffs performed on the weekend and the work they performed during the week. Plaintiffs sought to certify a group of all of Defendants' current and former employees employed as on-site supervisors who were paid pursuant to a flat salary with no payment for hours worked beyond 40 hours before the filing of the complaint up to the present. *Id.* at *3. The Court determined that Plaintiffs provided substantial allegations that they were aggrieved individuals under the FLSA. *Id.* at *9. In their declarations, Plaintiffs put forth detailed information about the nature of their positions as on-site supervisors, averred that they often worked "well over forty hours per week" and "frequently worked on Saturdays" but were never paid overtime for these additional hours. *Id.* at *10. The Court found that these facts demonstrated the existence of aggrieved individuals who were subject to Defendants' policy to exempt them from overtime pay. *Id.* The Court noted that Plaintiffs also averred that they all held the same position, worked similar hours, had the same job responsibilities, and were paid a flat salary for each week with no overtime compensation. The Court therefore held that Plaintiffs demonstrated that the putative collective action members were similarly-situated, as they all had the same position and were subject to the same policy of being paid a salary with no overtime compensation. *Id.* The Court found that Plaintiffs provided substantial allegations demonstrating that the putative collective action members were victims of a uniform policy or plan, and therefore conditional certification was warranted. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Parker, et al. v. Silverleaf Resorts,* 2017 U.S. Dist. LEXIS 65638 (N.D. Tex. May 1, 2017).** Plaintiffs, a group of sales representatives, brought a collective action alleging that Defendants violated the overtime and minimum wage provisions of the FLSA. Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court granted. Plaintiffs asserted that they were paid on a commission basis and regularly worked over 40 hours per week. Plaintiffs seek to certify a collective action of all current and former non-exempt sales employees of Defendants, who worked on-site at Defendants' resort properties. *Id.* at *8. Defendants argued that substantial discovery occurred prior to Plaintiffs moving for conditional certification, and therefore the Court should skip right to the more stringent standard under 29 U.S.C. § 216 (b) in its similarly-situated inquiry. *Id.* at *9. Defendants supported their argument by noting that discovery had been on-going for 28 months and included responses to interrogatories, requests for admission, 175 requests for production of documents, and depositions of four named Plaintiffs. Ultimately, the Court agreed with Defendants and found it appropriate to conduct its analysis using the more stringent standard. The Court noted that Plaintiffs' deposition testimony demonstrated that they did not receive overtime compensation as required by the FLSA because: (i) they were told to record around 40 hours a week regardless of the number of hours worked; (ii) they recorded lunch breaks even though they did not take them; and (iii) that these practices likely extended beyond the four named Plaintiffs given the fact that managers and directors communicated these policies at meetings and other co-workers allegedly followed these rules as well. *Id.* at *15. Thus, the Court found that Plaintiffs satisfied the first element of the applicable test by showing that there was a reasonable basis for believing that other aggrieved individuals existed. Defendants argued that Plaintiffs were not similarly-situated to putative collective action members because the proposed Plaintiffs included people working in different sales departments, at different resorts across the nation, for different supervisors, using different time-keeping methods, and doing various jobs such as working in contracts, gifting, or hospitality. *Id.* at *25. The Court determined that while Plaintiffs held varying job titles, they clarified in their declarations that their duties as "sales representative," "closer," "vc sampler representative," and "sampler representative" were essentially the same in that the primary responsibility was to sell timeshare interests. *Id.* at *26. The Court further found that according to the declarations submitted by Defendants, the responsibilities for sales employees appeared to not change with each resort location. Therefore, from the evidence in the record, the Court held that all sales employees who worked in outside sales and were paid based on commission performed the same basic duties and were therefore similarly-situated with regard to job requirements. *Id.* at *27. In order to establish that some common policy or scheme existed that extended to all other sales employees, Plaintiffs provided deposition excerpts that indicated managers and supervisors communicated this policy to multiple employees and that Plaintiffs heard that other resort locations implemented the same policy. *Id.* Ultimately, the Court determined that Plaintiffs produced more than a minimal amount of evidence establishing that sales employees were similarly-situated with Plaintiffs with regard to the four locations in which they previously worked, but it declined to extend the certification to all of Defendants' locations. Therefore, the Court granted Plaintiffs' motion for conditional certification but limited Plaintiffs' proposed collective action definition to current and former sales employees whose primary responsibility was to sell timeshare interests as part of their regular duties who worked at any of the four resorts specified.

***Rodriguez, et al. v. Alsalam, Inc.*, 2017 U.S. Dist. LEXIS 24489 (E.D. La. Feb. 22, 2017).** Plaintiff, a convenience store employee, brought a collective action against Defendant alleging that he and others similarly-situated were not paid the minimum wage or overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court denied. Plaintiff's responsibilities included stocking shelves, sweeping, mopping, disposing of garbage, and other manual labor. Plaintiff asserted that he was paid $600.00 per week, worked up to twelve hours per day, seven days a week, and therefore was paid only $7.14 per hour. Plaintiff also alleged that he was paid the same rate – $7.14 per house – for any hours worked in excess of 40 hours per week. Plaintiff requested conditional certification of two groups, including: (i) one group comprised of all individuals who worked or were working for Defendant during the previous three years and who were eligible for minimum wage pursuant to 29 U.S.C. § 206 and who did not receive at least $7.25 per hour; and (ii) one group of individuals who worked or were working for Defendant during the previous three years and who are eligible for overtime pay pursuant to the FLSA and who did not receive full overtime compensation. *Id.* at *3. Defendants asserted that Plaintiff failed to prove that the putative collective action members were substantially similar or had been victims of a single decision, policy, or plan that violated the FLSA. *Id.* The Court found that Plaintiff's declaration was insufficient to prove that a potential group of similarly-situated individuals existed. *Id.* at *7. The Court stated that Plaintiff's declaration failed to allege that he and the

putative collective action members were victims of a singular decision, policy, or practice. *Id.* at *8. Furthermore, the Court opined that Plaintiff did not provide affidavits from any other employee employed by Defendant and did not name or otherwise identify any other employee employed by Defendant. Moreover, the Court held that Plaintiff did not allege that other individuals who worked for Defendant desired to join the collective action. Accordingly, the Court denied Plaintiff's motion for conditional certification of a collective action.

***Rooks, et al. v. Coastal Chemical Co., LLC*, 2017 U.S. Dist. LEXIS 15972 (S.D. Tex. Feb. 6, 2017).** Plaintiff, a land technician, brought a putative collective action against Defendant alleging that he was improperly paid a base salary and bonus with no overtime compensation in violation of the FLSA. Plaintiff moved for conditional certification of a collective action of all similarly-situated land technicians, which the Court denied. The Court held that Plaintiff failed to make a minimal showing that similarly-situated individuals wished to join the lawsuit. *Id.* at *4. The Court explained that Plaintiff's only evidence was his own declaration, in which he stated that he knew that other similarly-situated current and former land technicians would be interested to learn about their rights and their opportunity to join his lawsuit. *Id.* The Court determined that this evidence was insufficient because a Plaintiff may not rely on his own allegations to show that similarly-situated individuals sought to join the lawsuit. *Id.* The Court found that even if Plaintiff were entitled to rely on his own assertions, the declaration alleged only that similarly-situated individuals would be "interested to learn about their rights," not that they sought to join the lawsuit. *Id.* Finally, the Court stated that even after over a year of litigation, Plaintiff remained the only Plaintiff in the case. As such, the Court concluded that Plaintiff failed to make the minimal showing required for conditional certification. *Id.* at *5. The Court therefore denied Plaintiff's motion for conditional certification of a collective action.

***Russell, et al. v. Nationwide Eviction, LLC,* 2017 U.S. Dist. LEXIS 173027 (S.D. Tex. Oct. 19, 2017).** Plaintiff, a court representative of an eviction company, filed a collective action alleging that Defendant failed to pay overtime wages in violation of the FLSA. Plaintiff asserted that Defendant paid a flat fee for each court appearance, even though some appearances required him to work more than 12 hours per day. *Id.* at *1. Plaintiff filed a motion for conditional certification, which the Court denied, finding that Plaintiff failed to provide evidence that others who were similarly-situated wished to opt-in to the lawsuit. Plaintiff subsequently filed a renewed motion for conditional certification, which the Court again denied. Plaintiff sought to conditionally certify a collective action of "all individuals who, at any point during the past three years prior to the filing of this lawsuit, worked for Defendant as court representatives." *Id.* at *6. Defendant asserted that Plaintiff failed to meet his burden to justify conditional certification, and in the alternative, that the proposed collective action and notice should be limited. *Id.* In support of his claims, Plaintiff relied on a single statement he made in the declaration attached as an exhibit to his motion, which stated that he knew other court representatives who worked a similar number of hours and who received a flat rate for each court appearance and were not paid one and one half times their regular rates of pay for each hour they worked over 40 in a workweek. *Id.* at *7. Plaintiff also specifically named two other court representatives in the declaration. The Court determined that Plaintiff failed to make a minimal showing that other similarly-situated individuals wanted to opt-in to the lawsuit. *Id.* The Court found that Plaintiff's statement in his declaration provided no evidence that any other individual had an interest in joining the lawsuit. *Id.* at *8. Further, the Court noted that in the ten months that the case had been on-going, only one individual other than Plaintiff had opted-in to the lawsuit. *Id.* The Court stated that it had previously declined to conditionally certify collective actions when Plaintiffs have presented more evidence than what Plaintiff had presented here. Accordingly, the Court denied Plaintiff's motion for conditional certification of a collective action.

***Salinas, et al. v. Wood Group PSN Commissioning Services*, 2017 U.S. Dist. LEXIS 211507 (S.D. Tex. Dec. 26, 2017).** Plaintiff, an employee at an industrial facility, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part and denied in part. Plaintiff sought conditional certification of a collective action consisting of all personnel employed by Defendant during the past three years who were paid the same hourly rate for all hours worked (including hours in excess of 40 hours in a single workweek) and no overtime compensation. *Id.* at *3-4. Plaintiff argued that conditional certification was appropriate because additional individuals who were employed by Defendant suffered injury as a result of Defendant's purported violations of the FLSA. Plaintiff further contended that the potential collective action members were similarly-

situated because they: (i) worked as hourly employees for Defendant during the operative time period; (ii) received straight time for overtime; and (iii) were all required or permitted to work overtime without receiving compensation at the legal rate of pay. *Id.* at *4. Defendant asserted that conditional certification should be denied because: (i) the scope of the proposed collective action was overly broad; (ii) Plaintiff was not a proper representative of the membership of the proposed collective action because he was not similarly-situated to others with respect to job duties; (iii) Plaintiff was not a proper representative because he had not provided any evidence to support his claim that a nationwide policy existed with respect to paying exempt employees "straight time" instead of overtime; (iv) Plaintiff was not similarly-situated with other potential collective action members because individualized issues predominated; and (v) Plaintiff had not shown there were other eligible members of the proposed collective action who were interested in joining the lawsuit. *Id.* at *5-6. The Court found that Plaintiff asserted that he was not paid overtime compensation for work over 40 hours per week and therefore Plaintiff set forth a reasonable basis for crediting the assertions that aggrieved individuals existed. *Id.* at *10. However, the Court held that the proposed collective action was too broad and would include individuals who were not similarly-situated. The Court determined that limiting the scope of the collective action to persons classified by Defendant as exempt would ensure that the aggrieved individuals were similarly-situated to Plaintiff in relevant respects. *Id.* The Court therefore held that narrowing the collective action to include employees classified as exempt would establish a collective action with a common method of compensation and a similar issue of whether the positions were appropriately classified as exempt. The Court found that there were approximately 100 to 200 individuals who could be eligible to opt-in to the collective action if limited to employees classified as exempt. *Id.* at *13. The Court concluded that Plaintiff's affidavit indicated he knew of other employees who received a similar method of compensation and would be interested in joining the lawsuit. *Id.* at *14. Therefore, the Court granted Plaintiff's motion for conditional certification of a narrower collective action consisting of exempt employees.

***Senegal, et al. v. Fairfield Industries, Inc.,* 2017 U.S. Dist. LEXIS 43830 (S.D. Tex. Mar. 27, 2017).** Plaintiff, a seismic crew worker, brought a putative collective action alleging that Defendant violated the overtime provisions of the FLSA. Plaintiff filed a motion for conditional certification and Defendant objected to the certification motion and the form of notice. The Court granted Plaintiff's motion for conditional certification subject to amendments in the proposed form of notice. Defendant objected to conditional certification because some of the opt-in Plaintiffs were exempt from the FLSA. *Id.* at *11. The Court rejected that argument on the basis that merit-based defenses to FLSA were not properly brought to defeat conditional certification at this stage. *Id.* However, the Court dismissed the marine crew opt-in Plaintiffs, as the proposed collective action consisted only of seismic crew members. *Id.* at *12. The Court also rejected Defendant's challenges to conditional certification on the basis that pre-shift and post-shift claims required individual analysis, ruling that such individual analysis does not mean that collective action members are not similarly-situated. *Id.* at *14. Defendant also maintained that the pay policies were appropriate and the collective action members were compensated for overtime, and therefore conditional certification should be denied. The Court also rejected this objection because some opt-in Plaintiffs claimed that that they worked more than 12 hours a day and were not paid overtime and Plaintiff challenged whether Defendant's day-rate policy was proper under the FLSA's regulations. *Id.* at *15. The Court also rejected Defendant' objection to conditional certification because the putative collective action members' jobs had different titles. The Court found that the jobs did not need to be identical, just similar enough and all members were part of the seismic crew, subject to a common plan or policy. *Id.* at *16. Defendant also objected to Plaintiff's proposed notice. The Court disagreed with Defendant's objections, finding that the broad purpose of the FLSA warranted such notice. *Id.* at *18. Defendant raised several objections to the form and content of the notice. The Court ruled that the statement that the Court approved the notice was neutral and that the language regarding statute of limitations was not coercive. *Id.* at *20. The Court agreed with Defendant that the potential collective action members must be advised that they may have to participate in discovery and testify at trial and that they have the right to choose their own counsel. *Id.* at *21. The Court also ruled that the Plaintiff's counsel could collect the signed opt-in notices, as opposed to the notices going directly to the Court, as this was the usual practice. Accordingly, the Court certified the collective action and allowed notice subject to amendments in the proposed form.

***Serrano, et al. v. Republic Services,* 2017 U.S. Dist. LEXIS 89551 (S.D. Tex. June 12, 2017).** Plaintiffs, a group of waste service employees, brought a collective action under the FLSA for unpaid wages and overtime

premium. *Id.* at *137. Plaintiffs were paid on a piece-rate basis for each long haul and, upon hire, were provided a table of rates that listed the amount that Defendant would pay per long haul. *Id.* at *144. Defendant, however, maintained a pay plan with provisions in addition to the piece-rate system. The parties agreed to a bifurcated bench trial. The liability issues were: (i) whether the FLSA required that Plaintiffs and Defendant come to an agreement or understanding regarding compensation for non-production time; (ii) whether there was such agreement or understanding between the parties that the piece-rate by which they were paid compensated Plaintiffs for both production and non-production work; (iii) whether Plaintiffs' on-the-clock work was unpaid non-production time; (iv) whether Defendant violated the maximum hour overtime provision by paying an incorrect regular rate for the first 40 hours in a workweek and, therefore, paid an incorrect overtime premium for all hours worked over 40 in a workweek; (v) whether Defendant acted in good faith so as to avoid liquidated damages; (vi) whether any FLSA violation was willful so as to extend the statute of limitations to three years; and (vii) whether the collective action should be decertified. *Id.* at *138. The Court concluded that, under the facts presented, Defendant was not permitted to derive its regular rate for purposes of calculating the overtime premium by dividing its piece-rate compensation by all hours worked in the absence of an agreement or understanding to that effect. The Court reasoned that principal activities could either be productive or non-productive; either way, the hours must be counted and paid. The Court held that Defendant's inclusion of non-production hours in its calculation of the regular rate resulted in an amount less than what the FLSA required for the regular rate and, as a result, less than what was required for the overtime rate. The Court found that Plaintiffs were not paid any amount of straight-time pay for non-productive time on-the-clock. Whereas Plaintiffs could not recover unpaid straight-time pay for any of the first 40 hours worked in a workweek, Defendant improperly used uncompensated non-production hours in determining the regular rate, and it used that artificially low regular rate to calculate overtime pay. The Court determined that although non-haul driving represented production time, time spent on truck breakdowns, stock searches, administrative time, paperwork, vehicle inspections, meetings, checking-in or checking-out with dispatchers, and security clearance was non-production time. The Court opined that fueling the trucks, landfill wait time, and customer delays was non-production time only when the time was excessive. Further, the Court ruled that Defendant did not satisfy its burden to show good faith to eliminate or mitigate liquidated damages. The Court found that Plaintiffs did not satisfy their burden to show that Defendant acted willfully for purposes of extending the statute of limitations to three years. As a result, the Court denied Defendant's motions to decertify the collective action and for judgment on partial findings. The Court ordered the parties to mediate the question of damages and stated that the Court would address damages as part of the bifurcated trial if necessary. *Id.* at *192.

***Shaw, et al. v. Jaguar Hydrostatic Testing,* 2017 U.S. Dist. LEXIS 142862 (S.D. Tex. Sept. 5, 2017).** Plaintiff, a field operator/tester, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff's duties included maintaining and servicing oil and gas production facilities and overseeing the testing and monitoring of wells, pumps, storage facilities, and other pressure control equipment. Plaintiff alleged that he was non-exempt and that Defendant paid him on a salary basis plus a day rate but did not pay overtime compensation. *Id.* at *3. Plaintiff further asserted that he often worked in excess of 80 – and sometimes 100 – hours per week and that other employees had also been denied overtime hours in violation of the FLSA. *Id.* Plaintiff sought to conditionally certify a collective action of all individuals who were employed by Defendant during the past three years as junior operators, operators, field operators and pressure testers, who were paid a base salary and a day-rate/job bonus with no overtime compensation. *Id.* at *4. Plaintiff argued that conditional certification was appropriate because all junior operators, operators, field operators, and pressure testers "performed the same essential job duties and were subjected to the same conditions of employment." *Id.* at *15-16. Plaintiff asserted that the work performed and method of compensation were consistent across all of Defendant's locations, and that the employees were similarly-situated. *Id.* at *17. Defendant opposed the motion and argued that the evidence demonstrated that "numerous variables affect daily conditions and duties of the putative [collective action] members, thus requiring a highly individualized inquiry as to damages and defenses available." *Id.* Defendant argued that the majority of the putative collective action members' job duties changed daily because of variables, including "the demands of the company man, the client and the specific worksite." *Id.* at *17-18. Defendant also pointed out that each job title represented a separate set of functions and/or levels of experience required for that position. Defendant further asserted that the putative collective action members received varying pay and had differing levels of eligibility for bonuses. *Id.* at *18. The Court determined that

though the job descriptions of junior operators, test pump operators, and lubricator operators varied, they need not be identical. The Court noted that Plaintiff alleged a general scheme of misclassification of employees. Therefore, the Court opined that even if there were different job functions among employees, the limited evidence before the Court showed that, in general, the prospective collective action members performed manual labor and generally did not have supervisory functions. *Id.* at *22-23. Therefore, the Court found that given the light burden applicable to Plaintiffs at the preliminary stage, Plaintiff's motion for conditional certification should be granted. *Id.* at *24.

***Vaughn, et al. v. Document Group, Inc.*, 2017 U.S. Dist. LEXIS 60222 (S.D. Tex. April 20, 2017).** Plaintiff, a litigation support service independent contractor, brought an action alleging that Defendant violated the FLSA by failing to pay overtime wages for work over 40 hours per week. Plaintiff alleged that he regularly worked in excess of 40 hours and was not paid overtime wages. Plaintiff sought conditional certification of a collective action comprised of all litigation support workers Defendant employed as independent contractors within the past three years who worked over 40 hours in a week and were not paid overtime at the rate of one and one-half times their regular hourly rate. *Id.* at *2-3. In addition to his own affidavit, Plaintiff submitted an affidavit from Naseem Roberson, in which Roberson affirmed his intention to join the lawsuit as an opt-in Plaintiff. *Id.* at *3. Roberson, like Plaintiff, stated that he performed litigation support work for Defendant and that Defendant classified Roberson as an independent contractor and did not pay him overtime wages. Roberson also stated that at least 15 other workers whose duties were similar to those Roberson performed were also not paid overtime for hours worked in excess of 40. *Id.* at *4. The Court found that Plaintiff provided sufficient evidence to credit his assertion that aggrieved individuals existed. *Id.* at *6. Plaintiff alleged that he and the other collective action members were similarly-situated because "Defendant has a common policy of mischaracterizing workers as independent contractors and thereby paying them straight time instead of the statutorily required overtime pay for hours worked above forty (40) each week," and second, "Plaintiff and putative class members performed the same job duties and were paid straight time instead of time and a half for overtime hours worked." *Id.* at *7. The Court determined that Plaintiff and members of the proposed collective action were sufficiently similarly-situated to one another with respect to their work for Defendant and its pay practices to satisfy this factor. The Court also stated that Plaintiff adequately alleged a common policy or plan, *i.e.*, that Defendant misclassified certain litigation support workers as independent contractors in order to avoid paying those individuals overtime. *Id.* at *8. Defendant argued that because it retained employees who perform "the same manual labor" as its independent contractors, this evidence showed there was no such common policy, and "Defendant's decision to treat certain personnel as W-2 employees, as opposed to 1099 workers, depended on the circumstances of each person." *Id.* at *9. The Court found this argument unpersuasive and stated that whether Plaintiff and other potential collective action members were subject to the FLSA's overtime requirements because they are independent contractors and not employees was a merits-based defense to FLSA claims that must be addressed at a later stage of the case. *Id.* at *10. Defendant also contended that Plaintiff and members of the proposed collective action were not similarly-situated because there were "substantial differences" with respect to their hours, skills, pay, and duration of relationship with Defendant. *Id.* Defendant stated that whether it erred in its classification of litigation support workers would require the Court to assess those differences by performing an individualized analysis of each collective action member, which would render the action ill-suited to certification. *Id.* at *10-11. The Court again disagreed, and ruled that Defendant failed to demonstrate any material differences for purposes of denying conditional certification because Defendant plainly employed a single policy of not paying overtime to independent contract workers. *Id.* at *13-14. The Court further opined that individualized analysis would not be so onerous as to "eviscerate[] all notion[s] of judicial economy that would otherwise be served by conditional class certification." *Id.* at *14. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

(vi) Sixth Circuit

***Abney, et al. v. R.J. Corman Railway Group*, 2017 U.S. Dist. LEXIS 138723 (E.D. Ky. Aug. 29, 2017).** Plaintiff, a railway operator and laborer, filed a collective action alleging that Defendant failed to pay travel time in violation of the FLSA. Plaintiff filed a motion for conditional certification of his FLSA claims, which the Court granted. Plaintiff asserted that he was required to travel to project locations away from home as part of his job requirements. Plaintiff further asserted that he and similarly-situated individuals were not paid for all time spent traveling away from their home site and back in violation of 29 U.S.C. § 207(a)(1). Plaintiff sought to certify a

collective action of all operators/laborers who worked for Defendant from June 2014 to the present, who worked more than 40 hours per week and were paid an hourly rate plus overtime, but not paid for all travel time from: (i) their home site to assigned project location; (ii) one assigned project location to another assigned project location; and/or (iii) an assigned project location back to home site. *Id.* at *4. Plaintiff submitted several employee declarations in support of his motion, all which attested that they were employed as operators or laborers for Defendant and that they similarly were not paid for all travel hours worked. *Id.* Plaintiff also provided a letter Defendant issued to its current employees indicating that it "recently began reviewing its travel pay practices to determine compliance with the FLSA." *Id.* at *5. The Court found that Plaintiff demonstrated that at least three of Defendant's former employees wished to opt-in to the action. Further, the Court held that the employees attested that they worked for Defendant as operators/laborers and were subject to the same travel pay policy that deprived them of proper overtime pay when working away from home. Accordingly, the Court concluded that Plaintiff had made the minimal showing for conditional certification required at the notice stage under 29 U.S.C. § 216 (b), and it granted Plaintiff's motion.

***Amos, et al. v. Lincoln Property Co.,* 2017 U.S. Dist. LEXIS 106051 (M.D. Tenn. July 7, 2017).** Plaintiff, a business manager, brought a collective action alleging that Defendant misclassified business managers as exempt employees and thereby denied them overtime wages in violation of the FLSA. Defendant asserted that Plaintiff was exempt from the FLSA's provisions because she was employed in a *bona fide* administrative and executive capacity. *Id.* at *2. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part. Plaintiff submitted her own declaration in support of her allegations, which contended that despite the fact that she routinely worked more than 40 hours per workweek, she was never paid for the additional hours. According to Amos, other business managers were similarly misclassified as exempt from the provisions of the FLSA, and therefore never paid required overtime wages. Plaintiff also asserted that she personally visited and "regularly communicated" with business managers at other Lincoln properties in Tennessee. *Id.* at *4-5. Defendant asserted that Plaintiff failed to: (i) identify any other potential opt-in Plaintiff by name; (ii) provide any affidavit from a potential opt-in Plaintiff; or (iii) provide the Court with any evidence of a widespread discriminatory plan. *Id.* at *5. The Court found that at this stage of the litigation, Plaintiff had provided sufficient factual support to demonstrate that she and other business managers suffered from a single, FLSA-violating policy whereby Defendant misclassified business managers as executives who were exempt from the FLSA's overtime wage provisions. *Id.* at *9. The Court opined that Plaintiff's own declaration provided sufficient details to support conditional certification. *Id.* Additionally, the Court found that Plaintiff stated that she personally visited and "regularly communicated" with business managers at other properties and learned that other business managers also did not supervise more than one full-time employee and were expected to work in excess of 40 hours per workweek without being paid an overtime wage. *Id.* At this stage in the proceedings, the Court ruled that Plaintiff made a modest factual showing that she and other business managers suffered from the same allegedly unlawful pay policy, *i.e.*, a misclassification of business managers as executives who were exempt from the provisions of the FLSA, and therefore met the lenient standard governing conditional certification. Defendant argued that Plaintiff's declaration consisted of "vague and conclusory statements and does not provide any specific details" demonstrating that she had personal knowledge of the payment policies applicable to other business managers. *Id.* at *10. The Court, however, stated that Plaintiff's statements that she personally visited and spoke with business managers at two additional properties were not mere conclusory allegations and they were sufficient to support a finding that Plaintiff and other business managers were similarly-situated to each other. Moreover, the Court determined that Plaintiff's statements regarding the experiences of other business managers were corroborated by Defendant's employee handbook, which classified all business managers as supervisors who were exempt from the overtime provisions of the FLSA. *Id.* at *10-11. Finally, Plaintiff argued that there were likely hundreds of potential opt-in Plaintiffs who were similarly-situated to her. The Court held that Plaintiff, however, did not explicitly state that she sought conditional certification of a nationwide collective action. The Court concluded that Plaintiff did not supply sufficient evidence that Defendant misclassified employees in locations outside of Tennessee. *Id.* at *12-13. The Court therefore limited conditional certification to business managers who were employed by Defendant at its Tennessee locations.

***Anderson, et al. v. P.F. Chang's,* 2017 U.S. Dist. LEXIS 134144 (E.D. Mich. Aug. 23, 2017).** Plaintiff, a sous chef, filed a collective action alleging that Defendant failed to pay overtime and the minimum wage in violation of

the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court denied. Plaintiff alleged that he performed the same work as hourly line cooks and was not paid any overtime premium for hours worked over 40 hours in a week. Plaintiff further alleged that his duties did not include managerial responsibilities or the exercise of independent business judgment. Plaintiff sought to conditionally certify a collective action consisting of current and former employees of Defendant who worked as food preparation employees with the title "sous chef" or in other similar non-managerial, non-administrative positions on or after November 20, 2013. *Id.* at *21. In support of his motion, Plaintiff included his own declaration as well as a declaration from Patrick Stancil ("Stancil"), a former employee. Plaintiff argued that the two declarations demonstrated that Defendant adopted and adhered to a policy requiring cooks with the title "sous chef" to work a double shift in excess of 40 hours per week and paid them a salary but failed to pay them overtime compensation in violation of the FLSA. *Id.* Defendant asserted that Plaintiff could not meet his burden of demonstrating the appropriateness of conditional certification based solely on his conclusory declarations that his experience and Stancil's experience were similar to those of the approximately 900 other sous chefs across over 200 locations. *Id.* at *22. Defendant further argued that its uniform classification did not demonstrate that sous chefs were similarly-situated. In support of its position, Defendant included declarations from 12 individuals who worked as sous chefs in 16 different restaurants. The Court found that Plaintiff failed to meet his burden, even under the fairly lenient first stage standard, for conditional certification of a collective action. Although not dispositive, one factor that the Court considered was that no other Plaintiff had opted-in to the proposed collective action. *Id.* at *31. While Plaintiff's declaration and Stancil's declaration contained some details regarding their duties as sous chefs, these declarations were contradicted in part by Plaintiff's deposition testimony and Defendant's declarations. *Id.* The Court noted that Plaintiff had not put forth any other affidavit or declaration describing the duties of any other sous chef besides himself and Stancil. *Id.* at *33. Under the circumstances, the Court determined that Plaintiff did not make a modest factual showing sufficient to demonstrate that he and potential Plaintiffs together were victims of a widespread, unlawful *de facto* policy or plan. *Id.* at *34. Accordingly, the Court denied Plaintiff's motion for conditional certification.

***Anderson, et al. v. The Minacs Group (USA) Inc.,* 2017 U.S. Dist. LEXIS 70513 (E.D. Mich. May 9, 2017).** Plaintiff, a call center representative, brought a collective action alleging that Defendant violated the overtime provisions of the FLSA by failing to pay her and other similarly-situated employees overtime compensation when they worked more than 40 hours per week. Plaintiff filed a motion for conditional certification of a collective action, and the Court granted the motion. Defendant provides business and technology support services for clients in a wide range of industries, including manufacturing, retail, banking, health care, and the public sector. *Id.* at *2. Plaintiff submitted declarations from herself and another former call center representative in support of her motion for conditional certification. Plaintiff stated that at the beginning of each shift, she had to perform a number of tasks before she could begin to accept incoming customer calls as required for her job, including entering a security code to enter her office concourse, log-in to her computer, and load applications. *Id.* at *4. Plaintiff estimated that due to delays in the computer systems, it took anywhere from 3 to 10 minutes on most days for the required computer applications to open and load. *Id.* at *5. Plaintiff asserted that she was instructed to arrive 15 minutes before her scheduled shift in order to complete these duties. Plaintiff stated that she and other call center representatives were not paid for the time spent on these preparatory tasks. *Id.* at *6. Plaintiff alleged that Defendant had a practice of not paying for pre-shift time, even if a representative requested to be paid for it. Plaintiff also alleged that Defendant denied compensation for time when representatives were not engaged in telephone calls with customers. *Id.* at *7. Plaintiff sought conditional certification of a collective action of "[a]ll current and former hourly customer service representatives who worked for Defendant in its Farmington Hills, Michigan call center at any time during the last three years." *Id.* at *15. Plaintiff argued that the record at this preliminary stage of this litigation sufficiently demonstrated that she and other call center representative were subjected to similar policies and procedures regarding their compensation that: (i) improperly disregarded some of their work-related activities in tallying the number of hours they worked, and (ii) thereby resulted in denial of overtime pay to which these employees were entitled under the FLSA. *Id.* at *17-18. The Court found that the declarations provided by Plaintiff supported the conclusion that Defendant operated under policies and practices that failed to count the time spent on certain work-related activities toward a representative's total hours worked. The Court determined that Plaintiff made the requisite modest factual showing that she and other potential opt-in Plaintiffs together were victims of a common policy or plan that violated the law. *Id.* at *20. Accordingly, the Court granted Plaintiff's motion for conditional certification pursuant to 29 U.S.C. § 216(b).

***Conklin, et al. v. 1800Flowers.com,* 2017 U.S. Dist. LEXIS 126733 (S.D. Ohio Aug. 10, 2017).** Plaintiffs, a group of customer service representatives ("CSRs"), filed a collective action alleging that Defendant violated the overtime provisions of the FLSA and related Ohio wage & hour laws by requiring them to perform work off-the-clock without compensation. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs sought conditional certification of all call center "Customer Service Representatives," or similar job title, employed by 1-800-Flowers Services Support Center, Inc. anywhere in the United States or its territories, who were not paid for the overtime hours they worked. *Id.* at *8. Plaintiffs submitted three declarations in support of their motion. In their declarations, the employees asserted that: (i) their duties were to take customer calls and resolve issues customers had with Defendant's services or products; (ii) their trainers informed them that Defendant's management required employees to show up for their shifts between 15 and 30 minutes early; (iii) during this time before shifts, employees were required to find an open workstation; (iv) employees had to boot up their computers and log-in to computer and phone software before the start of their shifts; and (v) they were aware of other CSRs who performed the same duties and were subjected to Defendant's same compensation policy of not paying its employees for off-the-clock work. *Id.* at *8-9. Defendant argued that Plaintiffs' motion should be denied because the proposed collective action was vague and overbroad, Plaintiffs were not similarly-situated to the putative collective action members, and Plaintiffs failed to identify a common policy or plan that violated the FLSA. *Id.* at *9. With regard to the collective action definition, Defendant pointed to the declarants' different job titles, including a CSR and a "Priority Voice Specialist," and noted that it would take an individualized determination across the putative collective action to determine whether various job titles were indeed similar. *Id.* at *10. As for whether putative collective action members were similarly-situated, Defendant submitted declarations of ten of Defendant's employees stating that they were not similarly-situated to Plaintiffs, as they did not work off-the-clock and did not come into work early. *Id.* The declarations also confirmed that Defendant's written policy was for "employees to accurately record their time" and that Defendant "properly pays them for all of the hours they work." *Id.* Because Defendant had this written policy that employees must not work off-the-clock, and that required employees to be paid for all hours worked, Defendant argued that Plaintiffs had not identified a common policy or plan that ran afoul of the FLSA. *Id.* The Court stated that at this stage of the litigation it does not matter if the employees held different job titles. The Court further opined that it should not consider the declarations submitted by Defendant, as doing so at this stage of the litigation would "constitute a premature examination of the merits of the FLSA claims." *Id.* at *11. However, the Court determined that Plaintiffs had not presented sufficient evidence to justify the conditional certification of a nationwide collective action, as the three declarations supporting Plaintiffs' motion contained information only about employees at Defendant's Hebron call center. *Id.* at *12-13. Accordingly, the Court granted Plaintiffs' motion for conditional certification in part, and limited the collective action to CSRs employed at Defendant's Hebron call center only.

***David, et al. v. Kohler Co.*, 2017 U.S. Dist. LEXIS 140766 (W.D. Tenn. Aug. 30, 2017).** Plaintiffs, a group of hourly manufacturing employees, filed a collective action asserting that Defendant failed to pay them for off-the-clock work in violation of the FLSA. Plaintiffs filed a motion for conditional certification and the Magistrate Judge recommended granting the motion. On Rule 72 review, the Court subsequently adopted the Magistrate Judge's findings, and granted the motion. Fourteen opt-in Plaintiffs submitted declarations in support of the motion indicating that that they were also hourly-paid manufacturing employees of Defendant within the three years preceding the filing of the lawsuit and were subject to Defendant's off-the-clock policies or practices, all of which deprived them of compensation and resulted in violations of FLSA overtime requirements. *Id.* at *3. The opt-in Plaintiffs further asserted that they were similarly-situated to the named Plaintiffs. The Magistrate Judge concluded that Plaintiffs met their lenient burden at this stage of the case to show that they were similarly-situated to the members of the putative collective action they sought to represent, despite the fact that the named Plaintiffs and the opt-in Plaintiffs were employed at six different facilities and working different jobs in different departments. *Id.* at *4. The Magistrate Judge reasoned that these differences could result in decertification at a later stage of the case. *Id.* Defendant objected, emphasizing the disparities among the members of the putative collective action. Defendant argued Plaintiffs had not shown that they were similarly-situated to the rest of the collective action they sought to represent, that all members of the putative collective action suffered from a single company-wide policy in violation of the FLSA, or that a common theory of liability unified their claims against Defendant. *Id.* at *5. Plaintiffs contended that they had made a *prima facie* showing that they were similarly-situated to the members of the putative collective action and at the conditional

certification stage, the Court was required to resolve any factual disputes in favor of Plaintiffs. Plaintiffs filed supplemental declarations, in which they described in greater detail how they alleged that Defendant failed to pay them for compensable time. *Id.* at *7. Having reviewed the Magistrate Judge's report and recommendation *de novo*, Defendant's objections to the report, and the entire record of the proceedings, the Court found good cause to grant Plaintiffs' motion. The Court held that Plaintiffs met their lenient burden to show how they were similarly-situated to the other employees they sought to represent. *Id.* at *12. The Court stated that named Plaintiffs as well as the opt-in Plaintiffs demonstrated through the pleadings and their supporting declarations that their "claims are unified by common theories of [Kohler's] statutory violations." *Id.* at *15. Each performed compensable, off-the-clock work for which they did not receive pay, specifically work before and after their scheduled shifts and during lunch breaks. Defendant raised a number of arguments to rebut Plaintiffs' showing, highlighting the potential for the putative collective action to exceed 8,000 members and the multiplicity of job functions and settings in which each collective action member worked. *Id.* at *16. The Court noted that it was possible that the putative collective action would be so large and diverse that Plaintiffs would not be able to show that they were similarly-situated to the members of the putative collective action. *Id.* at *16-17. However, the Court determined that was a question it need only reach at the second stage of the certification process and on the basis of a fully developed factual record. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Dillow, et al. v. Home Care Network,* 2017 U.S. Dist. LEXIS 85788 (S.D. Ohio June 5, 2017).** Plaintiff, a domestic service worker, brought a putative class action alleging that Defendant violated the overtime provisions of the FLSA and the Ohio Minimum Fair Wage Standards Act ("OMFWSA"). Plaintiff sought to conditionally certify a collective action under the FLSA and to certify a class action under Rule 23 of all domestic-service employees who: (i) worked for Defendants at any time from January 1, 2015 until April 30, 2016; and (ii) worked more than 40 hours in one or more workweeks. *Id.* at *2. Defendant did not oppose conditional certification of Plaintiffs' proposed class for the FLSA collective action, but requested that the class be limited to the state of Ohio as it claimed there were no domestic-service employees employed outside of Ohio. However, the Court found that Defendant presented no evidence regarding the geographic scope of the employees that may be affected by the proposed collective action, and therefore it found it appropriate to conditionally certify the collective action as proposed by Plaintiff. *Id.* The Court stated that even if Defendant was correct in its assertion that no covered employees worked outside of Ohio, there was no functional difference between the collective action as proposed by Plaintiff or Defendant. *Id.* at *2-3. Defendant, however, opposed certification of a class action under Rule 23(b). The Court found that Plaintiff provided a summation of Defendants' payroll records for domestic service employees showing that during the relevant time period, more than 230 workers were allegedly not paid overtime as was legally required. *Id.* at *5. Therefore, the Court stated that Plaintiff met the numerosity requirement. The Court determined that Plaintiff also established that there were questions of law or fact common to the class such that Rule 23 certification was appropriate, including that Defendant did not pay its domestic-service employees overtime in violation of state and federal labor laws. The Court further opined that Plaintiff and her counsel adequately met the typicality and adequacy requirements for class certification imposed by Rule 23, as Plaintiff was a domestic service employee for Defendant during the relevant time period and worked in excess of 40 hours per week at times during the relevant time period. *Id.* at *7. The Court also held that Plaintiff's interests aligned with those of putative class members, and there was no concern that Plaintiff would litigate any class action in a manner contrary to the interest of the class. Similarly, the Court stated that Plaintiff's counsel was well situated to advocate on behalf of the putative class. *Id.* at *8. Defendant argued that individual issues dominated over issues common to the class, and that class certification was therefore inappropriate. The Court found that Defendant's examples of individual issues were not persuasive. Some of the issues cited, such as whether an individual was a "domestic service worker," were determinative of the threshold issue of whether an individual was actually a member of the class and not an indication of how the cases of two confirmed class members may differ. *Id.* at *9. The Court noted that other individual issues cited by Defendant were related to calculation of damages, and it is not unusual for different class members in a Rule 23 class action to be entitled to differing damages based on their individual circumstances; class certification is appropriate in such circumstances, so long as the class is unified by a single theory of liability. *Id.* at *9-10. The Court further found no evidence that putative class members had any interest in maintaining this litigation in separate actions, and the relative size of the individual claims in the case made class resolution the superior

form of adjudication. Accordingly, the Court granted Plaintiff's motion for class certification pursuant to Rule 23 and conditional certification of the FLSA claims.

***Fitzpatrick, et al. v. Cuyahoga County*, 2017 U.S. Dist. LEXIS 185280 (N.D Ohio Nov. 8, 2017).** Plaintiffs, a group of correction officers, filed a collective action alleging violations of the FLSA. Plaintiffs sought conditional certification of a collective action, which the Court granted. The Court found that Plaintiffs met the lenient standard for conditional certification, and had demonstrated that they were similarly-situated to the putative collection active members. The Court held that the underlying legal and factual issues with respect to Plaintiffs and each of the potential collective action members' claims were substantially similar. Plaintiffs alleged that Defendant's non-exempt hourly employees were not paid the proper overtime premium for hours worked because Defendant failed to include longevity bonuses in the regular rate calculation. Both parties agreed that, although required to do so, Defendant did not begin incorporating longevity bonuses into employees' regular rate calculation until October 2015. Thus, the Court determined that each of Plaintiffs' claims would ultimately turn on their eligibility for longevity bonuses during the applicable period when Defendant was not including those payments in the regular rate calculation. *Id.* at *7. The Court noted that Plaintiffs submitted 15 additional declarations alleging that they worked in 2014 and 2015, and that they were eligible to receive a longevity bonus in 2014 and 2015. *Id.* In addition, Plaintiffs also alleged that Defendant exhibited a practice of failing to include non-discretionary longevity bonuses in the regular rate calculation. *Id.* at *8. Further, Defendant had not provided a reason to conclude that the factual analysis as to the other collective action members would be substantially different even though the proof required may be individualized and distinct. *Id.* Accordingly, the Court found that Plaintiffs met the minimal burden for conditional certification. The Court therefore conditionally certified a collective action consisting of all present and former non-exempt employees of Cuyahoga County who, at any time during the last three years, received longevity payments and worked overtime during any period in which said payment was earned.

***Ganci, et al. v. MBF Inspection Services,* 2017 U.S. Dist. LEXIS 178210 (S.D. Ohio Oct. 27, 2017).** Plaintiff, a welding inspector, filed a collective and class action alleging that Defendant failed to pay overtime compensation in violation of the FLSA and the Ohio Minimum Fair Wage Standards Act ("OMFWSA"). Plaintiff had previously filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff subsequently sought class certification for state law claims pursuant to Rule 23. Plaintiff's proposed class consisted of all inspection personnel, other than chief inspectors and lead inspectors, who were paid a day rate and who worked for Defendant under a Spectra contract at any time since three years prior to filing of the complaint. *Id.* at *3. First, as to numerosity, the parties agreed that the proposed class consisted of approximately 67 individuals. However, Defendant argued that joinder would nevertheless be easily accomplished because: (i) it produced the names and contact information of all 67 members of the class, (ii) class members did not lack resources to bring their own individual suits; and (iii) judicial economy concerns were not implicated when there is no indication that a multiplicity of suits was imminent. *Id.* at *7-8. However, the Court found that employees' fear of their employer's retaliation might keep them from pursuing wage & hour claims individually. The Court found this assertion supported by the low opt-in rate among collective action members (5 out of 67). Moreover, the Court stated that Plaintiff offered evidence that at least one management employee had suggested to inspectors that Defendant should not hire for future assignments any inspectors who joined the FLSA collective action. *Id.* at *10. The Court therefore ruled that the ease of identifying and serving class members was outweighed by inspectors' concerns for their job security. *Id.* at *11. As to commonality, Defendant asserted as affirmative defenses that inspectors were exempt from statutory overtime requirements under the executive, professional, administrative, and highly compensated exemptions. *Id.* at *12. The Court found that Plaintiff sufficiently demonstrated that the inspectors' duties relevant to these exemptions were common to all putative class members. The Court also stated that Plaintiffs demonstrated that all putative class members had suffered the same alleged injury (*i.e.*, misclassification as exempt employees, resulting in unpaid overtime wages), and that questions common to the class (*i.e.*, the applicability of the FLSA exemptions) therefore satisfied Plaintiff's burden of demonstrating typicality. *Id.* at *22. As to adequacy, Defendant did not contest that Plaintiff and his legal counsel were adequate representatives of the putative class. As to the predominance requirement, the Court opined that Plaintiff identified multiple questions whose answers were common to all class members that predominated over any individual inquiries. *Id.* at *28. The Court also reasoned that Plaintiffs met the superiority requirement because: (i) individual class members likely have little

interest in commencing or controlling separate actions due to the retaliation concerns; (ii) there were no other currently pending actions related to Defendant's failure to pay overtime wages to its inspectors; (iii) all putative class members worked in Ohio, making the Court an appropriate forum; and (iv) the class action would be manageable given the relatively small class size and limited necessary individual inquiries. *Id.* at *30. Accordingly, the Court granted Plaintiffs' motion for class certification pursuant to Rule 23.

***Holmes, et al. v. Kelly Services, Inc.*, 2017 U.S. Dist. LEXIS 123835 (E.D. Mich. Aug. 7, 2017).** Plaintiff, a former call center agent, alleged that Defendants violated the FLSA by failing to compensate her and the other employees at her call center for all of the time they spent working. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part. *Id.* at *2. Plaintiff sought certification of a collective action of all hourly call-center agents who worked at the Hampton, Virginia call center facility during the previous three years. However, the Court stated that Plaintiff failed to satisfy even the fairly lenient burden to show that all of the other call-center agents were similarly-situated to her. The Court therefore certified a much narrower collective action. The Court explained that Plaintiff provided evidence that eight other call-center agents, all of whom worked under one of two night-shift supervisors, were similarly-situated. First, Plaintiff submitted evidence that five team members were copied on that supervisor's email stating that they should arrive to work 10 minutes early but not log-in until their shift began. *Id.* at *15. Second, Plaintiff testified that two additional members of her team informed her they were not being paid for "off-the-clock" work. *Id.* Finally, Plaintiff testified that a downstairs night-shift agent who worked under a different supervisor said that she received an email that was similar to the one that Plaintiff's team received regarding "off-the-clock" work. *Id.* Accordingly, the Court opined that Plaintiff's evidence could support a finding that the hourly call-center agents at the Hampton facility who worked under the two supervisors were required to work "off-the-clock" without compensation. *Id.* at *16. Plaintiff requested the Court to certify a much broader collective action of all hourly call-center agents at the Hampton facility on that grounds that she had presented evidence that Defendants had a common policy or plan to deprive all agents of compensation for "off-the-clock" work. *Id.* The Court disagreed and concluded that Plaintiff failed to present evidence of a common policy or plan that applied to all of the hourly agents at the Hampton facility. Plaintiff submitted Defendant's training practices as evidence of a common policy or plan to not pay agents for "off-the-clock" work. The Court found that the fact that Defendant may have trained its call-center agents to arrive for work before their scheduled shift time (or to stay after their scheduled shift to log-off of their computers) was not evidence that Defendants had a common policy not to pay the agents for this pre-shift and post-shift work. *Id.* at *17. The Court stated that Plaintiff did not present any evidence that during the training agents were told: (i) not to record their pre-shift and post-shift work on their timesheets; or (ii) that they would not be paid for that work. *Id.* Plaintiff also argued that the Court could infer that Defendants had a common policy or plan not to pay its agents for all of the time they worked because she had "identified several specific co-workers" who were required to perform "off-the-clock" work without compensation. *Id.* at *18. However, the Court found that all of these "specific co-workers" worked on one of only two teams at the Hampton facility, and Plaintiff failed to produce any evidence that any other agents on any other team were not paid for "off-the-clock" work. *Id.* Accordingly, the Court held that Plaintiff presented some evidence that agents at the Hampton facility who worked for the two supervisors worked "off-the-clock" and were not paid for that time. *Id.* at *23. The Court therefore granted Plaintiff's motion in part, and conditionally certified a collective action of all hourly call-center agents who worked at the Hampton facility for the past three years that worked for either supervisors' team.

***Johnson, et al. v. J&B Mechanical, LLC,* 2017 U.S. Dist. LEXIS 141863 (W.D. Ky. Sept. 1, 2017).** Plaintiff, a millwright laborer and field foreman, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff stated that in a normal workweek, he would work 50 to 70 hours or more, and approximately seven to 10 of those hours were spent in travel time to out-of-town worksites. Plaintiff further alleged that Defendant did not count millwrights' travel time toward their total number of hours worked for calculation and payment of hourly overtime wages in violation of the FLSA. Plaintiff sought to certify a collective action of current and former field foremen, laborers, or helpers, or other functional equivalents who were also not paid overtime compensation. *Id.* at *3. The Court found that Plaintiff provided sufficient factual support to merit conditional certification of a collective action. *Id.* at *5. Plaintiff submitted an affidavit stating that all hourly, non-exempt employees in the positions of field foremen, laborers, helpers, or other functional equivalents were

treated similarly. Plaintiff averred that while working on a job-site, all members of the crew did essentially the same type of work, regardless of whether they were classified by the company as field foremen, laborers, or helpers. Defendant argued that as it had filed several counterclaims, including breach of duty of loyalty, fraud, negligent misrepresentation, and unjust enrichment against Plaintiff, it rendered him a poor representative of the putative collective action. *Id.* at *7. The Court noted that while Defendant's counterclaims might be meritorious, it found that it was inappropriate to engage in a merits analysis at this stage of the action in order to determine whether conditional certification was warranted. *Id.* Defendant further asserted that conditional certification was inappropriate because Plaintiff is likely subject to the motor carrier exemption under the FLSA. The Court declined to consider the argument, noting that it was premature. Defendant further argued that the potential applicability of the motor carrier exemption would predominate the litigation by requiring a fact-intensive analysis of each employee's job to determine whether the exemption applied. The Court again determined this argument was more appropriately discussed in the final certification stage. *Id.* at *8. Finally, Defendant argued that Plaintiff's proposed opt-in group was overbroad and that conditional certification should be denied because Plaintiff provided no indication that any other employees have shown an interest in asserting a claim against Defendant. However, the Court stated that Plaintiff specifically listed 19 other individuals in his affidavit that he contended did not receive the correct amount of overtime pay. *Id.* at *9-10. The Court found that Plaintiff had made the modest factual showing sufficient to satisfy the fairly lenient standard governing conditional certification of a collective action under the FLSA. Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Lindsey, et al. v. Tire Discounters, Inc.,* 2017 U.S. Dist. LEXIS 197996 (S.D. Ohio Dec. 1, 2017).** Plaintiffs, a group of service managers ("SMs"), filed a class action alleging overtime violations pursuant to the FLSA and the Ohio Minimum Fair Wage Standards Act ("OMFWSA"). Plaintiffs claimed that Defendant misclassified them as exempt from overtime pursuant to the FLSA's executive exemption. After discovery, Defendant moved to decertify the FLSA collective action on the basis that the opt-in Plaintiffs were not similarly-situated. At the same time, Plaintiffs brought a motion to certify a class as to the OMFWSA claims pursuant to Rule 23. First, in analyzing Defendant's decertification motion, the Court considered the factual and employment settings of the individual Plaintiffs. As the primary dispute was whether the SMs qualified for the executive exemption, the Court determined that the employees were not similarly-situated with respect to the elements of the executive exemption. The executive exemption applies to an employee: (i) compensated on a salary basis of not less than a rate of $455 per week; (ii) whose primary duty was management of the enterprise; (iii) who regularly directed the work of two or more other employees; and (iv) had the authority to hire or fire other employees or whose suggestions and recommendations as to hiring and firing were given weight. As evidence that the SMs were subject to a single policy that violated the FLSA, Plaintiffs relied upon the uniform job description, training programs, and the employees' uniform classifications, as well as their reclassification as non-exempt. *Id.* at *16. The Court reviewed the actual job duties of the SMs and determined that the opt-in Plaintiffs were not similarly-situated and the exemption defense could not be litigated on a collective basis. The Court determined that while the employees were similarly-situated as to the salary-based criteria, the employees were not similarly-situated with respect to the other three factors. The Court reasoned that the employees were not similarly-situated, as to their primary duties were management. Many SMs indicated that they did not have the authority to hire or fire employees and reported that senior technicians completed much of the training for new technicians. Some SMs reported no involvement with interviewing and training while others reported significant involvement. Because there was no consistency among SMs as to their actual interviewing, selecting, and training of employees, the Court concluded that the SMs were not similarly-situated for this aspect of the management definition. *Id.* at *21. Further, the Court determined that the SMs were not similarly-situated for purposes of whether they directed the work of two or more employees, as all the SMs, except for the named Plaintiff Lindsey, stated that there were more than two technicians under the SMs' supervision. The Court therefore concluded that the SMs were not similarly-situated relative to whether they directed the work of the two or more employees. *Id.* at *22. The Court found with respect to the final prong of the executive exemption that the employees were not similarly-situated, since their participation varied as to the hiring process and in recommending promotions. Accordingly, the Court ruled that the factual and employment settings of the SMs weighted in favor of decertification. The second factor of the decertification analysis – whether Plaintiffs were subject to different defenses on an individual basis – also weighed in favor of decertification because Plaintiffs' claims turned on the applicability of the executive exemption defenses. *Id.* The Court further determined that the third factor – fairness and procedural impact of

certification – also weighed in favor of decertification. The Court opined that because Plaintiffs were unable to demonstrate that the employees were similarly-situated, there was no judicial economy to be gained by allowing their claims to proceed collectively and the only possible result was unfairness to the employer and manageability problems for the Court. Accordingly, the Court granted the Defendant's motion to decertify the collective action. The Court also denied Plaintiffs' motion to certify a class as to the OMFWSA claims pursuant to Rule 23 because the SMs were not similarly-situated, and therefore Plaintiffs could not satisfy the more stringent predominance requirement of Rule 23(b)(3) or the typicality requirement of Rule 23(a)(3). Plaintiffs' claims under the OMFWSA mirrored those under the FLSA because the OMFWSA incorporated the FLSA's protections for overtime wages. The Court ruled that because the job duties of the SMs varied so widely, determining whether putative class members qualified for executive exemption would inevitably require individualized inquiries. In addition, the Court concluded that typicality was not satisfied for the same reasons. Accordingly, the Court granted Defendant's motion to decertify the collective action and denied Plaintiffs' motion for class certification pursuant to Rule 23.

***Luster, et al. v. AWP, Inc.,* 2017 U.S. Dist. LEXIS 116043 (N.D. Ohio July 26, 2017).** Plaintiffs, a group of traffic control specialists in a construction zone, brought a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiffs alleged that they were not paid for time spent driving Defendant's trucks to and from worksites, fueling trucks, or performing inspections. Plaintiffs also alleged they were not paid time and a half for hours worked over 40 each week, despite being classified as non-exempt hourly workers. *Id.* at *3. Plaintiffs filed a motion for conditional certification of the collective action, which the Court granted. Defendant argued that Plaintiffs' motion should be denied because they failed to identify an unlawful policy that members of the collective action were allegedly subject to and conditional certification would not serve judicial economy because the putative collective action definition was overbroad. *Id.* at *4. The named Plaintiff Luster submitted an affidavit that she was required to drive Defendant's truck from Defendant's place of business to the worksite and back; she was required to fuel Defendant's vehicle; she was required to pick up other employees and drop them off; she was required to perform pre-work and post-work inspections of the vehicle; and she was not paid for any of this work. *Id.* at *5. All opt-in Plaintiffs similarly alleged they drove from home or Defendant's place of business to work and back, were not paid for this time, and that this time put them over 40 hours for the week and they were not paid overtime. *Id.* Defendant argued that conditional certification should be denied because Plaintiffs had not identified an illegal policy or practice affecting the putative collective action members. The Court found that Defendant's assertions were questions of fact (*i.e.,* what duties employees performed and whether they were paid for them) and questions of law (*i.e.*, whether the alleged conduct constitutes a violation), and that questions on the merits were appropriate for the first stage of conditional certification. *Id.* at *6. The Court determined that it was sufficient at this stage of the case that Plaintiffs established a policy or practice and had advanced arguments that the policy violated the FLSA. Defendant also contended that allowing conditional certification would not promote judicial efficiency, as it would merely put off until later the large number of individual considerations that must be made. The Court found that Defendant's objection was better suited to the second stage of conditional certification. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Marek, et al. v. Toledo Tool & Die Co.*, 2017 U.S. Dist. LEXIS 196065 (S.D. Ohio Nov. 29, 2017).** Plaintiff, a non-exempt hourly employee, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court denied. Plaintiff sought to certify a collective action of "all current and former hourly, non-exempt employees of Defendant, who worked in excess of 40 hours in a workweek, but were not paid their overtime rate for all such hours worked, resulting in unpaid overtime wages." *Id.* at *3. In support of his motion, Plaintiff submitted his own declaration, Defendant's payroll records listing hours worked and hourly rates, and the payroll records of six other employees. *Id.* at *7. The Court stated that a Plaintiff "seeking certification based solely on his own declarations" may have difficulty securing conditional certification because his experience may not be representative of other employees' experiences, particularly where the proposed collective action encompassed all hourly employees irrespective of job category. *Id.* at *8. The Court noted that although Plaintiff attested that he worked for Defendant as a maintenance technician and a maintenance supervisor performing "general maintenance," he did not explain what "general maintenance" was as it related to tool and die work. *Id.* Further, Plaintiff did not describe the job duties of other potential Plaintiffs. Plaintiff also did not indicate whether

Defendant had multiple locations, multiple worksites within a single location, or a single worksite within a single location. *Id.* at *9. The Court also opined that it could not adequately consider "the different defenses to which Plaintiff may be subject on an individual basis." *Id.* at *10. Ordinarily, the Court explained, the likelihood that an employer may have to assert individualized defenses would not overcome a Plaintiff's minimal showing of similarity under 29 U.S.C. § 216(b), so long as "sufficient common issues or job traits otherwise permit collective litigation." *Id.* However, without further information, the Court found that it could not discern whether "sufficient common issues or job traits permit collective litigation" in this case. *Id.* The Court reasoned that although the employee payroll records suggested that Defendant did pay several employees at their regular hourly rate for more than 40 hours of work in a single workweek, Plaintiff did not provide proof of personal knowledge that Defendant actually denied other employees overtime compensation, and the records were from periods where Defendant paid for holiday time off work over 40 hours in a week. The Court stated that "overtime for holidays is due only for that time in any particular week in which the employee actually worked more than forty hours." *Id.* at *13. The Court therefore ruled that the payroll records did not prove that any employee "actually worked" more than 40 hours in a workweek. Accordingly, the Court found, at most, that Plaintiff provided evidence that Defendant paid employees for "occasional periods" when they were "not at work," and did not credit "such payments toward overtime compensation due under the FLSA," just as regulations require. *Id.* at *15. The Court held that evidence of compliance with FLSA regulations was not a "colorable basis" to believe that a group of similarly-situated Plaintiffs existed. *Id.* at *16. The Court therefore denied Plaintiff's motion for conditional certification of a collective action.

***McClain, et al. v. First Acceptance Corp.,* 2017 U.S. Dist. LEXIS 126733 (M.D. Tenn. Aug. 1, 2017).** Plaintiffs, a group of loss claims adjusters, brought a collective action alleging that Defendant misclassified them as exempt employees and thereby denied them overtime wages in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff sought to represent a group consisting all past and present employees of Defendant who were employed as Total Loss Claims Adjusters at any time from March 2, 2014, to the present. *Id.* at *2. In support of their motion, Plaintiffs submitted a declaration stating that all loss claims adjusters performed the same work and were misclassified as exempt employees and denied overtime wages despite regularly working over 40 hours per week. *Id.* at *3. Defendant argued that Plaintiffs had not met the modest factual showing that they were similarly-situated because they only submitted a single, conclusory declaration, which did not discuss specific job duties. *Id.* at *5. However, the Court found that Defendant's own evidence showed that a collective action of similarly-situated total loss claims adjusters existed. *Id.* at *6. The Court noted that Defendant submitted declarations of one former and two present total loss adjusters, which outlined their job duties and indicated that all total loss adjusters performed the same or substantially similar job duties and had the same essential job functions. The Court therefore concluded that Defendant's own declarations clearly indicated that a definable group of similarly-situated Plaintiffs existed. *Id.* at *10. Defendant further argued that Plaintiffs failed to show that other total loss adjusters wished to opt-in to the litigation. However, the Court rejected that argument and opined that it would be difficult to opt-in to something that was not known, as notice had not been sent to any parties that could opt-in. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***McFarlin, et al. v. Word Enterprises, LLC,* 2017 U.S. Dist. LEXIS 164968 (E.D. Mich. Oct. 5, 2017).** Plaintiff, a delivery driver, filed a collective and class action alleging that Defendants failed to pay minimum wage and overtime compensation in violation of the FLSA, the Michigan Minimum Wage Law ("MMWL"), and the Michigan Workforce Opportunity Wage Act ("MWOWA"). *Id.* at *2. Plaintiff filed a motion for class certification of his state law claims pursuant to Rule 23(b)(3), which the Court granted. Plaintiff contended that the total number of drivers for each of four Defendant companies should be combined when considering numerosity. The Court agreed and found that Defendants should be treated as a single employer for class certification purposes. As a result, the class consisted of 106 to 117 members, and met the requirement for numerosity. *Id.* at *4-5. Defendants claimed that Plaintiffs failed to meet commonality because the different companies did not have uniform mileage reimbursement policies, and the claims of potential class members were too individualized. *Id.* at *6. The Court, however, noted that based on Sixth Circuit precedent, the fact that there would need to be individualized inquiry as to the amount of damages for each delivery driver is not enough to invalidate commonality. *Id.* at *9. The Court further found that depositions given by Defendants' employees stated that all locations had the same payroll policies and practices. The Court therefore ruled that Plaintiff met the

commonality requirement. The Court also held that typicality was met because Plaintiff's allegations of under-payment of wages by Defendants was similar to all of the other potential class members. *Id.* at *11. Defendants did not contest that Plaintiff's counsel satisfied the adequacy requirement of Rule 23(a)(4). The Court also determined that Plaintiff had common interests with the unnamed members because of his interest, as a delivery driver, to get reimbursed for the costs he had to personally incur for his vehicle expenses from delivery driving. Accordingly, the Court also found that Plaintiff met the adequacy requirement. As to Rule 23(b)(3), the Court stated that the general issue of the adequacy of the reimbursement policies maintained by Defendants predominated over individual inquiries. *Id.* at *12. Although the damages for each delivery driver would entail an individual determination, the Court concluded that the damages arose from a course of conduct applicable to the entire class. Finally, the Court found that Plaintiffs claims arose from the single course of alleged wrongful conduct of Defendants in maintaining an inadequate reimbursement policy or policies. Therefore, the Court held that a class action was the superior method to bring the lawsuit. *Id.* at *13. Accordingly, the Court granted Plaintiff's motion for class certification.

***Monroe, et al. v. FTS USA, LLC,* 860 F.3d 389 (6th Cir. 2017).** Plaintiffs, a group of cable technicians, filed suit pursuant to the Fair Labor and Standards Act ("FLSA") alleging overtime violations. Plaintiffs alleged that Defendant implemented a company-wide policy that required its employees to systemically under-report their overtime hours. *Id.* at *2. The District Court certified the collective action and after a jury rendered a verdict in favor of Plaintiffs, the District Court awarded damages. Plaintiffs testified that they were required to "work off-the-clock" before and after scheduled hours or during lunch breaks and their timesheets were altered so as to under-report overtime. *Id.* at *29. On Defendant's appeal, the Sixth Circuit affirmed the District Court's certification of the collective action and found that there was sufficient evidence to support the jury's verdict. However, the Sixth Circuit reversed and remanded as to the District Court's calculation of damages. *Id.* at *2. Defendant argued that Plaintiffs were not similarly-situated. The Sixth Circuit disagreed and ruled that Plaintiffs were similarly-situated for purposes of a collective under 29 U.S.C. § 216(b), because they all performed essentially the same job and the policy of under-reporting overtime hours was company-wide and originated at the executive level. *Id.* at *27. In determining that Plaintiffs were similarly-situated, the Sixth Circuit applied three factors, including: (i) the factual and employment settings of the individual Plaintiffs; (ii) the different defenses to which Plaintiffs may be subject to on an individual basis; and (iii) the degree of fairness and procedural impact of certifying the action as a collective action. *Id.* at *14. The Sixth Circuit rejected Defendant's argument that there was insufficient evidence to establish Defendant's liability and ruled that the testimony of representative technicians along with direct evidence was more than sufficient to support the jury's verdict. The Sixth Circuit ruled that representative testimony from a sub-set of Plaintiffs may establish evidence of FLSA violations, when such proof would normally be individualized. *Id.* at *42. However, as to damages, the Sixth Circuit ruled that the District Court erred when it used a 1.5 multiplier to calculate damages, as the FLSA entitled piece-rate workers to an overtime multiplier of .5. *Id.* at *64. The Sixth Circuit reversed and remanded for recalculation of damages because the District Court should have used a .5 multiplier rather than the 1.5 multiplier that it used in its calculation. *Id.* at *65.

***Myers, et al. v. Marietta Memorial Hospital*, 2017 U.S. Dist. LEXIS 146233 (S.D. Ohio Sept. 11, 2017).** Plaintiffs, a group of former nurses, brought a putative collective action alleging that Defendant failed to pay them overtime compensation and minimum wages in violation of the FLSA and Ohio wage & hour laws. The Court had previously entered an order granting conditional certification of a collective action for Plaintiffs' FLSA claims. Plaintiffs subsequently filed a motion for class certification of their state law claims pursuant to Rule 23, and the Court granted the motion. Plaintiffs alleged that Defendants' policy of automatically deducting 30 minutes for a meal break for nurses and patient care technicians violated the FLSA and Ohio wage laws because employees were routinely prohibited from either taking an uninterrupted meal break or canceling the automatic deduction. *Id.* at *2. Plaintiffs sought certification of a class of all of Defendant's current and former nurses and patient care technicians who were hourly employees and subject to Defendant's automatic meal deduction policy during the three years before this complaint was filed up to the present. *Id.* In support of their motion, Plaintiffs submitted affidavits stating that patient care employees did not clock-in and clock-out for meal breaks, and that the hospital had a policy of regularly deducting 30 minutes from each shift for a meal period, regardless of whether the employees actually received meal breaks. Plaintiffs also stated that they could not recall a single day in the past three years during which they were able to take a 30-minute meal break free from

their job duties, and that they were aware of other employees who had the same experience. *Id.* at *3. The Court found that the numerosity requirement was satisfied, as Defendant provided a class list that contained 1,168 nurses and patient care technicians. *Id.* at *12. As to commonality, Plaintiffs asserted that there were 12 questions common to the class relating to Defendant's alleged violations. The Court ruled that Plaintiffs met commonality, as they argued that putative class members had all been injured by Defendant's common policies and pay practices. *Id.* at *13. Defendants disputed that Plaintiffs' claims were typical of those of the class members, claiming that the named Plaintiffs have "at most, claimed that a rogue supervisor instructed them differently than the proposed class." *Id.* at *20. According to Defendants, while several of named Plaintiffs claimed that a supervisor instructed them to ignore Defendant's "lawful compensation policy," their experience was unique and not typical of the practice of other supervisors. *Id.* The Court rejected Defendant's position, since Plaintiffs worked for various managers and in different departments, and also stated that they spoke with many co-workers who were subject to the same policies and practices. *Id.* at *20-21. For this reason, the Court determined that Plaintiffs met the typicality requirement. Defendant did not address the adequacy requirement, and therefore the Court assumed that Defendant conceded that Plaintiffs had met this requirement. *Id.* at *21. As to Rule 23(b)(3), the Court held that Plaintiffs satisfied the predominance requirement because the liability questions identified were the same for all putative class members. *Id.* at *22. Finally, as to the superiority requirement, the Court found that all factors weighed in favor of Plaintiffs, as they had no interest in litigating their claims individually, and they could prove class member claims through representative evidence. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Myers, et al. v. TRG Customer Solutions,* 2017 U.S. Dist. LEXIS 136140 (M.D. Tenn. Aug. 24, 2017).** Plaintiff, a call center employee, filed a collective action asserting that Defendant violated various provisions of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court denied. Plaintiff sought to certify a collective action of all current and former hourly-paid non-exempt call center workers at Defendant's United States call centers who at any time from June 1, 2014 through the present worked in positions in which employees handled telephone calls on behalf of IBEX clients. Plaintiff stipulated that this definition excluded any employee who both received notice and opted-in to the nationwide class and collective action currently pending in the Court entitled *Andrews, et al. v. TRG Customer Solutions, Inc.*, which was being actively litigated in a collective arbitration. *Id.* at *3. Defendant asserted that Plaintiff signed an acknowledgement in which she purportedly agreed to arbitrate any employment-related disputes, specifically including any claims under the FLSA. Defendant alleged that the arbitration agreements signed by Plaintiff and most or all of the employees she sought to represent barred collective action certification. Defendant further argued that Plaintiff failed to carry her burden of demonstrating that she was similarly-situated to the putative class of other call center employees throughout the United States. *Id.* at *5. The Court noted that Defendant had not filed a motion to compel arbitration, and the enforceability of the arbitration agreement was not before the Court. The Court stated that when presented with a fully briefed motion for conditional certification, it would typically proceed with the consideration of whether Plaintiff had demonstrated the requisite substantial similarity to justify granting the motion. *Id.* at *15. Here, however, the Court determined that consideration of the motion for conditional certification would be premature. The Court found that if Plaintiff and other similarly-situated current and former employees were subject to arbitration agreements that either implicitly or expressly required them to pursue arbitration individually rather than collectively, then certification of a collective class would be an exercise in futility. The Court recognized that in *Andrews*, the parties were able to reach an agreement to proceed with a collective arbitration, thereby avoiding lengthy litigation of the questions of whether the arbitration agreements signed by Plaintiffs were enforceable as to each individual opt-in Plaintiff and whether Defendant could compel individual arbitrations. *Id.* at *16. The Court thus encouraged the parties to try to reach a similar agreement, and deferred ruling on Plaintiff's motion for conditional certification.

***Ouellette, et al. v. Ameridial, Inc.,* 2017 U.S. Dist. LEXIS 107952 (N.D. Ohio July 12, 2017).** Plaintiff, a customer service representative ("CSR"), brought a collective action asserting that Defendant willfully violated the FLSA by requiring CSRs to perform off-the-clock work. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff sought to conditionally certify a group of "all current and former hourly customer service representatives who worked for Defendant in any of its brick-and-mortar call centers in the United States at any time during the last three years." *Id.* at *7-8. Defendant argued that no collective action should be certified and, in the alternative, that any certified collective action should not include

CSRs who work at call centers other than in Maine and should not cover any employee outside the two-year statute of limitations. *Id.* at *8. The Court noted that one person already filed a consent to join the lawsuit. Defendant did not challenge this person's consent and, therefore, the Court assumed that she was a legitimate, potential Plaintiff. To that extent, an additional potential Plaintiff had been identified. Plaintiff also submitted three job postings from Defendant's own website setting forth job descriptions for "healthcare customer service;" one for the same Maine location where Plaintiff worked, one in Canton, Ohio, and one in North Carolina. *Id.* at *9. The Court found that the job descriptions were broadly consistent with the job that Plaintiff described doing, and therefore established a "modest factual showing" of similarity in the job of CSRs at any location where healthcare customer services are provided. *Id.* at *10. Defendant asserted that Plaintiff failed to supply evidence of any widespread illegal plan maintained by Defendant. In particular, Defendant argued that Plaintiff failed to show that the call centers in all four locations focused exclusively on the service area of "Healthcare Call Center Solutions." *Id.* at *11. Accordingly, the Court stated that the collective action could be limited by defining it to include only CSRs at any of the locations who worked in the "Healthcare Call Center Solutions" service line, since they were all using the same work tools, software, and procedures. *Id.* at *12. Defendant further asserted that Plaintiff failed to provide documentary evidence that other CSRs repeatedly worked in excess of 40 hours per week. Defendant maintained that Plaintiff's sole declaration in support of a motion for certification of a collective action was insufficient to make the "modest factual showing" required by 29 U.S.C. § 216(b). The Court stated that Plaintiff supplied more than her own declaration, as she also provided the three job postings. *Id.* at *12-13. The Court noted that although the materials supplied may be of limited evidentiary value at a later stage of these proceedings, they were sufficient at the pre-discovery stage to make a showing for conditional certification. The Court therefore concluded that Plaintiff was entitled to conditional certification of the collective action. However, the Court also agreed with Defendant's argument that Plaintiff made no showing of willfulness that would warrant expansion of the time-frame from the typical two years to three years. *Id.* at *14. Accordingly, the Court granted Plaintiff's motion for conditional certification with the modified time-frame.

***Paxton, et al. v. Bluegreen Vacations Unlimited,* 2017 U.S. Dist. LEXIS 136531 (E.D. Tenn. Aug. 25, 2017).** Plaintiffs, a group of non-exempt in-house sales representatives, filed a collective action alleging that Defendant failed to pay proper wages in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action. The Magistrate Judge recommended granting the motion in part. Pursuant to Rule 72, Defendants objected to the Magistrate Judge's recommendation. The Court overruled Defendant's objections and adopted the Magistrate Judge's findings. Plaintiffs sought to certify a collective action consisting of sales representatives employed by Defendant at its Pigeon Forge, Gatlinburg, and Orlando, Florida locations within the last three years. *Id.* at *5. Defendants first objected to the Magistrate Judge's findings that the Florida employees and the front-line sales representatives should be part of the collective action. Defendant argued that the Florida employees: (i) were not similarly-situated to the Tennessee employees; (ii) allegations of FLSA violations were "inconsistent;" and (iii) "fairness and procedural impact" dictated that inclusion of the Florida employees was improper. *Id.* at *8. The Court noted that all Defendants' argument were presented to and rejected by the Magistrate Judge. The Court found that it was well-established that objections merely restating arguments previously presented are without merit and may be denied summarily. Accordingly, the Court overruled Defendant's objection regarding the Florida employees. Defendants also claimed that the Magistrate Judge's report erroneously found that front-line sales representatives should be included in the conditionally certified collective action. Defendants argued that front-line sales representatives were not similarly-situated to in-house sales representatives. *Id.* at *10. The Court rejected Defendants' arguments regarding the dissimilarities between job functions because they were merely recycled arguments that had already been rejected by the Magistrate Judge. *Id.* The Court stated that even if the objection were properly presented, it would find it meritless because the stated job differences were *de minimis*. The Court opined that the employees performed essentially the same function of selling time shares. *Id.* The Court thereby determined that Plaintiffs satisfied their burden at this early stage to show that they were similarly-situated to the employees they sought to include in the collective action. Accordingly, the Court adopted the Magistrate Judge's findings and overruled Defendants' objections.

***Peer, et al. v. Grayco Management LLC,* 2017 U.S. Dist. LEXIS 85017 (M.D. Tenn. June 2, 2017).** Plaintiff, a manager, brought a collective action alleging that Defendant violated the overtime provisions of the FLSA by failing to pay him and other similarly-situated employees overtime compensation when they worked more than

40 hours per week. Plaintiff filed a motion for conditional certification of a collective action, and the Court denied the motion. Defendants own and operate approximately 20 McDonald's restaurants in Nashville, Tennessee. *Id.* at *2. Plaintiff was the third shift manager responsible for taking food and drink orders, cooking, cleaning, and maintaining labor and sales. Plaintiff claimed that he regularly worked more than 40 hours per workweek and that his managers knew or should have known that he did so. Plaintiff further asserted that Defendant maintained a uniform time-keeping policy that automatically deducted 30 minutes from each shift he worked for an unpaid meal break, whether he actually took a break or not. Plaintiff also alleged that Defendant altered his time records to reflect less time than he actually worked, thereby depriving him of receiving overtime compensation. *Id.* at *2-3. Plaintiff also asserted that he was "personally aware of other former hourly employees" who were subjected to the same policy as he was, and "who worked more than 40 hours in a workweek but were not paid overtime pay for all hours they worked over 40 hours." *Id.* at *3. Defendant submitted declarations of four general managers from different McDonald's restaurants in Nashville operated by Defendant, which indicated that time records are reviewed regularly; employees are given an opportunity to review their time clock entries; time is not deducted from the time records; 30 minutes are not deducted for a meal break when an employee fails to take such a break; and employees are paid for all hours worked. *Id.* at *4-5. Plaintiff sought certification of a collective action containing all current or former employees who worked as hourly workers in the McDonald's restaurants owned by Defendant at any time within the last three years and who worked off-the-clock, had their time records altered to show less time worked than actually worked, and who did not receive overtime wages for all hours worked over 40 during some workweeks during the past three years. *Id.* at *9-10. The Court found that Plaintiff's declarations were based solely upon his alleged experiences at one McDonald's location, what he allegedly observed there, and what he allegedly was told by managers and co-workers at that restaurant. *Id.* at *10. The Court noted that despite this, Plaintiff sought conditional certification of all hourly employees at all 24 of Defendant's stores without any hint that those locations engaged in the same sort of FLSA violations. *Id.* at *11. The Court held that Plaintiff's allegations were insufficient, as a matter of law, to warrant conditional certification of the collective action that he proposed. Accordingly, the Court denied Plaintiff's motion for conditional certification.

***Perez, et al. v. El Torazo Mexican Restaurant,* 2017 U.S. Dist. LEXIS 203771 (W.D. Ky. Dec. 12, 2017).** Plaintiffs, a group of former tipped employees, filed a collective action alleging that Defendants violated various provisions of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs sought to certify a collective action consisting of "servers, waiters, waitresses, and other tipped employees" employed by Defendants from August 24, 2013 to the present. *Id.* at *2. In support of their motion, Plaintiffs submitted declarations that averred that all tipped employees were similarly-situated under 29 U.S.C. § 216(b) because: (i) the same type of invalid policy of "tip pooling" applied to similar types of tipped employees; (ii) tipped employees were paid the same rate for all hours of work, whether tip-producing or not; (iii) tipped employees were not informed of the application of a tip credit by Defendants; (iv) tipped employees were not paid minimum wage; and (v) tipped employees were not adequately compensated for overtime work. *Id.* at *5. Defendants argued that Plaintiffs' declarations were speculative, self-serving, and reliant on inadmissible hearsay, and therefore were not sufficient to establish that Plaintiffs were similarly-situated. *Id.* Defendants further alleged that the membership of the proposed collective action was overbroad, as it included potential Plaintiffs who, unlike the named Plaintiffs, were not servers and worked in both locations of the restaurant. Defendants further argued that Plaintiffs' affidavits failed to identify how they were similarly-situated to other potential collective action members, and that Plaintiffs failed to obtain any affidavits from non-server employees who had not received minimum and/or overtime wages. *Id.* at *6. The Court noted that it had found similar declarations in other cases relating to observations of FLSA violations in the workplace to be sufficient evidence to find a similarly-situated group of Plaintiffs in the first phase of certification under § 216(b). *Id.* The Court therefore concluded that Plaintiffs' declarations were sufficient to meet the modest showing needed to find that putative members of the proposed collective action were similarly-situated. *Id.* at *6-7. As to Defendants' argument of overbreadth, the Court reasoned that it also had previously certified collective actions in other cases under situations where a uniform corporate policy applied to similar, but not identical, types of employees. *Id.* at *7. The Court concluded that, at a minimum, Plaintiffs offered a modest showing sufficient to meet their burden under the fairly lenient standard to establish the elements required for conditional certification. *Id.* at *7-8. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Pierce, et al. v. Wyndham Vacation Resorts, Inc.*, 2017 U.S. Dist. LEXIS 163529 (E.D. Tenn. Oct. 3, 2017).** Plaintiffs, a group of sales representatives for a vacation club, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiffs had previously filed a motion for conditional certification, which the Court granted. Defendant subsequently filed a motion to decertify the collective action, which the Court denied. Defendant argued that Plaintiffs were not similarly-situated and therefore conditional certification was not appropriate. *Id.* at *8. Plaintiffs asserted that decertification was unwarranted because the evidentiary record overwhelmingly confirmed that Plaintiffs were similarly-situated. *Id.* at *9. Plaintiffs explained that they were similarly-situated in their factual and employment settings and that Defendant's defenses were assertable on a collective basis. *Id.* Plaintiffs further contended that fairness and procedural considerations favored proceeding collectively. Defendants argued that Plaintiffs' purported representative sample was statistically inadequate. Defendants contended that Plaintiffs did not have any admissible proof that the testimony of their witnesses would be statistically adequate to constitute representative evidence. The Court noted that case law authorities have consistently allowed the use of representative testimony in establishing liability and damages in FLSA collective actions. *Id.* at *22. The Court further opined that determining whether Plaintiffs have actually presented representative testimony of liability and damages of the collective action was reserved for trial. *Id.* at *23. In finding Plaintiffs to be similarly-situated, the Court analyzed: (i) the factual and employment settings of individual Plaintiffs; (ii) the different defenses to which Plaintiffs may be subject to on an individual basis; and (iii) the degree of fairness and procedural impact of certifying the action as a collective action. *Id.* at *25. All Plaintiffs were sales representatives, employed to make sales, although they had different titles based on sales to different customers. *Id.* at *28. The Court found that all the sales representatives performed sales, and therefore different titles within different sales representatives was not grounds to decertify the action. *Id.* at *29. Defendants also argued that Plaintiffs worked at different locations. The Court reasoned that the different locations did not prohibit the Plaintiffs from proceeding as a collective action, because the hierarchy of management was similar at all locations. Defendants further argued that the hours worked and the hours recorded varied from each opt-in Plaintiff. The Court held that while hours varied, such differences were insignificant because Plaintiffs' claims were unified by common theories of Defendants' statutory violations, even if proof of these theories was inevitably individualized and distinct. *Id.* at *30. As to individual defenses, the Court found that Defendants only pointed to three Plaintiffs that were clocked-out and were not engaged in work activities in support of their defense. *Id.* at *32. The Court stated that there were approximately 156 Plaintiffs alleging a common policy in violation of the FLSA and fairness, and procedural impact was best served by treating the case as a collective action. *Id.* at *38. Accordingly, the Court denied Defendant's motion for decertification.

***Rodkey, et al. v. Harry & David, LLC,* 2017 U.S. Dist. LEXIS 87364 (S.D. Ohio June 7, 2017).** Plaintiffs, a group of call center employees, alleged that they were denied compensation in violation of the FLSA due to Defendants' policy and practice of excluding incentive pay, commissions, and bonuses in calculating overtime compensation. *Id.* at *1-2. Plaintiffs filed a motion for conditional certification of a collective action, and the Court granted the motion. Defendants argued that conditional certification should be denied because the definition of the collective action was overbroad; Plaintiffs were not similarly-situated to all collective action members; and Plaintiffs had not shown that Defendants shared an unlawful common policy or plan. *Id.* at *2. Defendants argued that the definition of the collective action was fatally overbroad because it included "an untold number of individuals who did not suffer any injury." *Id.* at *5. Plaintiffs defined the collective action as all "non-exempt employees who were employed by Defendants and paid overtime and incentive pay, commissions, and/or other bonuses within the past three years preceding the Complaint's filing date." *Id.* at *5-6. Defendants stated that many of the putative collective action members were not injured by the alleged unlawful compensation practices because Plaintiffs' proposed collective action would include individuals who were paid commissions, incentive pay, or bonuses for periods during which they did not work any overtime (so long as they were paid overtime for any period over the last three years). *Id.* at *6. Plaintiffs countered that it was premature to determine whether every proposed collective action member had a valid claim against Defendants. *Id.* at *7. The Court found that based on the limited record before it, the collective action definition was not fatally overbroad. *Id.* at *8. The Court held the Defendants had not shown that the number of Plaintiffs without claims would be so large or the process for determining which Plaintiffs had viable claims would be so tedious that a collective action was inappropriate. The Court also found that Plaintiffs met their burden of making a modest factual showing that they were similarly-situated to the putative collective action members. Plaintiffs asserted that Defendants

miscalculated the rate for their overtime hours by failing to include their incentive pay, commissions, and bonuses in the calculation of their applicable base pay rate. Plaintiffs submitted declarations from 11 other employees supporting the allegations. Plaintiffs also presented evidence that Defendants shared the same compensation policies and practices. *Id.* at *9. Defendants argued that Plaintiffs and the putative collective action members were not similarly-situated because they had "different job titles, with different responsibilities and different terms and conditions of employment." *Id.* at *11. Defendants also asserted that the collective action members "were all subject to, and may have been eligible for, different payment programs from their respective employers." *Id.* The Court noted that although Plaintiffs had differing job titles, that fact did not defeat a finding that they were similarly-situated at this stage. *Id.* at *11-12. The Court noted that the argument that individual differences made the matter unsuitable to proceed as a collective action was better suited to the second stage of certification. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action under 29 U.S.C. § 216(b).

***Smith, et al. v. Generations Healthcare Services, LLC,* 2017 U.S. Dist. LEXIS 106583 (S.D. Ohio July 11, 2017).** Plaintiff, a home health aide, brought an action alleging that Defendants violated the overtime wage and time-keeping provisions of the FLSA and related Ohio statutes. Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court granted. Plaintiff asserted that she and the putative collective action members had the same job duties and that Defendants treated them all the same by subjecting them to the same company-wide policies of failing to report hours worked in excess of 40 per workweek on their pay stubs and failing to pay them overtime premiums in violation of the FLSA. *Id.* at *8. Plaintiff also submitted excerpts from the deposition testimony of Defendants' corporate representative, Sabatha Umoette, who testified that: (i) she was unaware of the federal law requiring overtime pay; (ii) Defendants do not pay the required overtime premium; (iii) she was not aware of the change in the law effective January 1, 2015 that mandated overtime pay for home health workers; (iv) Defendants had not done anything to change their pay practices since the change in the law because they "did not think they were doing anything wrong;" and (v) all HHAs were "paid in the same manner, all subject to the same rules, the same timesheet, the same procedures, the same office manager." *Id.* at *9. Umoette also testified that Defendants never accepted employee timesheets with over 40 hours per workweek. Based on this evidence, Plaintiff argued that she has shown that she and putative collective action members were "similarly-situated because they were hourly, non-exempt employees of Defendants who share similar duties and responsibilities and were victims of Defendants' same policy, decision, and practice to deny them premium overtime wages for hours worked in excess of 40 per workweek." *Id.* at *9-10. Defendants argued that Plaintiff failed to meet her burden of showing that she and other potential collective action members were similarly-situated because she has not: (i) identified potential Plaintiffs or provided affidavits from potential Plaintiffs; or (ii) provided sufficient evidence of a common policy or plan that violated the FLSA. *Id.* at *11. The Court noted that by construing Plaintiff's allegations generously, she made a modest factual showing establishing at least a colorable basis for her claim that a group of similarly-situated Plaintiffs existed through the allegations in her complaint and her sworn declaration. *Id.* at *12. Moreover, although not presented with her conditional certification motion, the Court opined that the deposition testimony of Umoette provided additional evidence to support the fact that similarly-situated Plaintiffs existed. *Id.* at *14. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Totte, et al. v. Quick Lane Oil*, 2017 U.S. Dist. LEXIS 46068 (E.D. Mich. Mar. 29, 2017).** Plaintiffs, three former employees, brought a collective action alleging the Defendant violated the overtime and minimum wage requirements of the FLSA. Plaintiffs asserted that their hourly wages that did not account for all time worked, including overtime. Plaintiffs further alleged that they received a weekly salary, as well as hourly wages, at a rate of pay less than the minimum wage for hours worked. *Id.* at *1-2. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs alleged that their employee declarations, timesheets, and pay stubs demonstrated a "company-wide policy and practice" by Defendants to underpay oil change technicians for hours worked in violation of the FLSA. *Id.* at *8. Plaintiffs further asserted that since Plaintiff Totte spent time working at each Defendant location and was paid in the same manner, he had "reason to believe" the pay and hour policies were company-wide. *Id.* at *9. Plaintiffs asserted that they were similarly-situated with other technicians because of a common "policy or practice of not paying the statutorily mandated minimum wage and overtime wage rates." *Id.* Defendants asserted that Plaintiffs could not demonstrate interest by potential Plaintiffs, and therefore there was no need for a collective action. *Id.* at *9-10. Defendants also

argued that Plaintiffs could not prove they were similarly-situated because there were differences in the treatment of pay and hours for each Plaintiff. *Id.* at *10. Defendants further contended that Plaintiffs' job duties were not similar (*e.g.,* as one was a manager and exempt, one was a "greeter" who did not perform oil changes, and one was a technician). *Id.* at *11. The Court found that Plaintiffs' declarations offered evidence to suggest a common policy or plan by Defendant in compensating its oil change technicians. *Id.* at *12. The named Plaintiff Totte in his declaration stated that he had worked at each location of Defendant and was paid in the same manner. The Court reasoned that this suggested that pay practices did not vary across location. *Id.* The named Plaintiffs Totte and Hitch also attested to the existence of a 6-day schedule of shifts by which all oil change technicians abided. *Id.* at *13. The Court opined that this suggested that oil change technicians would have worked and reported a similar number of hours each week. *Id.* The named Plaintiff Totte described how he came to know other technicians were paid in the same way based on negotiations with co-workers over shifts and conversations about pay while working shifts. *Id.* at *13-14. The Court found that this was a plausible basis for such knowledge. *Id.* Although the Court stated that Defendants correctly noted that there were differences in the treatment of pay and hours between each Plaintiff, it failed to explain why the differences were relevant to proving an FLSA claim. *Id.* at *14. The Court explained that the named Plaintiff Hitch was paid a weekly salary in cash that did not correspond to all hours worked whereas the named Plaintiff Merrell was paid hourly by check for fewer hours than he worked. The Court opined that in both cases the effect was the same – underpayment based on hours worked. The Court held that Plaintiffs need not show they are "identical" in every respect, only that they are "similar" in respects material to proving an FLSA claim. *Id.* at *15. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

(vii) Seventh Circuit

***Balderamma-Baca, et al. v. Clarence Davis & Co.,* 2017 U.S. Dist. LEXIS 35009 (N.D. Ill. Mar. 10, 2017).** Plaintiffs, a group of landscapers, brought a class action against Defendant alleging that it required them to perform off-the-clock work without pay in violation of the FLSA and the Illinois Minimum Wage Law ("IMWL"). *Id.* at *1. Plaintiffs also alleged that Defendant covered the costs of uniforms by taking payroll deductions without obtaining contemporaneous written authorization as required by the Illinois Wage Payment and Collection Act ("IWPCA"). *Id.* Plaintiffs sought class certification of the IWPCA claim. *Id.* The Court granted class certification, finding that all Rule 23 requirements were met. *Id.* at *9. Defendant opposed Plaintiffs' motion on the basis that the requirements of commonality, predominance, and superiority were not met. *Id.* Defendant argued that the commonality requirement was not met because the Defendant's uniform deduction policy changed several times during the class period. *Id.* at *11. The Court agreed that Plaintiffs' claims could be resolved only through inquiry into questions of whether they received payroll deductions without contemporaneous written authorization under the: (i) 2005-2010; (ii) 2011-2012; or (iii) the 2013-2016 uniform deduction policies. *Id.* at *12. However, the Court ruled that this was not a ground to deny certification, and instead modified Plaintiffs' three sub-class definitions. *Id.* Defendant disputed that its deduction policies could be characterized as applying class-wide because the amount of deductions varied among employees and because not every class member had deductions taken in every pay period. *Id.* at *16. The Court ruled that such differences went to damages and not liability. *Id.* The Court also found that Defendant's objections were ancillary to the overarching common questions capable of class-wide resolution. *Id.* at *18. The Defendant further asserted that the predominance requirement of Rule 23(b)(3) was not met because of the individualized issues of the class members. *Id.* at *22. The Court opined that these questions went to damages and it noted that case law authorities routinely grant class certification on IWPCA cases, finding that issues of liability under IWPCA predominate over individualized issues of damages. *Id.* As to superiority, the Court noted that Defendant's arguments were identical to its arguments with respect to commonality and predominance. *Id.* at *25. The Court was unpersuaded by Defendant's position, and found that because common questions predominated, class certification was the most efficient method of adjudicating the class members' IWPCA claims. *Id.* at *24. Accordingly, the Court granted class certification of three sub-classes. *Id.* at *25.

***Bridgewater, et al. v. Jadcore, LLC*, 2017 U.S. Dist. LEXIS 62167 (S.D. Ind. April 24, 2017).** Plaintiffs, a group of employees, alleged that Defendant's policies violated the FLSA and the Indiana Wage Payment Act. Plaintiffs filed a motion for class certification pursuant to Rule 23(b)(3) and for conditional certification of a collective action for their FLSA claims, which the Court granted. The Court agreed with the Plaintiff that the requirements of Rule 23(a) and 23(b)(3) were satisfied in this case and class certification therefore was

appropriate. *Id.* at *1. Specifically, the Court found that with regard to numerosity, the class contained 500 potential members. The Court further determined that commonality and typicality were satisfied because Plaintiffs alleged that they and all other class members were subjected to a uniform practice that violated the Wage Payment Statute. *Id.* at *2. Further, the Court stated that there nothing to suggest that Plaintiffs would not adequately represent the interests of the class. With regard to Rule 23(b)(3), the Court found that Plaintiffs demonstrated that the issue of whether the Defendant's uniform policy violated the Wage Payment Statute predominated, and therefore litigating the claims by a class action was superior to other means. *Id.* Accordingly, the Court granted Plaintiffs' motion for class certification of their state law claims. With regard to the proposed collective action relating to Plaintiffs' FLSA claim, the Court held that conditional certification was appropriate because Plaintiffs made a modest factual showing that they and potential opt-in Plaintiffs were victims of a common policy or plan that violated the law. The Court therefore also conditionally certified Plaintiffs' FLSA claims as a collective action.

***Crawford, et al. v. Professional Transportation Inc.*, 2017 U.S. Dist. LEXIS 41545 (S.D. Ind. Mar. 22, 2017).** Plaintiff, an over-the-road ("OTR") driver, brought a collective action alleging that Defendant failed to pay him and others similarly-situated overtime and minimum wages as required by the FLSA. The Court had previously conditionally certified a collective action. *Id.* at *3. After discovery, Defendant subsequently moved to decertify the collective action, and the Court granted the motion. Defendant provided OTR drivers transportation services to customers in the railroad industry across the United States. *Id.* at *4. Before July 1, 2011, Defendant classified its OTR drivers as exempt from the FLSA's overtime pay requirements pursuant to the Motor Carrier Act exemption. Since July 1, 2011, Defendant treated OTR drivers as non-exempt. Plaintiff alleged FLSA violations under seven different theories. The Court noted that notice and opt-in forms were mailed to potential opt-in Plaintiffs soon after conditional certification was granted. The collective action was comprised of all former and current OTR drivers employed from February 11, 2011 to the present with outstanding claims for wages. However, the Court stated that after the case was conditionally certified as a collective action, Plaintiff narrowed his theory of liability to two areas, including: (i) minimum wage/overtime compensation for OTR driving; and (ii) required pre-trip van inspections. *Id.* at *19. The Court thus found that absent individual inquiries into the reasons why each OTR driver decided to join this lawsuit, it could not ascertain whether the opt-ins purportedly had pre-trip inspection claims or claims based on some other theory. *Id.* The Court therefore determined that the collective action definition was fatally overbroad. *Id.* The Court further noted that over the certified time period, Defendant changed its policies and practices regarding the exempt status of its OTR drivers and its van inspection policy. *Id.* These policy and procedural practices impacted the putative collective action. Prior to July 1, 2011, Defendant classified OTR drivers as exempt from the FLSA's overtime pay provision, and therefore opt-in Plaintiffs who worked for Defendant before July 1, 2011, potentially had a claim for unpaid overtime. The Court also found that the policy and practice of performing pre-trip inspections raised issues regarding whether opt-in Plaintiffs were sufficiently similar to Plaintiff. The parties did not agree on the duration of a pre-trip inspection as Defendant claimed it took around 5 minutes and opt-in Plaintiffs claimed it took from 10 to 45 minutes. *Id.* at *21. The Court also noted that there was evidence in the record which casted doubt on whether OTR drivers consistently performed pre-trip inspections before every shift. *Id.* at *22. In addition, Defendant submitted evidence that 11 opt-in Plaintiffs were disciplined for failing to perform vehicle inspections. *Id.* Based on this evidence, the Court found that the opt-ins' pre-trip inspection claims raised inherently individualized issues that favored decertification. Finally, Plaintiff asserted that Defendant continued to require OTR drivers to perform pre-trip inspections. However, the evidence in the record reinforced the fact that there was no common policy or practice alleged to violate the FLSA that applied to the claims of the collective class. *Id.* at *23. Plaintiff and opt-in Plaintiffs experienced widely disparate factual and employment settings. *Id.* Furthermore, the Court opined that because the policy was effective May 1, 2011, and because opt-in Plaintiffs learned of the policy at differing times, an individualized inquiry into when each opt-in learned about the policy, and, if applicable, why he or she chose to ignore the policy, would be required to determine both liability and damages. *Id.* The Court stated that this type of individualized inquiry was not suitable for class certification, and therefore decertification was proper. Accordingly, the Court granted Defendant's motion for decertification.

***Dekeyser, et al. v. Thyssenkrupp Waupaca, Inc.*, 860 F.3d 918 (7th Cir. 2017).** Plaintiffs brought a putative collective action alleging that Defendant failed to compensate them for time donning and doffing work clothes and protective gear, and for time spent showering and changing clothes at its foundries in violation of the FLSA

and Wisconsin law. Plaintiffs moved to certify the Wisconsin law claims under Rule 23. At the same time, Defendant moved to decertify the previously certified FLSA collective action. The District Court granted Plaintiffs' motion and granted in part Defendant's motion. The District Court divided the FLSA class – which included employees from Indiana, Tennessee, and Wisconsin – into three sub-classes, *i.e.*, one for each state. The District Court then severed the claims of the Indiana and Tennessee Plaintiffs and transferred them to District Courts in their respective states, on the ground that they could be more efficiently evaluated in those jurisdictions. *Id.* at 921. Defendant appealed the order under Rule 23(f), which permits interlocutory appeals of class certification decisions. Plaintiffs argued that Defendant should be ordered to give the class members overtime pay and back pay for the time they have spent or are spending on decontamination, as well as time for changing out of their work clothing and showering in the workplace locker rooms immediately after their shifts. *Id.* Defendant contended that Plaintiffs failed to meet Rule 23's requirement of identifying questions of fact common to the class because each Plaintiff must provide an individualized analysis of the chemicals exposed to in the foundry and provide information about his personal medical background that would demonstrate that changing clothes and showering on-site would indeed significantly reduce the risk to his health. *Id.* Defendant argued that the District Court erred by severing the FLSA claims of Plaintiffs from Indiana and Tennessee who had opted-in to the lawsuit and transferring those claims to their respective home districts. *Id.* at 922. The Seventh Circuit held that although the District Court's plan to sever and transfer was laid out in its class certification order, Rule 23(f) appeals are limited to "those issues related to [the] class certification decision." *Id.* The Seventh Circuit stated that it was true that the non-Wisconsin Plaintiffs had been conditionally certified under 29 U.S.C. § 216(b), so in a sense the District Court "decertified" them from the FLSA action. However, the Seventh Circuit opined that Defendant did not challenge that aspect of the order by arguing that the Indiana and Tennessee Plaintiffs should be added back into the FLSA action; it simply requested the claims of non-Wisconsin Plaintiffs be dismissed. *Id.* The Seventh Circuit found that the District Court's plan to sever and transfer the non-Wisconsin Plaintiffs to their home districts did not bear on the soundness of the class certification decision for Wisconsin Plaintiffs, so Defendant was unable to challenge it on a Rule 23(f) appeal. Further, the Seventh Circuit held that there was no error in what the District Court did, as 28 U.S.C. § 1404(a) gives a District Court discretion to transfer a civil action to any other district or division where it might have been brought if the transfer is "for the convenience of parties and witnesses, [and] in the interest of justice." *Id.* at 923. The Seventh Circuit thereby affirmed the District Court's decision severing the claims of the non-Wisconsin Plaintiffs and transferring them to their home districts.

***De Leon, et al. v. Grade A Construction, Inc.,* 2017 U.S. Dist. LEXIS 205630 (W.D. Wis. Dec. 13, 2017).** Plaintiffs, a group of employees, filed a class and collective action alleging that Defendant violated the FLSA and state wage & hour laws. Plaintiffs asserted that Defendant had two unlawful practices, including: (i) Defendant's "banking" policy, in which an employee who worked more than 40 hours one week could "bank" overtime hours rather than be paid and "cash in" the hours at a later time when the employee worked less than 40 hours in a week; and (ii) Defendant's practice of paying staffing agency employees at the same rate even if they worked over 40 hours a week. *Id.* at *1. The Court had previously conditionally certified both groups as collective actions under the FLSA. Plaintiffs now sought class certification of their state law claims pursuant to Rule 23. At the same time, Defendant sought to decertify the FLSA collective actions. The Court denied Plaintiffs' motion and granted Defendant's motion. Plaintiffs estimated that there were approximately 20 to 25 members in their proposed state law class. *Id.* at *2. The Court noted that although 20 to 25 members was not insufficient *per se* to establish numerosity under Rule 23(a)(1), it was on the lower end of the size of proposed classes that Courts have certified. *Id.* at *3. The Court opined, however, that where the number of proposed class members was relatively small, it was less reasonable to infer that joiner was impractical. *Id.* The Court found that Plaintiffs did not allege that it would be difficult to locate and contact each potential Plaintiff, and in fact, Plaintiffs asserted that they have already identified most of the employees in the proposed class. *Id.* at *4. Further, the Court determined that interest in joining the class seemed weak, and therefore the actual number of class members could be significantly less than 20. The Court also noted that only three other employees consented to join the FLSA collective action by filing opt-in consents. *Id.* Plaintiffs argued that the proposed class was sufficiently numerous because damages for the individual employees were relatively small and because the legality of Defendant's practice of delaying overtime hours could be resolved uniformly in one forum. *Id.* at *6. However, the Court found that Plaintiffs' argument missed the point because the question under Rule 23 was not whether it made sense for injured parties to combine claims rather than litigate them individually, but whether Plaintiffs

could combine claims through joinder rather than class certification. *Id.* Because Plaintiffs failed to show that joinder was impracticable, the Court concluded that the proposed class was not sufficiently numerous. *Id.* Accordingly, the Court denied Plaintiffs' motion for class certification. Further, the Court held that it made sense for the federal and state law claims to proceed in the same fashion, as Plaintiffs did not contend that they would suffer undue prejudice if they were required to join other employees. The Court therefore granted Defendant's motion for decertification of Plaintiffs' collective actions.

***Foday, et al. v. Air Check, Inc.,* 2017 U.S. Dist. LEXIS 95183 (N.D. Ill. June 21, 2017).** Plaintiffs, a group of airport employees, filed a class and collective action alleging that Defendant failed to pay overtime compensation and the minimum wage in violation of the FLSA, the Illinois Wage Payment and Collection Act ("IWPCA"), and the Illinois Minimum Wage Law ("IMWL"). Plaintiffs moved to certify a class for their IMWL and IWPCA claims pursuant to Rule 23. Defendants argued that Plaintiffs could not meet the commonality or typicality requirements. Plaintiffs contended that there were questions of law or fact common to the proposed class. *Id.* at *6. Plaintiffs asserted that each member of the proposed class was employed by Defendant under the same policy, which involved rounding of hours and failure to pay for time worked outside scheduled times. *Id.* at *6-7. The Court found that Plaintiffs sought to combine claims of employees that worked in very different jobs and who were subjected to different policies. *Id.* at *7. The Court determined that evaluating the alleged work that Plaintiffs claimed was performed without pay for each group would require an inquiry into a diverse set of facts that would not be consistent with the commonality requirement in Rule 23(a). *Id.* at *8. The Court therefore held that Plaintiffs failed to show that the commonality requirement was met and thus failed to satisfy Rule 23(a). Plaintiffs argued in regard to the Rule 23(b) requirements that the questions of law or fact common to proposed class members predominated over any questions affecting only individual members, and that a class action was superior to other available methods for fairly and efficiently adjudicating the controversy. The Court rejected Plaintiffs' position. The Court opined that Plaintiffs attempted to patch together workers in entirely different positions with different supervisory structures and different work requirements, work rules, work locations, and schedules. *Id.* at *10. Additionally, the Court determined that Plaintiffs asserted an array of varying alleged misconduct on the part of Defendant, including work being performed without pay before, during, and/or after shifts, and during different shifts and for a variety of different tasks. *Id.* The Court explained that a trier of fact would need to assess if each class member was required to work without pay during one or more of the time-periods at issue in this case, which included pre-shift time, break time, meal time, and post-shift time. *Id.* at *11. Further, the trier of fact would need to engage in an individualized inquiry as to the type of work performed without pay and under what type of supervisory command structure that employee was working. *Id.* The Court concluded that while sub-classes can be appropriate in certain instances to address such divisions among the class members' claims, Plaintiffs presented a host of diverse claims that could not be effectively addressed by sub-classes. Although the Court stated that the requirement of individualized inquiries for damages would not necessarily preclude class certification, in this case the diverse facts entwined in the proposed class were beyond mere damage calculations. *Id.* at *13. The Court therefore held that Plaintiffs failed to meet their burden to show that their proposed class was capable of effective resolution in this matter. Since Plaintiffs failed to show that any of the factors in Rule 23(a) were satisfied and Plaintiffs failed to show that any alternative in Rule 23(b) existed, the Court denied Plaintiffs' motion for class certification.

***Grosscup, et al. v. KPW Management, Inc.,* 2017 U.S. Dist. LEXIS 87014 (N.D. Ill. June 7, 2017).** Plaintiffs, a group of servers, brought a collective action alleging that Defendant violated the FLSA by paying them tip credited hourly wages while: (i) they performed excessive amounts of non-tipped work related to their jobs; and (ii) they were required to perform duties unrelated to their jobs. *Id.* at *2. Plaintiffs also alleged that they were denied the statutory right to retain all of their tips when they were forced to pay for customer walkouts and cash shortages from their tips. Plaintiffs moved for conditional certification of a collective action, and the Court granted the motion. In support of their motion, Plaintiffs provided declarations from five workers and Defendant's official training materials, schedules, and checklists, which outlined the responsibilities of the bartenders and servers. *Id.* at *11. Plaintiffs' declarations stated that all of their work at Defendants' restaurants was paid at below the minimum wage tip credited rate, and they were required to perform many job duties outside of serving customers that was not tipped work, including "filling 'sani' buckets with water and sanitizer in the back of the house and placing them at the server stations; lifting chairs from on top of tables and placing them on the floor underneath tables; putting nozzles onto the soda fountains; filling buckets with ice in the back of the house and

carrying them to the front of the house to empty into ice bins; placing bus tubs at the server stations; making sure server stations are stocked with to-go boxes, paper boats, napkins, silverware, receipt paper, coasters, and to-go cups and lids; and setting up the patio, which involves carrying caddie buckets with condiments, wet naps and menus to the patio and watering the plants." *Id.* at *11-12. Defendants submitted contradictory declarations from 14 servers and bartenders at seven of their franchise locations asserting various defenses. However, the 14 declarants did not all claim that they were not required to do the same job duties. The Court found that Plaintiffs had made the required modest showing of a common policy among Defendants' 23 franchise locations. *Id.* at *14-15. The Court stated that the declarations and the materials setting out the workers' duties established enough commonality to survive Defendants' challenge to conditional certification of the collective action. *Id.* at *15-16. The Court opined that Defendant's evidence was hardly overwhelming as not all of its declarants attested to all of the same things. In fact, the Court noted, in most cases, only a couple of the declarants disavowed a particular task that the materials described as part of the duties of a bartender or server. *Id.* at *16. Defendant further argued that a collective action should not be conditionally certified because it would be unmanageable and require fact-intensive inquiries and individualized defenses that would necessitate "hundreds of mini-trials." *Id.* at *26. The Court held that although there might be genuine difficulties with managing a collective action that would entail discerning how much time individual bartenders and servers spent on related side work to determine whether it exceeded 20%, it found that it was premature to conclude that the action was *per se* unmanageable. *Id.* at *27. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Heuberger, et al. v. Smith,* 2017 U.S. Dist. LEXIS 144783 (N.D. Ind. Sept. 7, 2017).** Plaintiff, a fast food restaurant worker, brought a collective action alleging Defendants violated the FLSA and state labor law by failing to pay him and similarly-situated employees for their attendance at a mandatory orientation session and deducting a uniform clothing fee of $2.00, which reduced the employees' wages to below minimum wage. *Id.* at *2. Defendants Gamma, Destiny, and Diamond properties owned 19 fast-food restaurants. *Id.* at *3. Plaintiff was hired to and worked at one of Gamma's restaurants. *Id.* Plaintiff moved to conditionally certify a collective action pursuant to 29 U.S.C. § 216(b) and Defendants moved to dismiss for lack of standing. *Id.* The Court denied Plaintiff's requests to certify two groups of employees consisting of those: (i) who participated in the alleged unpaid mandatory orientation; and (ii) whose wages were reduced by the crew uniform deductions. *Id.* at *6. The Court found that the group consisting of those who participated in unpaid mandatory orientation was overbroad because the restaurant that Plaintiff worked at was not owned by Defendants Diamond and Destiny. *Id.* at *15. Plaintiff offered no evidence to support his assertion that all three Defendants implemented this policy, as Plaintiff did not allege that any other employees at any of the restaurant underwent the same orientation. *Id.* The Court amended the membership of the proposed orientation collective action to exclude employees of Destiny and Diamond. *Id.* at *16. The Court also denied Plaintiff's request to certify the uniform deduction group because Plaintiff was not similarly-situated to the membership of the proposed collective action. *Id.* at *12. Plaintiff's pay stubs indicated that there were no deductions taken from his paychecks. *Id.* at *11. The Court dismissed all the counts as to Destiny and Diamond for lack of standing as Plaintiff failed to establish that the Defendants were joint employers or a single integrated enterprise. *Id.* at *34-35.

***Holmes, et al. v. Sid's Sealants, LLC*, 2017 U.S. Dist. LEXIS 194833 (W.D. Wis. Nov. 28, 2017).** Plaintiff, a union crewmember employee, filed a collective action alleging that Defendants failed to pay overtime compensation and failed to pay for travel time in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Defendant Sid's and Defendant North Shore, although being separate and distinct businesses, had Defendant Sidney Arthur as the companies' registered agent and sole member of both LLCs. *Id.* at *2. Plaintiff alleged that Defendants shared policies that violated the FLSA, including a policy of not paying overtime compensation and requiring employees to punch-out at the start of travel. Plaintiff sought certification of a collective action consisting of all persons who worked as a jobsite employee for either Sid's or North Shore during the time period on or after December 12, 2013. *Id.* at *6. In support of his motion, Plaintiff submitted his own declaration describing his observations and experiences working for both companies. Defendants asserted that: (i) Plaintiff failed to offer additional employee declarations in support of his motion; and (ii) Plaintiff's facts were wrong, and thus he has not met his burden. The Court stated that Plaintiff was not required to present additional declarations at the conditional certification stage, and factual disputes would be resolved in Plaintiff's favor. *Id.* Defendants contended that Plaintiff should

be held to an "intermediate" standard of scrutiny, because he had access to and interacted with other employees. However, the Court agreed with Plaintiff's view that such a standard was best applied after more robust discovery had occurred. Defendants also argued that the companies were not joint employers, and therefore their "separateness" disqualified Plaintiff as not being similarly-situated to employees of both companies. *Id.* at *7. The Court declined to make a determination of the joint-employer issue at the conditional certification stage, since such a ruling would go to the merits of Plaintiff's case. The Court opined that Plaintiff offered his personal observations and experiences in working with employees from both companies who were similarly impacted by policies apparently promulgated and enforced by the same sole member of both limited liability corporations. Defendants further maintain that the sole member, Defendant Arthur, gave discretion to his on-site employee managers to handle day-to-day tasks, including travel times and hours so that there was no policy capable of collective evaluation. *Id.* at *8. Based on these factors, the Court found that this argument went to the merits of Plaintiff's claims. Accordingly, the Court found that Plaintiff had made the modest factual showing required by the FLSA based on his declaration and on the companies' payroll documents, Plaintiff's own bank statement, and statements allegedly made by Defendant Arthur. *Id.* at *9. The Court determined that Plaintiff produced sufficient evidence to suggest that the companies had policies that prevented the payment of earned overtime compensation, and failed to count as hours worked return travel or travel between work locations. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Hudson, et al. v. Protech Security Group*, 2017 U.S. Dist. LEXIS 23864 (N.D. Ill. Feb. 21, 2017).** Plaintiff, a security officer, brought an action on behalf of himself and a group of similarly-situated currently and former security officers and patrol personnel for violations of the FLSA, the Illinois Minimum Wage Law ("IMWL"), and the Illinois Wage Payment and Collection Act ("IWPCA"). Plaintiff contended that Defendant maintained an unlawful policy of not paying employees for all time worked, including failing to pay them overtime at a rate of one and a half times their regular rate and wrongfully classifying employees as independent contractors in an effort to avoid paying overtime wages. *Id.* at *4. Plaintiff filed a motion for conditional certification of their FLSA claims, which the Court granted. In support of his motion, Plaintiff submitted his own affidavit, a sampling of Defendant's payroll records, and an attorney-created summary table based on the Defendant's records. *Id.* Plaintiff attested that throughout his employment, he and other security officers worked in excess of 40 hours during most workweeks and were "not paid time and half, or overtime wages, for such work." *Id.* at *5. In addition, Plaintiff alleged that although he always performed work for Defendant as an employee and never requested to be paid as an independent contractor, Defendant would sometimes classify him and other employees as independent contractors. *Id.* at *6. Defendant argued that the affidavit and payroll evidence were not enough – at the conditional certification stage – to show that its policies violated the law or that Plaintiff was similarly-situated to other security officer employees. Defendant asserted that in order to obtain conditional certification, Plaintiff was required to submit additional evidence from other employees, written policies, and/or deposition testimony. *Id.* at *7. The Court disagreed. The Court found that the payroll records and summary tables that Plaintiff relied on supported his claim that security officers were routinely not paid overtime wages. *Id.* at *8. The Court opined that these records showed that during various time periods, at least 18 security officer employees worked more than 40 hours per week but were not paid overtime wages as required by the FLSA. *Id.* at *8-9. The Court further stated that Defendant admitted that it may not have paid its employees "the technically correct overtime amount" under the FLSA. *Id.* at *9. The Court concluded that the affidavit attesting that Defendant involuntarily classified Plaintiff as an independent contractor to avoid paying him overtime wages under the FLSA, together with Defendant admissions that it sometimes categorized Plaintiff and other employees as independent contractors, created the required "modest factual showing" supporting conditional certification. *Id.* at *10. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action. The Court directed the parties to file a joint document proposing the form of notice and consent and the method for its delivery to potential Plaintiffs. *Id.* at *14-15.

***Ivery, et al. v. RMH Franchise Corp.*, 2017 U.S. Dist. LEXIS 202270 (N.D. Ill. Dec. 8, 2017).** Plaintiff, an assistant manager, alleged that Defendant RMH, which owns 175 Applebee's restaurants throughout the U.S., misclassified assistant managers as exempt and therefore failed to pay overtime wages in violation of the FLSA and Illinois wage & hour laws. Plaintiff sued Applebee's, the franchisor, as well as Defendant RMH, a franchisee, as joint employers. Plaintiff filed a motion for conditional certification, which the Court granted in part. Defendant also filed a motion to dismiss, arguing that Plaintiff did not properly allege that Defendant RMH was her

employer and thus was not a proper Defendant, and that Plaintiff failed to plead a necessary element of one her Illinois wage claims. The Court granted Defendant's motion. At issue was whether Plaintiff had adequately alleged a joint employer relationship as to one of the franchise business entities. The Court applied the four-factor employment test under the FLSA. Because Plaintiff had failed to allege even the most basic facts about her employment, including who hired her, paid her, and directly supervised her work, the Court held that she had failed to identify which of the franchise entities was her primary, direct employer. *Id.* at *10-11. Given these pleading deficiencies, the Court held that the complaint failed to plead sufficient facts to establish a joint employer relationship as to all of the franchise business entities, and dismissed one of those entities from the case. *Id.* at *17. As to Plaintiff's motion for conditional certification, Plaintiff submitted two declarations in support of her motion. *Id.* at *21. Plaintiff's declaration stated that she spent 80% of her time performing manual and customer service tasks, and that her managerial duties took up only a small amount of her time. *Id.* The Court held that at the first stage conditional certification stage, Plaintiff's declarations were sufficient to make a modest factual showing necessary to warrant notice to the putative members of the collective action. Defendants argued that notice should be limited to the one restaurant where the named Plaintiff worked. *Id.* at *32. However, the Court held that Plaintiffs' declarations had sufficiently demonstrated commonality across the entire putative collective action. *Id.* The Court therefore conditionally certified a nationwide collective action that included all assistant managers who worked at an Applebee's restaurant operated by the franchise group.

Kolish, et al. v. Metal Technologies, **2017 U.S. Dist. LEXIS 17464 (S.D. Ind. Feb. 8, 2017).** Plaintiffs, a group of factory workers, brought an action alleging that Defendant violated the FLSA and Indiana wage laws when Defendant automatically deducted 30 minutes from employees' wages for lunch breaks, even though employees sometimes clocked-out for lunch periods of 20 minutes or less. 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. Defendant submitted declarations of 22 employees that indicated that they always took 30-minute unpaid lunch breaks and that Defendant's time records did not accurately reflect the duration of their lunch breaks. *Id.* at *13. The named Plaintiff's records showed that at times she clocked-out for a period of 20 minutes or less, but they also established that she inexplicably clocked-out and back in for lunch in the same minute on 88 different occasions. *Id.* at *9. The Court found that while the numerosity and adequacy requirements of Rule 23 were met, Plaintiffs failed to satisfy the remaining requirements for Rule 23 class certification because the time and payroll records were not reliable and did not accurately reflect the duration of all the employees' lunch breaks. *Id.* at *22. The Court ruled that Plaintiffs failed to satisfy the commonality element because Plaintiffs were unable to demonstrate that all class members were subject to the same conduct of not getting paid for lunch breaks of twenty minutes or less. *Id.* at *30. Because the time records were unreliable, the Court would need to look beyond the employees' time and payroll records and inquire specifically into whether each class members' lunch breaks corresponded to their time clock entries. With respect to typicality, Plaintiffs failed to demonstrate that their claims were typical to those of the class because the records failed to demonstrate that other employees suffered the same or any injury. *Id.* at *32. The Court also concluded that because the time and payroll records were an "unreliable barometer of whether wages were unpaid," individual issues would predominate over the issues common to the class. *Id.* at *39. Accordingly, the predominance requirement was not satisfied. The Court also held that Plaintiffs failed to satisfy the superiority requirement because Plaintiffs relied upon the unreliable time and payroll records that did not establish that Defendant maintained a policy that violated state law. Therefore, the Court would need to conduct "mini-trials" to examine each class member's claim individually. *Id.* at *40. As to Plaintiff's motion for conditional certification of the FLSA collective action, the Court found that Plaintiffs had not made the necessary showing that similarly-situated Plaintiffs were all subjected to the same policy or practice. Even though evidence was presented that Defendant rounded lunch breaks of 20 minutes or less to 30 minutes of unpaid lunch time, rounding practices and automatic meal deductions are not *per se* violations of the FLSA. *Id.* at *46. Second, Plaintiffs testified that they knew they were required to take 30 minutes of lunch breaks and when employees worked during their lunch breaks, Defendant required them to complete an overtime authorization form to be paid for the time that they worked. The Court noted that Defendant was only required to pay for work of which it was aware, and was not liable for FLSA violations unless it has actual or constructive knowledge of employees' overtime work. *Id.* at *47. Plaintiffs failed to establish that Defendant was aware that its employees were taking unpaid lunch breaks of twenty minutes or less. Accordingly, the Court also denied Plaintiff's motion for conditional certification of the FLSA collective action as well.

***Kramer, et al. v. American Bank & Trust Co., N.A.,* 2017 U.S. Dist. LEXIS 48360 (N.D. Ill. Mar. 31, 2017)**. Plaintiffs, a group of loan officers, filed suit alleging violations of the FLSA, the Illinois Minimum Wage Law ("IMWL"), the Illinois Wage Payment and Collection Act ("IWPCA"), as well as for common law breach of contract, fraud by misrepresentation, and fraud by omission. *Id.* at *2. The Court had previously granted Plaintiffs' motion for conditional certification of a collective action on their FLSA claims. After some discovery, Plaintiffs moved to certify the class and Defendant moved to decertify the collective action. The Court granted Plaintiffs' motion to certify the class and denied Defendants' motion to decertify the conditionally certified FLSA collective action. *Id.* at *36. Plaintiffs claimed that Defendant classified them as sales employees and did not pay them minimum wage or overtime wages and instead paid them on a commission basis. *Id.* at *4. Plaintiffs also asserted that Defendants violated state law when they perpetrated a skimming scheme in which Defendants artificially deflated loan officers' commissions in contravention of their employment contracts. *Id.* at *5. Plaintiffs claimed that Defendant represented to Plaintiffs that they would be paid monthly commissions from the loans that they had originated, when this was not the case. *Id.* at *7. Plaintiffs sought to certify two classes under Rule 23, including: (i) an IMWL class alleging failure to pay minimum wage and overtime; and (ii) a class divided into two sub-classes consisting of a breach of contract and fraud claims. The Court ruled that numerosity was satisfied. *Id.* at *11. The Court also found that commonality was satisfied because in regards to the IMWL claim, the class members had clearly suffered the same alleged injury, as they were all classified as employees who were exempt from minimum wage and overtime laws. *Id.* The Court reasoned that there were common questions in regards to Plaintiffs' IWPCA and skimming claims, including: (i) whether individual Defendants were employers under the IWPCA; (ii) whether Defendants represented to Plaintiffs that their commissions would be a percentage of revenue generated; (iii) whether the portion withheld from commissions known as "secondary gain" included revenue generated from loans; and (iv) whether any Defendant failed to pay commissions owed to Plaintiffs. The Court rejected Defendants' argument that there were individual questions that precluded certification, including the amount of damages suffered and how each class member interpreted their contracts. The Court opined that Rule 23 did not require commonality of all questions and individual damages determinations did not require denial of certification. *Id.* at *14. The Court also rejected Defendants' argument that Plaintiffs were barred from proceeding as a class on their IWPCA claim because the IWPCA's amendment adding a class action right was a substantive change in the law, which could not be applied retroactively, as it ruled that the ability to bring a class action is a procedural, not a substantive, right. *Id.* at *15. The Court also found that typicality was satisfied and it rejected Defendants' assertion that the claims of the named Plaintiffs were not typical of the class, ruling that the class representative's claims arose from the same course of conduct and the same legal theory that was alleged by the class throughout the class period. The Court also concluded that the named Plaintiffs' lack of understanding of the issues at hand was insufficient to prevent certification. *Id.* at *17. The Court determined that the named Plaintiffs and class counsel adequately represented the class. *Id.* at *18-20. The Court ruled that Rule 23(b)(3)'s requirements of predominance and superiority were also satisfied. *Id.* at *29. The Court rejected Defendants' argument that it would be impossible to determine damages using a class-wide methodology, because the class members did not work the same schedule, reasoning that if this were a requirement for predominance, no collective action or wage & hour class action would ever be certified. *Id.* at *22. Accordingly, the Court granted Plaintiffs motion to certify the class. The Court also denied Defendants' motion to decertify the FLSA collective action and ruled that Plaintiffs met their burden that the opt-in Plaintiffs were similarly-situated for purposes of § 216(b).

***Lamarr, et al. v. Illinois Bell Telephone Co.,* 2017 U.S. Dist. LEXIS 79241 (N.D. Ill. May 24, 2017).** Plaintiffs, a group of call center representatives ("CCRs"), brought an action alleging that Defendants required them to work before their shifts, during meal breaks, and after their shifts and were not compensated for such work in violation of the FLSA and the Illinois Minimum Wage Law ("IMWL"). Plaintiffs claimed that they were required to turn on equipment and boot up software programs before their scheduled shifts, that they were required to perform work during meal breaks, and they performed work after shifts such as completing calls. *Id.* at *3. As a result of Defendants' policies, Plaintiffs alleged that they were deprived of overtime compensation. Plaintiffs sought to conditionally certify their FLSA claims as a collective action, and the Court granted the motion. Defendants argued that the evidence showed that certain putative collective action members worked for entities that were not named as Defendants in the case. *Id.* at *7. However, the Court stated that the FLSA does not require that all members of a collective action have the same employer, and Plaintiffs produced evidence that the putative collective action members had a joint employer. *Id.* Plaintiffs also alleged that the named

Defendants had control over the putative collective action members such that they would be considered an employer of the collective action members. The Court found that the joint employer question involved a consideration of matters outside the pleadings and its determination was premature at the conditional certification stage. Defendants further argued that the putative collective action members were not subjected to any common policies that would warrant certification. *Id.* at *8. The Court noted that Defendants, in making their arguments, focused on irrelevant conflicts and sought to impose a stringent evidentiary burden on Plaintiffs at the conditional certification stage that was not required under 29 U.S.C. § 216(b). *Id.* The Court held that Plaintiffs pointed to evidence, such as the testimony from Defendants Rule 30(b)(6) witnesses, deposition testimony from Plaintiffs, and declarations from putative collective action members to show at this juncture that there were certain common policies and practices among Defendants that the putative collective action members faced while employed by Defendants. *Id.* The Court further stated that the fact that Defendants allegedly had multiple policies and practices that violated the FLSA and deprived their employees of earned overtime did not preclude certification. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***McCaster, et al. v. Darden Restaurants, Inc.,* 845 Fed. 3d 794 (7th Cir. 2017).** Plaintiffs, two former restaurant employees, brought a class action alleging that Defendants 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 ("IWPCA"). Plaintiffs contended that Defendants had a vacation policy under which hourly employees earned vacation days based on length of service. *Id.* at 796. Plaintiffs sought to certify a class of all former Defendant employees in Illinois since December 11, 2003, who were subject to Defendants' vacation policy and who did not receive all earned vacation pay benefits. *Id.* at 797. The District Court denied Plaintiffs' motion for class certification. The District Court ruled that Plaintiffs' proposed class definition constituted an impermissible fail-safe class. Plaintiffs proposed an alternative class definition removing the phrase "and who did not receive all earned vacation pay benefits," which the District Court also rejected because it failed to meet the requirements of Rule 23. *Id.* Defendant also moved for partial summary judgment on Plaintiff Clark's individual claim, arguing that Clark was not eligible for vacation pay during the relevant time period because she worked part-time. The District Court agreed and granted the motion. On Plaintiffs' appeal, the Seventh Circuit held that, because Defendant's vacation-pay policy covered only full-time employees, Clark did not qualify for benefits. *Id.* at 798. Clark argued that if an employer provides paid vacation to its full-time employees on a *pro rata* length-of-service basis, it may not deny this same benefit to its part-time employees. The Seventh Circuit rejected Plaintiffs' argument, holding that Clark's interpretation had no support in the text of the IWPCA, its implementing regulations, or in Illinois cases interpreting it, for "the Act merely prohibits the forfeiture of accrued earned vacation pay. Whether an employee has earned paid vacation in the first place depends on the terms of the employer's employment policy." *Id.* at 799. The Seventh Circuit stated that since Clark did not work full-time, she did not accrue benefits subject to forfeiture at separation. *Id.* at 802. The Seventh Circuit further concluded that the District Court did not abuse its discretion in denying class certification. *Id.* at 803. The Seventh Circuit held that, under Plaintiffs' class definition, class membership turned on whether class members had valid claims, "a classic fail-safe class," and therefore it was properly rejected by the District Court. *Id.* The Seventh Circuit found that although Plaintiffs' proposed alternative class was free from fail-safe concerns, Plaintiffs failed to identify any unlawful conduct on Defendant's part "that spans the entire class and caused all class members to suffer the same injury" with the proposed class definition. *Id.* at 804. The Seventh Circuit noted that Plaintiffs did not identify whether the vacation accrual pay policy violated Illinois labor law, or whether Darden had a practice of withholding such pay. *Id.* Plaintiffs simply argued that some separated employees did not receive all the vacation pay they were due. The Seventh Circuit noted that "that may be true, . . . but establishing those violations (if there were any) would not involve any class-wide proof." *Id.* The Seventh Circuit opined that it was not enough for Plaintiffs to allege that certain employees did not receive all the pay that was allegedly due to establish a class action, because resolving each class members' vacation pay claims would depend entirely on the members' individual work history and the specific payroll practices of the managers of the restaurants where they worked. *Id.* at 805. The Seventh Circuit therefore agreed with the District Court that Plaintiffs failed to satisfy the commonality requirement of Rule 23. Accordingly, the Seventh Circuit affirmed the District Court's ruling denying Plaintiffs' motion for class certification.

***McDonald, et al. v. P.F. Chang's,* 2017 U.S. Dist. LEXIS 73322 (N.D. Ill. May 15, 2017).** Plaintiffs, a group of restaurant servers, brought a collective action alleging that Defendant violated the minimum wage requirements of the FLSA by improperly requiring them to share tips, not compensating them at minimum wage for time spent doing non-tipped work, and not providing the required tip credit notice to servers. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted in part. With regard to their tip notice claims, Plaintiffs submitted three tip reporting agreement forms that Plaintiffs contended were deficient pursuant to 29 U.S.C. § 203(m). The Court found that Plaintiffs made the minimal showing necessary for conditional certification on their claim that employees lacked the required tip notice, which was distributed consistently across multiple restaurants in multiple states. *Id.* at *14. Plaintiffs also claimed that: (i) they were required to perform "improper types" of tasks unrelated to their tipped occupation for which they should have the full minimum wage for the time they spent performing that work (the "unrelated dual jobs claim"); and (ii) they spent more than 20% of their time performing untipped tasks "related" to their tipped occupation for which they should have received the full minimum wage for that time (the "excessive related jobs claim"). *Id.* at *26. Plaintiffs relied on their own declarations, which described the type of tasks that they were made to perform and which stated that their managers required them to perform this work. Defendant argued that requiring employees to perform non-tip producing work is not unlawful as long as the work is related to the tipped occupation, and many of the side work tasks that Plaintiffs contested were "precisely the types of side tasks which the law recognizes may be performed at the tipped rate." *Id.* at *26-27. The Court opined that whether or not the tasks were "related" or "unrelated" went to the merits of Plaintiffs' claims and could not be resolved at the conditional certification stage. *Id.* at *27. Accordingly, the Court found that Plaintiffs had made the minimal showing necessary for conditional certification on their unrelated dual jobs claim. However, the Court noted that Plaintiffs' only evidence that employees performed an excessive amount of non-tipped work came from their own affidavits, and therefore Plaintiffs had not met their burden to show the existence of any common policy in any other restaurants in Illinois or New York other than the restaurants where they worked. *Id.* Plaintiffs further alleged that they and other tipped employees were subject to a common policy requiring them to share a portion of their tips with ineligible employees. *Id.* at *28. As to that issue, the Court determined that the sole support for the allegations were the two declarations from Plaintiffs describing the tip-pooling arrangements at their restaurants. Accordingly, the Court found that Plaintiffs made the minimal showing necessary for conditional certification of the claim for employees at their own restaurants, but had not met their burden to show that a common illegal policy regarding tip-pooling arrangements existed for any of the other restaurants in Illinois and New York. *Id.* Plaintiffs also contended that they were regularly required to work off-the-clock. *Id.* at *32-33. Plaintiffs stated that they "saw other employees arrive early and not punch in" and that "they too were required to punch out while finishing closing side work." *Id.* at *33. Based on the evidence that Plaintiffs presented, the Court determined that they had made the minimal showing necessary for conditional certification of this claim for employees at their own restaurants, but that nothing about the practices that Plaintiffs observed at their restaurants suggested the existence of a policy of requiring off-the-clock work at any other restaurant. Accordingly, the Court granted Plaintiffs' motion for conditional certification in part.

***Meetz, et al. v. Wisconsin Hospitality Group,* 2017 U.S. Dist. LEXIS 138380 (E.D. Wis. Aug. 29, 2017).** Plaintiffs, a group of pizza delivery drivers, brought a collective action alleging that Defendants' expense reimbursement policy resulted in their failure to receive the federal minimum wage in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Defendants' delivery drivers supplied their own vehicles for deliveries. *Id.* at *4. Defendants paid drivers a per delivery reimbursement to defray the costs of operating their delivery vehicles. *Id.* Plaintiff alleged that Defendants failed to reasonably approximate the drivers' actual vehicle expenses and that the drivers' compensation therefore fell below the federal minimum wage. *Id.* at *5. Defendants contended that the 48 declarations filed by Plaintiff and opt-in Plaintiffs, 6 declarations filed by Defendants, and 3 depositions of Defendant's representatives taken by Plaintiff, as well as the company policies in the record, provided the Court with sufficient factual information to proceed under the heightened second stage certification standard. *Id.* at *9. Plaintiffs asserted that they still lacked requested reimbursement rate data for all of Defendants' restaurants, as well as complete payroll and time data for half of the opt-in Plaintiffs, and therefore discovery was not well underway. *Id.* at *10. The Court opined that regardless of whether the lenient standard or the heightened standard applied, conditional certification of a collective action was proper because Plaintiffs made an adequate showing that they and the other current and former delivery drivers in the putative class were similarly-situated. *Id.* The Court noted that

the evidence in the record indicated that delivery drivers at all of Defendants' restaurants shared consistent job requirements, including responsibility for providing a delivery vehicle, maintaining it in a safe, working condition, and procuring an insurance policy that provided minimum coverage levels. *Id.* The Court determined that the evidence showed that delivery drivers employed by Defendants were subject to a common compensation and reimbursement policy that resulted in their failure to receive the federal minimum wage. *Id.* Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Morgan, et al. v. Northern Concrete Construction Inc.,* 2017 U.S. Dist. LEXIS 212515 (E.D. Wis. Dec. 28, 2017).** Plaintiffs, a group of concrete finishers and laborers, alleged that Defendants CSW and Northern Concrete failed to pay them the minimum wage and overtime pay in violation of the FLSA and the Wisconsin wage & hour laws. Plaintiffs filed a motion for conditional certification of a collective action for their FLSA claims against Northern Concrete, which the Court granted in part and denied in part. Plaintiffs sought certification of two collective actions, including: (i) all employees who traveled to Wisconsin to work on Northern Concrete jobsites after being referred to Northern Concrete by CSW; and (ii) all Northern Concrete direct-hire employees who received a per diem that exceeded their reasonably estimated meal expenses. *Id.* at *2. With regard to their travel time claim, Plaintiffs asserted that Northern Concrete was liable to them for unpaid overtime as a joint employer because Plaintiffs' travel time to and from Wisconsin was not counted as hours worked. *Id.* at *7. Plaintiffs argued that if travel time properly had been counted as hours worked, they would have worked over 40 hours per week without receiving overtime compensation. *Id.* Plaintiffs cited to several named Plaintiffs' time-cards, which indicated that when including travel time on Sundays with hours worked for the following week, they worked over 40 hours per week without receiving overtime compensation. *Id.* at *8. Based on this record, the Court was satisfied that Plaintiffs were similarly-situated to the members of the proposed travel time collective action. The Court stated that although Northern Concrete pointed to several alleged deficiencies in Plaintiffs' evidence, any shortcomings in the evidence did not change the fact that the claims turn on two critical questions, including: (i) whether Northern Concrete was liable to members of the proposed travel time collective action as a joint employer with CSW; and (ii) whether the practice of not paying workers referred to Northern Concrete by CSW for their travel time to Wisconsin violated the FLSA. *Id.* at *9. Accordingly, the Court granted Plaintiffs' motion for conditional certification as to the travel time claims. Plaintiffs also alleged that Northern Concrete paid its direct-hire employees a per diem that exceeded their actual meal expenses and therefore Northern Concrete should have included the excess portion of the per diem payment in the regular rate of pay when calculating overtime payments. *Id.* at *13. Considering the whole record, the Court determined that Plaintiffs failed to offer compelling evidence that the per diem payments were unreasonably excessive. The Court further stated that nature of Plaintiffs' per diem claim ultimately was not amenable to efficient resolution on a collective action basis. The Court reasoned that determining whether the per diem reasonably approximated any individual employee's expenses turned on highly individualized factors, including the distance between the particular worksite and the employee's home; whether the employee stayed in a hotel; whether and where the employee ate breakfast, lunch and dinner; and whether the employee drove his own vehicle, a company truck, or car-pooled with another employee. *Id.* at *17. Accordingly, the Court held that Plaintiffs failed to make an adequate showing that they were similarly-situated with members of the proposed per diem collective action. *Id.* at *17-18. The Court therefore denied Plaintiffs' motion for conditional certification as to the per diem collective action.

***Muir, et al. v. Guardian Heating & Cooling*, 2017 U.S. Dist. LEXIS 35232 (N.D. Ill. Mar. 13, 2017).** Plaintiffs, a group of former hourly employees, brought a putative collective action alleging that Defendants failed to pay proper overtime compensation in violation of the FLSA, the Illinois Minimum Wage Law, and the Illinois Wage Payment and Collection Act. Plaintiffs moved for conditional certification, which the Court granted in part. Plaintiffs' proposed collective action included all employees to whom Defendant failed to pay overtime because they worked through lunch without pay, worked past the end of the workday, spent time on the phone conducting phone consultations off-hours, and spent time commuting to job-sites. *Id.* at *3. The named Plaintiff Muir asserted in his declaration that many of Defendants' employees "are similarly-situated to me as they worked through lunch without pay, were not paid for call times on off-hours, and were not paid for all travel time." *Id.* at *5. Defendants contended that the members of Plaintiffs' proposed collective were not similarly-situated because installers, office staff, and service representatives were subjected to different sets of policies. The Court found that service representatives and installers were similarly-situated because Plaintiffs made a modest

factual showing that both were victims of the challenged policies. The Court stated that both sets of employees predominantly spent their days visiting and traveling between job-sites to perform installations, maintenance, and other service work. *Id.* at *22. The Court found that the two employee types faced similar pressures that may make electing to take a 30-minute lunch break impracticable. Further, both types of employees drove company vehicles to job-sites, and they were therefore similarly-situated with respect to Defendant's alleged premature "punching out" of service employees upon their starting the engine of their vehicles (before completion of all job-related work). *Id.* at *23. The Court determined that Plaintiffs had made a modest factual showing that service representatives and installers shared the "same essential responsibilities," and were thus similarly-situated for purposes of the lunch, transit, and phone policies. *Id.* at *23-24. However, the Court found that office staff personnel did not experience work conditions "on-call" such as floating or discretionary lunch breaks, working on job-sites, or responding to emergency service requests. *Id.* at *24. The Court held that there was insufficient evidence that supported the notion that office staff ever performed itinerant work outside the office, drove company vehicles, or worked on job-sites. *Id.* at *25. Similarly, because the only particulars in Plaintiffs' phone policy claim related to in-person emergency service calls, Plaintiffs fell short of a modest factual showing that office staff were victims of Defendant's "on-call" policy or otherwise were shorted overtime based on uncompensated call time. *Id.* at *26. The Court therefore determined that Defendant's office staff were not similarly-situated and crafted the conditional certification order to include only service representatives and installers. Accordingly, the Court granted Plaintiffs' motion for conditional certification in part.

***Murphy, et al. v. Professional Transportation Inc.,* Case No. 14-CV-378 (S.D. Ill. Nov. 27, 2017).** Plaintiff, a ground transportation provider on the Illinois High Speed Rail Project, filed a putative class action alleging minimum wage violations pursuant to the Illinois Prevailing Wage Act ("IPWA"). Plaintiff moved for class certification and the Court denied Plaintiff's motion on the grounds that he failed to satisfy Rule 23's requirements with respect to numerosity, adequacy, and predominance. *Id.* at *19. Defendant asserted that the IPWA was inapplicable for various reasons. The Court assumed, without deciding, for purposes of certification that the work that Plaintiff allegedly performed was subject to the IPWA. *Id.* at *2. The Court rejected Defendant's argument that the definition of the class was a fail-safe class because despite the incorporation of statutory laws, even if putative class members were found to be paid the correct amount, they would still be bound by the Court's judgment. As to numerosity, the Court found that the declaration of Plaintiff's counsel that there were 45 potential class members who performed this type of work for Defendant, standing alone, was not sufficient to satisfy the rigorous analysis required for class certification. *Id.* at *8. Plaintiff failed to offer any facts or argument as to why joinder would be impractical. *Id*.at *10. Therefore, the Court ruled that Plaintiff failed to satisfy the numerosity requirement. *Id.* With respect to adequacy, Plaintiff answered under oath in his interrogatories that he had never been convicted of a felony crime. However, during his deposition, he admitted that he had been convicted of voluntary manslaughter and was sentenced to ten years' incarceration. *Id.* at *14. Defendant argued that Plaintiff's failure to disclose his convictions in discovery raised questions regarding his credibility. Defendant asserted that due to an administrative error, Plaintiff was overpaid in a two-week period and this was an arguable defense which did not appear to pertain to the remaining putative class members. As such, because of these issues, the Court concluded that Plaintiff was not an adequate class representative. *Id.* at *15. Finally, the Court ruled the Rule 23(b)(3)'s requirement of predominance was not satisfied because Plaintiff's theory of liability would require significant individualized inquiries as to each driver to determine whether they worked on the project in question on any given day. *Id.* at *16. Further, calculation of damages would require inquiry into how long each driver spent in each county, and there was testimony that the drivers crossed multiple county lines in a day and the wages owed varied from county to county. *Id.* at *17. The Court found that when combined with the individualized proof required to establish liability, these issues made certification inappropriate. *Id.* at *19. Accordingly, the Court denied Plaintiff's motion for class certification.

***Nicks, et al. v. Koch Foods Co.,* 2017 U.S. Dist. LEXIS 150763 (N.D. Ill. Sept. 18, 2017).** Plaintiffs, a group of chicken catching crew employees, filed a collective action alleging that Defendants failed to pay overtime and minimum wages in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Defendants used third-party contractors to staff its live-haul crews. Plaintiff asserted that Defendant paid based on the number of chickens caught, and the third-party contractors in turn paid the members of the chicken catching crews. *Id.* at *8. Plaintiffs further alleged that Defendants required crew members to work hours in excess of 40 hours per week, but did not pay them overtime or compensate

them for travel time or time spent waiting for Defendants' machines to become available. *Id.* at *13. Plaintiffs contended that Defendants did not properly record the number of hours worked by crew members, and accordingly, they did not pay crew members minimum wages or pay them overtime for hours worked over 40 hours per work. Plaintiffs argued that they had made a modest factual showing that they and the other potential Plaintiffs were similarly-situated because they all worked for Defendant Koch Foods through independent contracting companies, they all performed similar chicken-catching work without receiving overtime pay, and all the contractors were subject to the identical service agreement. Defendants argued that: (i) Plaintiffs had not identified a common policy that violated the FLSA; and (ii) Plaintiffs and other potential claimants were not similarly-situated because they worked in different locations for different third-party contractors and supervisors. *Id.* at *21. Defendants argued that Plaintiffs failed to show that Defendants' use of third-party contractors was a scheme to avoid FLSA liability and they had failed to show that the potential claimants were subjected to a vertical reporting structure in which they were required to work unpaid overtime. *Id.* at *22. However, the Court determined that Plaintiffs provided sufficient evidence, at the preliminary conditional certification stage, to make a modest factual showing that Defendants had a common policy or practice that caused chicken-catchers at their various complexes to work unpaid overtime. *Id.* at *25-26. The Court noted that Plaintiffs submitted multiple declarations from workers at multiple locations in which they averred that they were regularly required to work more than 40 hours per week without being paid overtime. *Id.* at *26. The Court stated that Plaintiffs need not identify a specific, written policy requiring them to work overtime. It is sufficient that they have provided multiple declarations indicating that Defendants had a *de facto* practice at more than one complex of not paying for overtime hours. Defendants also argued that Plaintiffs provided insufficient evidence that they were similarly-situated to other potential Plaintiffs because they worked at different complexes for different independent contractors and had different supervisors. *Id.* at *27. The Court determined that Plaintiffs sufficiently demonstrated that the chicken-catchers at the various complexes performed similar job functions and had similar duties such that they were similarly-situated for purposes of the FLSA. *Id.* at *30-31. Plaintiffs provided affidavits from five individuals who worked at different complexes as chicken-catchers, in which the individuals declared that they performed functionally the same work at each complex; catching chickens and loading them on to cages for transport to processing plants. *Id.* at *31. Additionally, all the chicken-catchers work for third-party contractors that provided "similar functions" for Defendants and had similar service contracts with Defendants, whereby Defendants set the daily catch schedules and determined "when and how many chickens to put in each cage on each load." *Id.* The Court found that these facts demonstrated that Plaintiffs provided sufficient evidence to make a modest factual showing that the potential collective action members were similarly-situated. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Owens, et al. v. GLH Enterprises,* 2017 U.S. Dist. LEXIS 108808 (S.D. Ill. July 13, 2017).** Plaintiffs, a group of former employees, brought a collective action alleging that Defendants violated the FLSA by failing to pay overtime for hours worked over 40 in a workweek. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs requested the Court conditionally certify a collective action of all non-exempt cooks, servers, bartenders, and assistant managers who worked for Defendant at any time in the past three years. *Id.* at *2. Defendants opposed certification, asserting that Plaintiffs: (i) could not prove potential members of the proposed collective action were similarly-situated; (ii) could not prove Defendants were joint employers and part of an enterprise-wide action; and (iii) could not prove the three year statute of limitations applied. *Id.* at *3. As to Defendant's first argument, Plaintiffs alleged that the proposed collective action was similarly-situated because all members were non-exempt employees who were entitled to uncompensated overtime pay. *Id.* at *4-5. Defendants argued that potential members of the proposed collective action were not similarly-situated because of differences in the day-to-day job duties and method of payment for different groups of employees. *Id.* at *5. The Court found Defendants' arguments to be premature at this stage of the litigation, and declined to decide substantive issues going to the ultimate merits or make credibility determinations. Defendants further asserted that the Court must look to the type of work performed by each employee to determine whether they were similarly-situated, and that because dish washers, bartenders, servers, and assistant managers performed different daily functions, they were not similarly-situated. *Id.* at *6. The Court held that an analysis of the employee' daily duties was not necessary to determine whether they qualify as members of the collective action. The Court stated that the type of work done by a dishwasher or bartender was wholly irrelevant to the underlying claim of whether they were properly paid overtime. The employees identified as part of the proposed collective action were all non-exempt, and therefore entitled to overtime, and nothing about the

job duties of the employees would change that status. *Id.* at *7. Further, with regard to pay structures, the Court found that since that claim was the same for both tipped and non-tipped employees, that fact that they may be compensated somewhat differently did not prevent them from being a homogenous group. *Id.* at *8. Defendants also argued that Plaintiffs failed to show they were "joint employers." *Id.* Defendants contended that an individualized inquiry would be necessary to determine whether they were joint employers, and that the certification process should be delayed until such a determination can be made. *Id.* at *10. The Court found Defendant's argument unpersuasive. Finally, the Court determined that Plaintiffs pled facts supporting their claim that Defendants' failure to pay overtime was done either knowingly or recklessly. *Id.* at *12. Therefore, the Court ruled that the allegations made by Plaintiffs were sufficient to allege willfulness on the part of Defendants and therefore a three-year statute of limitations time period was appropriate. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Pecor, et al. v. North Point EDC, Inc.,* 2017 U.S. Dist. LEXIS 88894 (E.D. Wis. June 9, 2017).** Plaintiff, an exotic dancer, filed a collective action alleging that Defendant violated the FLSA and Wisconsin wage laws by misclassifying dancers as independent contractors and thereby failed to pay the statutory minimum wage and overtime wages. Plaintiff filed a motion for conditional certification of the collective action, which the Court denied. Plaintiff contended that she met the minimal burden to show that she and potential Plaintiffs were victims of Defendant's common policy or plan. Plaintiff alleged that Defendant's common schemes applied to all its exotic dancers, since: (i) each dancer kept their own tips for regular dance performances; (ii) Defendant required that each dancer's costume/performance complied with local laws regarding nudity and imitating sexual acts; (iii) each dancer had to pay $10 at the start of their shift to fund the juke box; (vi) a dancer's number of days performed was determined by their schedule and Defendant's need; (v) each dancer was encouraged to perform at least four "lap dances" and obtain a customer's purchase of approximately 10 drinks per day; (vi) the performance manager established the schedule a week early and assigned each dancer a number to keep track of performances, drinks, and dances sold; (vii) the bartender tracked which dancers performed according to the schedule; (viii) the bartender and dancer recorded the days the dancer worked, the time arrived, the drinks sold, and dances/lap dances performed and sold; (ix) the customers pay the bartenders for any lap dances; and (x) Defendant controlled performances to the extent necessary to comply with state and local laws. *Id.* at *9-10. Defendants asserted that Plaintiff was not similarly-situated to other putative collective action members. Defendant alleged that each dancer signed a different agreement for fees for their performances, usually based on experience, the nature of their performance, or individually negotiated daily bonus rates, and some dancers received an appearance bonus based on their popularity. *Id.* at *10. Defendants further asserted that because the majority of dancers did not work a minimum workweek and there was not commonality of earnings between dancers, there could be no similarly-situated claims. *Id.* at *10. Based on the record, the Court concluded that Plaintiff failed to make an adequate showing that she was similarly-situated with proposed collective action members so as to warrant conditional certification. *Id.* at *11. The Court found that Defendant provided evidence that significant variations existed between dancers. The Court noted that Plaintiff offered no evidence as to how many hours a week most dancers worked, the amount they generally received in tips and bonus payment, or how many reach the threshold number for requiring overtime pay. *Id.* The Court further noted that Plaintiff asserted that she had "heard" of other dancers not being paid for a week's worth of work, but she did not allege her weekly total was ever withheld. *Id.* The Court reasoned that a Plaintiff may not demonstrate she is similarly-situated for the purposes of conditional certification by relying on "unsupported assertions of additional Plaintiffs and widespread FLSA violations." *Id.* at *12. Accordingly, the Court denied Plaintiff's motion for conditional class certification.

***Pietrzycki, et al. v. Heights Tower Service, Inc.,* Case No. 14 C6546 (N.D. Ill. Nov. 29, 2017).** Plaintiffs, a group of cell tower foremen and technicians, filed a class action pursuant to the Illinois Minimum Wage Law ("IMWL") and a collective action under the FLSA. Both parties moved for summary judgment and the Magistrate Judge denied both motions for summary judgment, as well as Defendants' motion to decertify the class and the collective action. *Id.* at 46. Plaintiffs alleged that Defendants failed to properly compensate them for time traveling to and from cell towers. With respect to traveling to worksites, Plaintiffs had two options, including: (i) arrange their own transportation; or (ii) travel on Defendants' trucks at no cost. Defendant paid its employees $10 per hour for travel time. If an employee traveled in one of Defendants' trucks they were required to meet at a designated location at the start of the day by a certain time. Plaintiffs challenged Defendants' failure to count

the drive time when computing how many hours Plaintiffs worked in a week for purposes of overtime and in determining their regular rate. *Id.* at 27. As to the hours worked claim, Plaintiffs asserted that Defendants violated the IMWL and the FLSA by undercounting the number of overtime hours that they worked when it failed to count the drive time hours. The Court agreed that Defendant had a practice to compensate Plaintiffs for traveling as passengers to and from jobsites, but disagreed that such a practice automatically made the drive time hours worked into hours worked under the Portal-to-Portal Act ("PPA"). The Court determined that Plaintiffs failed to show that the drive time should be characterized as anything other than ordinary home-to work travel based upon the record. Plaintiffs asserted that when traveling on Defendant's trucks they went to designated meeting locations and did not directly commute from or to home. The Court rejected Plaintiffs' argument because Defendant did not require employees to go to a designated meeting spot and they were free to travel directly from home to their assigned towers at the start of the day and do directly home at the end of the day and Defendants' decision to provide transportation did not transform ordinary commuting hours into hours worked. The Magistrate Judge noted that the record was poorly developed as to how much time Plaintiffs spent traveling to job-sites and it was possible Plaintiffs could establish that the amount of time spent should not be characterized as ordinary home-to work travel, but Plaintiffs had not established a record of this. The Magistrate Judge rejected Plaintiffs' assertion that some sub-sets of drive time counted as hours worked, including: (i) hours worked under the continuous workday rule; (ii) hours in which employees performed other compensable work while traveling as passengers; and (iii) travel time away from home overnight. The Magistrate Judge also rejected Defendants' arguments that drive-time payments fell within the exclusion of 29 U.S.C. § 207(e)(2) because it found Defendants "undeveloped and unsupported" argument was not sufficient and failed to satisfy the burden of proving that an exclusion applied. *Id.* at 30. The Magistrate Judge also denied Plaintiffs' motion as to the regular rate because it could not determine whether any drive time counted as hours worked, and therefore could not determine whether Defendants' hourly rate of pay for overtime was too low. The Magistrate Judge concluded because of the uncertainty regarding Plaintiffs' hours worked and the uncertainty of how the exclusion of drive time from hours worked would affect the amount of overtime compensation due, Plaintiffs were not entitled to summary judgment on their regular rate claim. The Magistrate Judge also rejected Defendants' argument that the PPA shielded them from liability because they did not have a practice to pay for drive time, as the Court found that Defendants did have such a practice. Finally, the Magistrate Judge denied Defendants' motion to decertify the class. The Magistrate Judge noted that Defendants' motion was "somewhat in tension with the fact that they have moved for summary judgment on a class-wide basis." *Id.* at 45. Moreover, the Magistrate Judge had previously denied the Defendants' motion to decertify the collective action over a year prior to Defendants' new motion, and it had rejected Defendants' assertion that there was no custom or practice of compensating employees for drive time. *Id.* at 46. Accordingly, the Magistrate Judge denied both parties' motions for summary judgment and Defendants' motion to decertify the class and the collective action.

***Solsol, et al. v. Scrub, Inc.,* Case No. 13-CV-7652 (N.D. Ill. May 23, 2017).** 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 to supervisors the amount of time they worked. *Id.* at *2-3. Plaintiffs asserted that Defendant violated the FLSA in several ways. First, Plaintiffs claimed that Defendant only paid them for their scheduled, rather than actual, working hours. Second, Plaintiffs alleged that Defendant rounded their time in a way that under-compensated them. Third, Plaintiffs claimed that Defendant automatically deducted 30 minutes for meal breaks even when Plaintiffs worked during their breaks. The Court conditionally certified a collective action of employees who worked as janitorial staff at that airport. Subsequently, after discovery was complete, Defendant moved to decertify the collective action, and the Court granted the motion. The Court first considered whether Plaintiffs and the opt-ins had similar factual and employment settings. It found that even though all opt-ins worked at O'Hare, it was at least questionable that all opt-ins worked in the same location given the size of O'Hare. *Id.* at 6. The Court determined that the opt-ins worked on different shifts for more than 40 different supervisors, a factor weighing in favor of decertification. *Id.* at 7. The Court also opined that the claims of the opt-ins varied, as some claimed they were required to start work 15 minutes before their scheduled shift time every day; others claimed they worked only a few minutes before the start of their shift; and others claimed they did not work prior to the start of their shift. *Id.* at 6-7. Some claimed their lunch breaks were interrupted for work about once per week; others claimed their lunch breaks were interrupted every day; others claimed they never

took a lunch break; and others claimed they took full lunch breaks every day. *Id.* at 7. Significantly, the Court stated that each supervisor had his or her own rounding policy and therefore Plaintiffs and the opt-ins had different factual and employment settings. *Id.* at 12. Second, the Court considered whether Defendant had individualized affirmative defenses. The Court noted that Defendant could claim that it overpaid some opt-ins and that the unpaid time for some opt-ins was so minimal that it did not support a claim. *Id.* at 13. Third, the Court considered whether allowing the opt-ins' claims to be decided in one proceeding would be fair. The Court reasoned that the only way to determine the number of hours that each opt-in worked without pay would be through individualized inquiries. *Id.* at 15. Whereas Plaintiffs argued that the Court could determine the amount of off-the-clock work by comparing each employees' time-card with the time for which they were compensated, the Court found that this was, by necessity, individualized. *Id.* at 15-16. Accordingly, the Court granted Defendant's motion for decertification.

***Swafford, et al. v. Cent. Tri-Axle Inc.*, 2017 U.S. Dist. LEXIS 186985 (S.D. Ind. Nov. 13, 2017).** Plaintiffs, a group of former dump truck drivers, filed a collective action alleging that Defendant failed to pay overtime wages in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. In support of their motion for conditional certification, Plaintiffs submitted declarations describing their work duties and activities, the lack of time-keeping records by Defendant, their consistent workweek of more than 40 hours, and the failure of Defendant to pay them any overtime wages. *Id.* at *8. Plaintiffs also described that they worked with approximately 40 other drivers, and based on their observations of, and conversations with, these other drivers, they understand that the other drivers were subject to the same work policies, performed the same work responsibilities, did not have their work hours accurately recorded, worked overtime hours, and did not receive overtime wages. *Id.* at *8-9. Plaintiffs also submitted the declaration of a similarly-situated employee, which offered additional evidence regarding other similarly-situated employees who had similar work experiences. *Id.* at *9. Defendant argued that conditional certification of a collective action was not appropriate because Plaintiffs' declarations were not reliable and failed to establish **t**hat similarly-situated employees were subject to the same policies or practices that violated the FLSA. *Id.* at *10. The Court determined that conditional certification of a collective action for Plaintiffs' FLSA claim was appropriate because Plaintiffs made a threshold showing that they were similarly-situated to other drivers who were denied overtime wages. *Id.* at *13. The Court held that Plaintiffs' declarations established their work duties, their overtime hours, and the denial of overtime wages, and sufficiently described the similar conditions of other drivers employed by Defendant. *Id.* at *14. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Ward, et al. v. Hat World*, 2017 U.S. Dist. LEXIS 195778 (S.D. Ind. Nov. 29, 2017).** Plaintiff, a regional loss prevention investigator ("RLPI"), filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff stated that he regularly worked more than 40 hours in a week, but Defendant never providing overtime compensation. Plaintiff further alleged that he talked with other RLPIs who experienced similar long work hours without overtime compensation. *Id.* at *4. In support of his motion, Plaintiff provided his own declaration and declarations from two other employees describing their experience of regularly working more than 40 hours in a week but not receiving overtime wages. The declarations also affirmed that Defendant classified Plaintiff and all other RLPIs as "exempt administrative employees" under the FLSA and failed to pay RLPIs overtime wages for any hours they worked in excess of 40 hours in a week. *Id.* at *5. The declarations also described the tasks RLPIs performed, which were consistent with the "job description" document that Defendant gave employees. *Id.* at *10. In response, Defendant argued that it properly classified RLPIs as exempt under the FLSA overtime provision, so there was no unlawful common practice or policy suffered by similarly-situated employees. *Id.* Defendant further asserted that a collective action was improper because of variations in job duties, which it attempted to illustrate through several of its own declarations. The Court determined that each of the declarations showed similar job responsibilities and working conditions at their core among the RLPIs. Additionally, the Court found that the declarations provided by Defendant actually confirmed that RLPIs worked more than 40 hours in a week and were not compensated with overtime wages. *Id.* at *12. The Court held that the arguments advanced by each party and the evidence offered in support showed that RLPIs had similar job responsibilities, were subject to similar company policies and practices, and were paid under a similar compensation structure. *Id.* at *13. The Court also noted that a determination of whether RLPIs

were properly classified as exempt employees went to the merits of Plaintiff's claims, and therefore it declined to address the issue at the conditional certification stage. Therefore, the Court concluded that Plaintiff met his burden of making a modest factual showing that he was similarly-situated to the potential Plaintiffs for purposes of conditionally certifying a collective action. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Williams, et al. v. Angie's List, Inc.*, 2017 U.S. Dist. LEXIS 64732 (S.D. Ind. April 27, 2017).** Plaintiffs brought an action alleging that Defendant failed to compensate them for overtime hours worked as required by the FLSA. Plaintiffs alleged that Defendant, through its sales trainers, sales managers, sales directors, and other executives and officers, routinely and regularly instructed sales representatives to under-report, or not report, hours worked in excess of 40 hours per week. Plaintiffs also alleged that Defendant knew or should have known that its sales representatives regularly worked hours in excess of 40 hours per week, but did not pay them for all overtime hours worked. *Id.* Plaintiffs previously sought to conditionally certify a collective action that included employees who worked for Defendant as advertising sales consultants, discovery representatives, eligibility representatives, and senior solutions consultants in the sales origination department. The Court found that Plaintiffs did not provide sufficient support for conditional certification, and denied their motion. The Court, however, allowed Plaintiffs to file another motion for conditional certification, which they subsequently presented to the Court. In their second motion, Plaintiffs sought conditional certification for a collective action of a number of current and former employees, including individuals who were advertising sales consultants in the sales origination department from three years prior to the date of the ruling to October 1, 2015, and employees in the sales origination department from October 1, 2015, to the present, who held several jobs, such as discovery representatives, eligibility representatives, and senior solutions consultants. Plaintiffs also sought to include current and former employees who work or worked as big deal representatives or e-commerce representatives in the big deal department or in the e-commerce department from three years prior to the date of the ruling to the present. *Id.* at *2. Plaintiffs also sought, in the alternative, conditional certification for six collective action sub-groups, which corresponded to the six identified job titles. Defendant argued that Plaintiffs failed to show that they were similarly-situated to members of the proposed collective action or to each other. Defendant also contended that Plaintiffs had not offered any new substantive evidence to support their position and that they failed to show a common policy or plan that would have required the putative collective action members to under-report or not report overtime hours. *Id.* at *4. Plaintiffs submitted affidavits in support of their allegations, from employees across all job titles, claiming that their managers instructed them to work overtime without recording the work time and thereby not receiving overtime compensation. Defendants submitted contrary affidavits from employees stating that their managers never requested that they work overtime without recording it and receiving overtime compensation. The Court found that Defendant's evidence did not contradict Plaintiffs' evidence in a way that would lead it to resolve a conflict in Plaintiffs' favor. *Id.* at *15. The Court opined that it was possible for the facts in both Plaintiffs' affidavits and Defendant's affidavits to be true. The Court determined that if it accepted both sets of declarations as true, it could not conclude that the putative collective action members and Plaintiffs were victims of a common policy or plan. Plaintiffs' evidence, taken as true, failed to support a finding that Defendant instructed all identified employees to not report overtime hours or to under-report overtime hours in order to not pay them for all overtime that they worked; nor did it support a finding that any other common plan or policy applied to avoid paying all those employees for all hours worked. *Id.* at *16. The Court held that Plaintiffs may have individual claims against Defendant, but they failed to provide sufficient support for conditional certification of the proposed collective action or any sub-group. The Court therefore denied Plaintiff's motion for conditional certification.

(viii) Eighth Circuit

***Coates, et al. v. Dassault Falc-on Jet Corp.*, 2017 U.S. Dist. LEXIS 192345 (E.D. Ark. Nov. 21, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant misclassified them as exempt employees and thereby failed to pay overtime compensation in violation of the FLSA and the Arkansas Minimum Wage Act ("AMWA"). Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs sought to certify a collective action of three different groups of employees, including: (i) team leaders and those in similar positions employed by Defendants since June 6, 2014; (ii) office personnel employees and those in similar positions employed by Defendants since June 6, 2014; and (iii) liaisons and those in similar positions employed by Defendants since June 6, 2014. *Id.* at *5. In support of their motion,

Plaintiffs submitted that they and employees similarly-situated to them were victims of a common policy that violated the FLSA. *Id.* at *5-6. Defendant argued that the "similar positions" language in the proposed collective action definitions rendered the definitions too broad. *Id.* at *6. The Court agreed and opined that the "similar positions" language left the collective action definition too vague for efficient case administration. *Id.* In addition, the Court held that the collective action description must be limited to employees working in Arkansas, as Plaintiffs presented no evidence that similarly-situated employees existed in other states. *Id.* at *7. Defendant also argued that Plaintiffs failed to meet their burden to show that individuals similarly-situated to them existed. The Court disagreed, finding that the affidavits of Plaintiffs established that a number of employees held the same job title, worked in the same geographic region, experienced alleged FLSA violations during the same time period, and were subject to the same practices. *Id.* at *8. Defendant also argued that conditional certification was inappropriate because determining whether Plaintiffs were similarly-situated would require the Court to conduct an in-depth factual inquiry into the job duties of each individual employee. *Id.* The Court, however, noted that according to the affidavits, the duties for each position were sufficiently similar. Accordingly, the Court found that based on the pleadings and accompanying affidavits, Plaintiffs had made a modest factual showing that Defendant implemented a common policy unlawfully exempting team leaders, office personnel employees, and liaisons in Arkansas from the FLSA and the AMWA overtime requirements. *Id.* at *9. The Court therefore granted Plaintiffs' motion for conditional certification of a collective action limited to Arkansas-based team leaders, office personnel employees, and liaisons.

***Cooper, et al. v. Integrity Home Care, Inc.,* 2017 U.S. Dist. LEXIS 65521 (W.D. Mo. May 1, 2017).** Plaintiff, a personal care aide ("PCA"), filed a collective action alleging that Defendant violated the FLSA and the Missouri Minimum Wage Law ("MMWL") when it failed to pay overtime compensation for hours worked over 40. Plaintiff filed a motion for conditional certification, which the Court granted. Defendant, a healthcare services provider in private homes, employs PCAs for "a wide variety of services including, but not necessarily limited to, companionship, respite, meal preparation, transportation, assistance with house work, arranging for medical care, and assistance with activities of daily living including dressing, grooming, toileting, feeding, laundry and bathing." *Id.* at *2-3. Advanced Personal Care Aides ("APCAs") "provide additional services including ostomy care, catheter care, bowel programs, and range of motion services. *Id.* at *3. Plaintiff's motion sought to certify a proposed collective action of all current or former PCAs and APCAs who were employed directly by Defendant and provided companionship services, who were not paid overtime for all hours worked in excess of 40 hours per week from January 1, 2015 to November 12, 2015. *Id.* at *4. Defendant argued conditional certification was unwarranted because: (i) Plaintiff was exempt from the overtime wage provisions of the FLSA during all periods when Defendant allegedly failed to pay overtime wages; and (ii) Plaintiff and the alleged putative collective action members were not similarly-situated. The Court determined that it would not consider the merits of Plaintiff's claims in ruling on a motion for conditional certification, and therefore declined to address Defendant's merits-based argument. *Id.* at *7. As to Defendant's argument that Plaintiff was not similarly-situated to members of the putative collective action, Plaintiff averred that the collective action definition included only PCAs and APCAs that were all denied overtime pay by Defendant. Plaintiff alleged she and Defendant's PCAs and APCAs were similarly-situated because they performed similar duties and were subject to the same unlawful policy, *i.e.*, Defendant's failure to pay overtime. The Court held that though the duties of PCAs and APCAs could vary depending on the needs of a particular patient, the evidence before the Court illustrated that their job duties were similar. *Id.* at *8. Further, the Court found that the evidence suggested that Defendant knew personal care aides should be re-classified as "non-exempt" from FLSA overtime pay requirements after January 2015. *Id.* The Court opined that while this did not constitute direct evidence that all PCAs and APCAs were subject to a policy excluding them from overtime payment after January 2015, it was sufficient at this stage to show that the members of the putative collective action were similarly-situated for purposes of the FLSA. Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Cope, et al. v. Let's Eat Out, Inc.*, 319 F.R.D. 544 (W.D. Mo. 2017).** Plaintiffs, a group of servers and bartenders, brought an action alleging that Defendant failed to pay all wages due by requiring servers to reimburse the restaurant in the event a customer failed to pay in violation of the FLSA and the Missouri Minimum Wage Law ("MMWL"). The Court had previously conditionally certified a collective action as to Plaintiffs' FLSA claims. Plaintiffs subsequently sought class certification of their MMWL claims pursuant to Rule 23. First, with regard to numerosity, Plaintiff submitted that there were 99 opt-in members of the putative class

who worked at Missouri locations during the relevant time period. *Id.* at 554. The Court found that this was sufficient for Plaintiffs to meet the numerosity requirement. *Id.* at 554-555. As to commonality, Defendants argued Plaintiffs' case theory would require individual inquiries into whether each class member was actually required to reimburse the restaurant for customer walkouts and/or cash shortages. The Court, however, stated that it was not necessary that all class members suffer from the same injury as the class representatives or one another. The Court held that factual and legal issues relating to Defendant's policies and the legality of the policies under the MMWL were common to the proposed classes and suitable for class-wide adjudication. Further, the Court noted that the named Plaintiff stated that she was required to reimburse the restaurant from her tips to cover an unpaid tab resulting from a customer walkout. The named Plaintiff also cited other occasions in which she was required to pay tips to cover another unpaid bill, and to reimburse the restaurant when the "cash register was short" at the end of the night. *Id.* at 556. The Court found that Plaintiff's grievances were the same or similar to the facts stated by other members of the proposed class who submitted declarations. Accordingly, the Court held that Plaintiffs met the typicality requirement. In addition, the Court stated that the named Plaintiff possessed the same interest and injury related to alleged violations of the MMWL as the class, had no currently discernable interests antagonistic to the interests of other class members, and was being represented by competent class counsel. Therefore, Plaintiffs met the adequacy requirement. *Id.* As to the Rule 23(b) requirements, the Court noted that questions of law and fact relating to Defendant's policies, and whether Defendants' maintenance and enforcement of the policy violated the MMWL and Missouri common law, were common questions that predominated over questions affecting individual members. *Id.* Further, because this matter involved common questions of fact and law relating to the same Missouri minimum wage laws and common laws, and potential class members could be ascertained by examining Defendants' payroll data, maintenance of the class action would be manageable. Additionally, the Court found that individual adjudication of the more than 99 potential claims that involved common issues would be unrealistic and unnecessarily repetitive. *Id.* at 557. Thus, the Court found that class action would be the superior method of adjudication, and therefore the superiority requirement of Rule 23(b)(3) was also satisfied. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Dean, et al. v. Billings*, 2017 U.S. Dist. LEXIS 197953 (W.D. Okla. Dec. 1, 2017).** Plaintiff, an exotic dancer, filed a collective action alleging that Defendants misclassified her and other dancers that she claimed were similarly-situated as independent contractors and thereby denied overtime compensation and minimum wages in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. The Court found that Plaintiff set forth substantial allegations that the putative collective action members were together the victims of a single decision, policy, or plan under 29 U.S.C. § 216(b). The Court determined that Plaintiff and the other putative collective action members were similarly-situated. *Id.* at *2. Accordingly, the Court held that Plaintiff's proposed collective action should be conditionally certified, and it granted certification of a collective action containing all current and former exotic dancers who worked for Defendants and were subject to Defendants' classification of dancers as independent contractors at any time from 2013 through the present. *Id.* at *3-4.

***Dean, et al. v. Whispers Gentlemen's Club, LLC,* 2017 U.S. Dist. LEXIS 197947 (W.D. Okla. Dec. 1, 2017).** Plaintiff, an exotic dancer, filed a collective action alleging that Defendants misclassified her and other dancers as independent contractors and denied them overtime pay and minimum wages in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. The Court found that Plaintiff set forth substantial allegations that the putative collective action members were together the victims of a single decision, policy, or plan that violated the FLSA. *Id.* at *3. The Court also ruled that Plaintiff and the other putative collective action members were similarly-situated. *Id.* Accordingly, the Court held that Plaintiff's proposed collective action should be conditionally certified, and it granted certification to a collective action consisting of all current and former exotic dancers who worked for Defendants and were subject to Defendants' alleged misclassification of dancers as independent contractors at any time from 2013 through the present. *Id.* at *3-4.

***Elliott, et al. v. Schlumberger Technology Corp.*, Case No. 13-CV-79 (D.N.D. Sept. 28, 2017).** Plaintiffs, a group of equipment operators, filed a collective action alleging Defendant violated the FLSA and North Dakota state wage & hour laws by paying them under the fluctuating workweek ("FWW") method. *Id.* at 1. The Court

had previously conditionally certified a collective action consisting of "all equipment operators, equipment operator trainees, and other employees in substantially similar positions employed by Defendant in the Williston, North Dakota location who were paid under the fluctuating workweek method for at least one week during the three years prior to the commencement of the lawsuit to the present." *Id.* After discovery, Defendant moved to decertify on the ground that Plaintiffs were not similarly-situated. *Id.* Plaintiffs also moved to class certification of their state law claims under Rule 23. The Court granted Defendant's motion and denied Plaintiffs' motion. At the outset, the Court noted that to qualify for the FWW method, there must be: (i) a clear mutual understanding between employer and employee; (ii) fixed salary not including overtime; (iii) salary above minimum wage; and (iv) overtime premium of one-half the rate of regular pay. *Id.* at 2-3. Plaintiffs asserted that Defendant's FWW method did not pay a fixed salary, did not properly calculate overtime, and failed to pay minimum wage. *Id.* at 3. The Court found that the differences in Plaintiffs' claims were more than inconsequential as: (i) some claims damages for unpaid training and some did not; (ii) some received bonuses and others did not; (iii) some bonuses were revenue-based and others were flat fee; (iv) some understood the FWW method and some did not; (v) some signed acknowledgments regarding how they would be paid and some did not; (vi) and some were subject to Department of Transportation restrictions and some were not. *Id.* at 5. The Court reasoned that a fact-finder would be required to conduct an individual determination with regard to damages and liability, which would be dependent on the specific facts pertaining to each employee. *Id.* at 5-6. The Court determined that it was therefore not convinced that members of the collective action were similarly-situated to representative Plaintiffs due to their wide ranging employment and factual settings that give rise to their individual claims. *Id.* at 6. The Court further opined that based on the record, it was clear that employees' claims varied to such a degree that it was not possible to lump them in a single class in which common issues predominated over individual issues. *Id.* at 7. Accordingly, because common issues did not predominate, the Court denied Plaintiffs' motion for class certification.

Harris, et al. v. Chipotle Mexican Grill, Inc., **2017 U.S. Dist. LEXIS 90302 (D. Minn. June 12, 2017).** Plaintiffs, a group of fast food workers, filed an action alleging overtime violations pursuant to the FLSA and the Minnesota Fair Labor Standards Act ("MFLSA"). The Court conditionally certified the collective action for purposes of the FLSA. Plaintiffs claimed that they were automatically punched off-the-clock, but continued to work during closing shifts, resulting in non-payment of wages and overtime wages. *Id.* at *2. After discovery, Defendant moved to decertify the collective action, arguing that Plaintiffs were not similarly-situated with respect to the alleged off-the-clock violations and that conflicts of interest among Plaintiffs compelled decertification. *Id.* at *21. The Court denied Defendant's motion. Defendant asserted that there was no common plan or unlawful policy, because its time-keeping policies that were common to all employees were entirely lawful. *Id.* The Court rejected this argument because evidence of a lawful written policy compensating for overtime work does not automatically defeat an FLSA claim if evidence exists of a common policy of not paying for overtime. *Id.* Defendant argued that any off-the-clock work stemmed from scattered and unrelated causes, such that no single, common policy was responsible. *Id.* at *23. The Court found that the off-the-clock work in question was not so varied as to warrant decertification. The collective action encompassed employees: (i) who were either punched off-the-clock at 12:30 p.m. by the automatic time-keeping system and continued to work; or (ii) who otherwise worked off-the-clock during closing shifts. *Id.* Because the alleged policy or plan of non-payment for work on the closing shift was the same, the Court ruled that decertification was not appropriate. *Id.* at *25. Defendant argued that decertification was appropriate because of disparate factual and employment settings among Plaintiffs for the off-the-clock work and the different nature of the work performed. *Id.* Defendant contended that the FLSA violations were attributable to varied reasons or the varied nature of the work, such as the automatic clock-out system at closing time, pre-shift work performed off-the-clock, and managerial requests to clock-out early and continue working. *Id.* The Court rejected Defendant's argument finding that the factual and employment settings factors supported the denial of Defendant's decertification motion because the class members worked at a single location, performed the same duties, and were subject to the same off-the-clock policies. *Id.* The Court found the declarations of non-Plaintiff employees that they did not perform any "off-the-clock" work to be irrelevant because the central question at issue was whether the named Plaintiffs and opt-in Plaintiffs were similarly-situated and not whether the FLSA was violated. *Id.* Defendant also argued that decertification was warranted because it needed to assert six individualized defenses against certain named Plaintiffs and opt-in Plaintiffs, but not others. *Id.* at *29. The Court found that none of the defenses warranted decertification. *Id.* at *30-35. The Court noted the remedial purpose of the FLSA and ruled that the case was

amenable to collective resolution, as a collective action was a more efficient means of resolving Plaintiffs' clams *Id.* at *38. Because Plaintiffs had relatively small claims, it would be impractical for them to pursue individual claims. *Id.* at *38. Finally, Defendant asserted that conflicts of interests among Plaintiffs provided an independent basis for decertification. *Id.* Defendants argued that because some named Plaintiffs were kitchen managers who directed other Plaintiffs to perform the off-the-clock work, their interests were in conflict. *Id.* The Court rejected this position, ruling that there was no conflict of interest among Plaintiffs warranting decertification, as collective actions often include both hourly employees and supervisors. *Id.* at *42-43. As such, the Court denied Defendant's motion to decertify the collective action.

***Harris, et al. v. Express Courier International, Inc.*, 2017 U.S. Dist. LEXIS 192363 (W.D. Ark. Nov. 21, 2017).** Plaintiffs, a group of former couriers, filed a collective action alleging that Defendant misclassified couriers as independent contractors and thereby failed to pay minimum wages and overtime compensation in violation of the FLSA and state wage & hour laws. The Court had previously conditionally certified a collective action of Plaintiffs' FLSA claims. Plaintiffs subsequently moved for class certification of their state law claims pursuant to Rule 23. At the same time, Defendant moved to decertify Plaintiffs' collective action. The Court granted Defendant's motion and denied Plaintiffs' motion. In analyzing Defendant's motion for decertification, the Court noted that according to the deposition testimony taken in the case, even though Defendant considered all couriers to be independent contractors, it exerted control over the couriers in different ways, and it paid them differently. *Id.* at *14-15. The Court held that Defendant's treatment of its couriers varied so greatly, from location to location, and even from courier to courier, that there would be no way for a fact-finder to decide on a class-wide basis the degree to which Defendant affected the couriers' collective opportunity for profit and loss. *Id.* at *15. The Court further found that, even if a fact-finder could determine the misclassification issue on a class-wide basis, Plaintiffs had not presented the Court with a feasible method for establishing which, if any, collective action member was paid below the minimum wage or was denied overtime pay in violation of the FLSA. *Id.* at *21-22. As a result, the Court determined that multiple individual inquiries would be needed in order to determine how many hours each courier worked when driving for Defendant, and how much each courier was paid for that work. *Id.* at *22. The Court also stated that because couriers were paid in so many different ways, calculating the number of hours the couriers worked per week would necessitate individualized inquiries. Accordingly, the Court held that maintaining the collective action would not provide an efficient and cost-effective mechanism to resolve the liability questions in this case, as compared to proceeding with individual actions. *Id.* at *23. As to Plaintiffs' motion, Plaintiffs proposed certifying a Rule 23 class of approximately 260 couriers who drove for Defendant in Arkansas. The Court opined that Plaintiffs and the purported class lacked commonality with regard to how they would prove they are employees, rather than independent contractors. *Id.* at *28. Further, because Plaintiffs' claims differed from one another with respect to the degree of control Defendant exerted over their work and their ability to profit, and with respect to the ways in which they were paid for their work, the Court found that Plaintiffs' claims were not sufficiently typical of those of the rest of the class. *Id.* Plaintiffs argued that questions of law and fact regarding the status of the couriers predominated over individual questions. The Court stated a class-wide determination on this issue would be extremely onerous, if not impossible. *Id.* at *29. Accordingly, the Court concluded that the class action mechanism was not superior to holding individual trials on the issue of liability. The Court held that the lack of uniformity in how couriers were paid was fatal to achieving effective and efficient class-wide consideration of Defendant's alleged liability. The Court therefore granted Defendant's motion for decertification and denied Plaintiffs' motion for class certification.

***Kumar, et al. v. Tech Mahindra (Americas) Inc.,* 2017 U.S. Dist. LEXIS 116550 (E.D. Mo. July 26, 2017).** Plaintiff, a software engineer, brought an action alleging that Defendant violated the overtime provisions of the FLSA and Missouri state law. Plaintiff filed a motion for conditional certification of his FLSA claims, which the Court granted. Plaintiff's proposed collective action consisted of all persons who are, have been, or will be employed by Defendant as "Software Test Engineers" or "Software Engineers" at any time from three years prior to filing the action through the entry of judgment, and whose job it was to troubleshoot issues raised by test teams, deploy code, and compile production plans. *Id.* at *2. In response, Defendant consented to conditional certification of the collective action, but opposed the limitations period. *Id.* at *3. Defendant argued that the limitations period should be two years, not three, as there was no evidence that it willfully violated the FLSA. Defendant further argued that the limitations period, whether it is two years or three, should be measured from the date the Court conditionally certified the collective action, and not from the date Plaintiff filed his original

complaint. Plaintiff argued that the FLSA's three-year statute of limitations should apply because he had pled that Defendant's violation was willful, and that at this conditional certification stage of the proceeding, no evidence of willfulness was required. *Id.* at *4. Plaintiff further contended that, for purposes of defining the scope of the conditionally certified FLSA collective action, the Court should run the limitations period from the date he initiated this action by filing his original complaint. *Id.* The Court agreed with the parties that Plaintiff met his burden for conditional certification, and granted Plaintiff's motion to the extent it included U1-U3 band IT delivery engineers. The Court further concluded that a three-year certification period was appropriate, as Plaintiff pled a willful FLSA violation in his amended petition. *Id.* at *6-7. However, the Court ruled that the certification period should run from October 5, 2016, as Plaintiff first purported to bring a collective action and filed written consent to be a party Plaintiff on that date. As such, the Court determined that the certification period for Plaintiff's claim should run from that date, and the earliest possible cut-off date for eligible claims by opt-in Plaintiffs was October 5, 2013. *Id.* at *7-8. Accordingly, the Court granted Plaintiff's motion for conditional certification.

***Mayberry, et al. v. SSM Health,* 2017 U.S. Dist. LEXIS 81903 (E.D. Mo. May 30, 2017).** Plaintiffs, a group of hourly home healthcare workers, filed a collective action alleging that Defendant required them to work off-the-clock, which resulted in a failure to pay overtime compensation in violation of the FLSA and the Missouri Minimum Wage Law. Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court granted. Plaintiffs submitted declarations in support of their claims, stating that they had to perform essential tasks of their job off-the-clock; their supervisors were aware of and permitted work to be performed outside of the regular paid shift; they complained to management about being unable to complete tasks during the workday and not being compensated for time worked off-the-clock; they utilized a defendant-issued laptop for work-purposes before and after their scheduled shifts, they routinely worked on and completed charting and patient reports at home off-the-clock; and they incurred unpaid overtime on a regular basis. *Id.* at *4. Defendant argued that in cases such as this, where Plaintiffs have been afforded discovery on the issue of whether or not the case should proceed as a collective action, the Court should apply a more restrictive standard requiring Plaintiffs to demonstrate at least modest factual support for the collective actions allegations in the complaint. *Id.* at *6. The Court found that while Plaintiffs relied on the evidence from Defendant's pay and time records in support of their motion, substantial discovery had not yet been conducted. Based upon the limited discovery conducted thus far, the Court stated that it would apply the more lenient standard typically applied for conditional certification motions. *Id.* at *7. The Court found that Plaintiffs performed similar duties, had a similar hourly compensation structure, recorded their hours through the same time-keeping program, and were treated as non-exempt for purposes of overtime pay. The Court determined that the affidavits and deposition testimony contained allegations that Defendant's supervisory employees were aware of the off-the-clock work and permitted Plaintiffs to work outside of their scheduled shifts and off-the-clock without receiving appropriate overtime compensation. *Id.* at *8. The Court held that the evidence was sufficient to satisfy the substantial allegations necessary for conditional certification under 29 U.S.C. § 216(b). The Court stated that even under the higher standard proposed by Defendant, Plaintiffs demonstrated at least modest factual support for the allegations in the complaint. *Id.* at *8-9. Defendant provided a number of declarations from employees stating either that: (i) they have not performed off-the-clock work; or (ii) to the extent they performed any off-the-clock work, they believed it was off-set by personal time spent on-the-clock. *Id.* at *9. Defendant's declarants also stated that Defendant did not have a practice or policy requiring or permitting home healthcare workers to perform work off-the-clock and that their supervisors have never instructed them to perform work off-the-clock. The Court determined that although Defendant offered evidence of contrary company-wide policies, it could not weigh such evidence at this juncture. *Id.* The Court found that Defendant's arguments were premature; at this stage of the litigation all that was required were substantial allegations, or applying Defendant's more restrictive standard, at least some modest factual support. *Id.* Defendant also argued that Plaintiffs had failed to demonstrate that they were similarly-situated to the hourly home healthcare workers they sought to represent. *Id.* at *10. However, the Court opined that Plaintiffs alleged that the putative class members had similar duties, compensation structures, and time-keeping methods, and that they had been subjected to similar policies or practices. *Id.* The Court therefore held that Plaintiffs' declarations and testimony, as well as Defendant's records, provided enough evidence at this stage to satisfy the substantial allegations standard that employees were similarly-situated and subject to a common practice. *Id.* at *10-11. The Court thus concluded that the evidence produced by Plaintiffs was sufficient to satisfy the lenient standard for conditional certification of the collective action. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Murray, et al. v. Silver Dollar Cabaret*, 2017 U.S. Dist. LEXIS 17462 (W.D. Ark. Feb. 8, 2017).** Plaintiffs, a group of exotic dancers, brought an action alleging that Defendants failed to pay them properly in violation of the FLSA and the Arkansas Minimum Wage Act ("AMWA"). Specifically, Plaintiffs alleged that they and others were not paid a minimum wage or overtime compensation for hours worked in excess of 40 in a given week. *Id.* at *2. Plaintiffs sought conditional certification of their FLSA claims as a collective action pursuant to 29 U.S.C. § 216(b) and Rule 23 class certification for their AMWA state law claims. *Id.* at *3. Plaintiffs requested that the Court conditionally certify and approve notice for all potential collective action members for a group defined as all exotic dancers who worked for Defendants at the two clubs in question within a three year period. The Court found that Plaintiffs met their burden to demonstrate that that they were similarly-situated with putative collective action members to the extent necessary to justify conditional certification. The Court stated that in the pleadings and sworn affidavits, Plaintiffs established that they and all other potential opt-in Plaintiffs were exotic dancers at the two adult entertainment clubs in question at all relevant times, and they were all subject to the same alleged FLSA violations by not being paid a minimum wage or compensated for overtime. *Id.* at *7. Accordingly, the Court conditionally certified the action for the purpose of giving notice to putative opt-in Plaintiffs. *Id.* at *8. The Court also approved Plaintiffs' proposed § 216(b) notice with some modifications. First, the Court held that because Plaintiffs alleged willful violations of the FLSA, a three-year limitations period applied. The Court found it appropriate to toll the statute of limitations from February 15, 2016, *i.e.*, the date Plaintiffs' second motion for conditional certification was filed, until the date of the certification order, and therefore the period for collective action members began February 15, 2013. *Id.* at *12-13. The Court then opined that a 90-day opt-in period was sufficient and would best serve the interests of efficiently facilitating notice without further delaying the litigation because of the transient nature of potential Plaintiffs and the lack of available contact information. *Id.* at *17. As to Plaintiffs' motion for class certification, the Court found that Plaintiffs failed to meet their Rule 23(b)(3) burdens. The Court, however, determined that having both collective certification of an FLSA claim and class certification of an AMWA claim was not appropriate due to the nature of the lawsuit. *Id.* at *21-22. The Court reasoned that since the FLSA provides for participation on an opt-in basis and Rule 23 requires that non-participating class members affirmatively opt-out of the suit, potential Plaintiffs deserve the ability to "control their participation in this litigation in a far more expeditious fashion" than that provided for under Rule 23. *Id.* at *22. Additionally, the Court stated that there would be inherent difficulties in managing a class action, because if both the collective action and class action were certified, notice and settlement issues could arise for individual members. *Id.* at *23. The Court found that the different notices of rights under the two actions would likely be confusing for recipients. The Court therefore granted Plaintiffs' motion for conditional certification under 29 U.S.C. § 216(b), granted in part Plaintiffs' motion for Court-approved notice, and denied Plaintiffs' motion for class certification pursuant to Rule 23.

***Oxford, et al. v. Broadband Installations Of Iowa,* 2017 U.S. Dist. LEXIS 212389 (S.D. Iowa Dec. 19, 2017).** Plaintiffs, a group of former cable installation technicians, alleged that Defendants misclassified them as independent contractors and thereby denied paying them overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff sought certification of a collective action consisting of all technicians classified as independent contractors while performing installation and repair work for Defendant Broadband on behalf of Defendant Mediacom in the United States from May 19, 2014 to the present. *Id.* at *12. In support of their motion for conditional certification, Plaintiffs submitted several declarations describing their experiences. Defendant Broadband conceded that Plaintiffs met the standard for conditional certification for individuals working in Iowa, however, it argued that certification of a nationwide collective action was not appropriate. *Id.* at *12-13. Defendant Mediacom argued against Plaintiffs' request for certification in its entirety. The Court first addressed Mediacom's argument that Plaintiffs failed to meet their evidential burden because they failed to demonstrate they were similarly-situated with respect to the joint employment factors of the economic realities test. *Id.* at *14. The Court opined that such a requirement would add an additional dimension to the similarly-situated inquiry. Mediacom also argued that individual inquiries regarding each collective action member's employment relationship to Mediacom precluded conditional certification. The Court disagreed, finding that at this early stage, such considerations went to the merits of Plaintiffs' claims and were not appropriate in determining to appropriateness of conditional certification. *Id.* at *16. Further, the Court reasoned that denying Plaintiffs' motion only as to Mediacom would force putative collective action members to opt-in to the collective action against Broadband, and seek to join the action as an individual Plaintiff or file their own individual action to pursue claims against Mediacom, which would hardly

promote judicial efficiency. *Id.* at *16-17. Finally, the Court found that Plaintiffs provided sufficient evidence that they and others similarly-situated were subjected to a common decision, plan, or policy. *Id.* at *17. The Court explained that Plaintiffs' declarations stated that they were paid on a piece-rate basis and were regularly required to work more than 40 hours per week without receiving overtime compensation. Plaintiffs were all classified as independent contractors and all performed the same type of work. *Id.* The Court therefore granted Plaintiffs' motion for conditional certification of a collective action. The Court also declined to limit the scope of the proposed collective action. It found that Defendant failed to provide any evidence of differences of employment policies or employee classifications at its locations, and Plaintiffs' evidence suggested that Broadband's practices were similar, if not the same, across Iowa and other states. *Id.* at *18.

***Rasberry, et al. v. Columbia County,* 2017 U.S. Dist. LEXIS 119688 (W.D. Ark. July 31, 2017).** Plaintiff, a county jail janitor, filed a class and collective action alleging that Defendant failed to pay her and others similarly-situated overtime compensation in violation of the FLSA and the Arkansas Minimum Wage Act ("AMWA"). Plaintiff claimed that she was a salaried employee and "was routinely required to work off-the-clock in excess of 171 hours in a 28-day work period and was not allowed to report all hours worked, including overtime." *Id.* at *2. The Court previously granted Plaintiff's motion for conditional certification of the FLSA claims under 29 U.S. C. § 216(b). Plaintiff subsequently sought to certify her AMWA claims pursuant to Rule 23. Plaintiff's proposed class consisted of Defendant's salaried jailors (or similar positions) who worked in the State of Arkansas at the Columbia County Jail at any time after August 4, 2013. *Id.* at *3. As to numerosity, Plaintiff provided the Court with a spreadsheet reflecting 42 individuals who would allegedly fall within the class. Accordingly, the Court determined that the proposed class was large enough to make joinder impracticable. As to commonality, the Court opined that each potential class member's claim would concern the issue of whether Defendant maintained a policy of misclassifying salaried jailors, or those employed in similar positions, in violation of the AMWA. The Court thereby found that Plaintiff met her burden of showing that there were questions of law or fact common to the class. The Court was also satisfied that Plaintiff demonstrated that her claims were typical of the claims of potential class members. Plaintiff contended that all potential class members suffered under the same alleged policy. Accordingly, the Court determined that class members' claims would almost certainly be similar to Plaintiff's claims that Defendant misclassified them and failed to pay them overtime wages in violation of the AMWA. *Id.* at *9. The Court also concluded that Plaintiff met the adequacy requirement, as Plaintiff's allegations and supporting documents showed that Plaintiff's interests were the same as those of potential class members, and therefore Plaintiff and potential class members likely had the same interest in arguing that Defendant's policies and practices run afoul of AMWA requirements. Relative to the requirements of Rule 23(b), although the Court found that Plaintiff satisfied the commonality requirement of Rule 23(a)(2), the Court was unconvinced that Plaintiff has established that common questions predominated. *Id.* at *14. The Court reasoned that Plaintiff relied on general statements alleging that class issues predominated, but failed to provide the Court with a detailed argument explaining what is required to make out a *prima facie* case under the AMWA or how the common questions of law or fact would predominate over individualized questions. *Id.* at *14-15. Accordingly, though there were common questions that will affect all proposed class members, the Court held that Plaintiff failed to establish that common questions predominate. With regard to superiority, the Court noted that although Plaintiff made cursory arguments regarding the non-exclusive list of factors Courts may consider in making the superiority determination, her contentions were largely conclusory. *Id.* at *15-16. Accordingly, the Court was unconvinced that a Rule 23 class action was superior to other available methods for fairly and efficiently adjudicating Plaintiff's claims and potential class members' AMWA claims. The Court therefore denied Plaintiff's motion for class certification.

***Salley, et al. v. ABC Financial Services,* 2017 U.S. Dist. LEXIS 124992 (E.D. Ark. Aug. 8, 2017).** Plaintiff, a technology support employee, filed a collective action alleging that Defendant failed to pay for all hours worked in violation of the FLSA. Specifically Plaintiff alleged that Defendant's policy required that technology support employees must be available in the interactive client software when they clocked-in, and that when she worked there, it took her between 10 and 15 minutes to get her computer and the necessary software started. Plaintiff asserted that she and others similarly-situated were not paid for this time. *Id.* at *1. Plaintiff filed a motion for conditional certification, which the Court denied. The Court first noted that Plaintiff did not submit any affidavits from other employees or former employees indicating that they desired to join the case. *Id.* at *2. The Court found that Plaintiff also failed to provide specific details about her allegations, including how often she or co-

workers had to boot up their computers. The Court opined that the current record left too many questions, and without more proof of group-wide effect, some proof that having to boot up without pay occurred more than sporadically, and a firmer expression of interest from others in joining, this matter seemed more like a dispute between the parties, not a collective action. *Id.* Accordingly, the Court denied Plaintiff's motion for conditional certification.

***Stagner, et al. v. Hulcher Services, Inc.,* 2017 U.S. Dist. LEXIS 115771 (W.D. Mo. July 25, 2017).** Plaintiff, a laborer, brought a collective action alleging that Plaintiff failed to pay overtime compensation in violation of the FLSA. Plaintiff alleged that Defendant had a policy of: (i) failing to pay both non-exempt laborers and non-exempt managers for time worked for meetings and travel occurring before and after clocking-in at and out of the job-site; and (ii) failing to use a blended overtime rate of pay for employees who had multiple rates of regular pay, and instead paid overtime by calculating from the lowest rate of pay. *Id.* at *1. Plaintiff sought to conditionally certify a collective action including all current and former hourly non-exempt laborers and managers who worked for Defendant at any time within the preceding three-year period at any of Defendant's locations nationwide. *Id.* at *2. The Court denied Plaintiff's motion. In support of his motion, Plaintiff provided his own affidavit, indicating that "all" similarly-situated employees across the country worked more than 40 hours per week without receiving straight time for all hours worked and overtime compensation for hours worked in excess of 40 in a workweek. *Id.* at *3. In response, Defendant provided affidavits showing that, at all relevant times, Plaintiff was employed as division manager, which according to Defendant's job description was a position that was exempt from FLSA overtime requirements due to the positions' duties and pay. Defendant argued that: (i) Plaintiff lacked standing to bring an FLSA claim because he was always an exempt employee; (ii) Plaintiff was not a proper representative of the proposed collective action because he was exempt and his interests as a management employee were different from the interests of the laborer/operator employees he supervised; (iii) there were irreconcilable differences among the collective action; (iv) the collective action definition was inadequate, as Plaintiff had provided no information on the details/job duties of his position or the positions of others in the collective action; (v) Plaintiff's declaration failed to establish a colorable basis for his claim that the collective action members were victims of a single decision, policy or plan; (vi) Plaintiff should have provided evidence showing that higher level managers directed or encouraged off-the-clock work, but no such evidence is provided; (vii) off-the-clock work claims were too individualized to show that collective action members were similarly-situated; and (viii) the union status of the various laborer/operator employees created factual dissimilarities fatal to conditional certification. *Id.* at *7-8. The Court found Defendant's arguments that Plaintiff was classified as an exempt employee to be persuasive. Given that status, the Court ruled that Plaintiff lacked standing to bring claims on behalf of the proposed collective of non-exempt employees. *Id.* at *9. For that same reason, the Court held that Plaintiff was not a proper representative of the proposed collective action, and his interests as a management employee diverged from those of the non-exempt employees. The Court further held that Plaintiff's collective action definition was inadequate, as there was no information provided as to job duties and titles, leaving Defendant and the Court to guess which types of employees should be included. *Id.* The Court further determined that the union status of certain potential collective action members created another divergence between Plaintiff's interests and those of the collective action. Accordingly, the Court denied Plaintiff's motion for conditional certification of his FLSA claims.

***Thompson, et al. v. Spa City Steaks, Inc.,* Case No. 17-CV-6055 (W.D. Ark. Nov. 7, 2017).** Plaintiffs, a group of servers, filed a collective action alleging that Defendant's tip pooling policy violated the FLSA. Plaintiff alleged that she was paid $2.63 per hour plus tips, but was not allowed to keep the tips she earned and was made to participate in a tip pooling arrangement where tips were distributed to other non-server restaurant employees, such as cooks and dishwashers. *Id.* at 1. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff's proposed collective action consisted of "all persons whom Defendant classified as tipped employees at any time since June 30, 2014. *Id.* at 5. Plaintiff submitted an affidavit in support of the motion and contended that she and potential collective action members all performed similar job duties, including taking customer orders, bringing food to tables, and meeting the dining needs of Defendant's customers. *Id.* Plaintiff further asserted that Defendant "had a mandatory policy of collective tips earned by servers and redistributing those tips among other restaurant staff." *Id.* Defendant did not dispute that its tipped employees were similarly-situated, and thus did not oppose Plaintiff's request for conditional certification. The Court analyzed whether Plaintiff established the requirements for conditional certification under 29 U.S.C.

§ 216(b). It found that Plaintiff met her burden to establish that she was similarly-situated to the potential collective action members. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

(ix) Ninth Circuit

***Aboudara , et al. v. City Of Santa Rosa*, 2017 U.S. Dist. LEXIS 142345 (N.D. Cal. Sept. 1, 2017).** Plaintiff, a firefighter, brought a collective action alleging that Defendant improperly calculated overtime compensation and cash-out payments for compensatory time off ("CTO") in violation of the FLSA. Specifically, Plaintiff alleged that Defendant erroneously excluded two types of compensation that he received under the collective bargaining agreement between Defendant and Local 1401 when calculating his regular rate of pay. Pursuant to the collective bargaining agreement, Plaintiff and members of Local 1401 received cash payments in lieu of holidays ("HIL"), regardless of whether they actually worked those holidays. *Id.* at *2. Plaintiff and members of Local 1401 also received sick leave incentive payments ("SLI"), the equivalent of one shift's pay if they took fewer than 56 hours of sick leave in a year. *Id.* According to Plaintiff, Defendant excluded both HIL and SLI from Local 1401's overtime pay and CTO calculations. *Id.* at *3. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted in part. Defendant conceded that the claims of a group of firefighters should be conditionally certified as a collective action under the FLSA. *Id.* at *4. Plaintiff argued that the collective action should also include police officers who received HIL payments and worked overtime. Plaintiff asserted that the police officers were similarly-situated because "employees in multiple job classifications across multiple bargaining units received cash payments in lieu of holidays" and "were all subject to Defendant's practice of excluding such payments from the 'regular rate' of pay." *Id.* at *4-5. The Court, however, found that Plaintiff failed to show, even under the more lenient conditional certification standard, that he was similarly-situated to individuals outside of Local 1401. The Court noted that in the complaint, Plaintiff alleged that police officers received HIL payments that were not included in their overtime compensation, yet he offered no factual basis for this allegation. *Id.* at *5. Even if the Court could find based on the collective bargaining agreements that Santa Rosa police officers received HIL payments like Plaintiff, that provision was not itself unlawful. The Court opined that Plaintiff still must show that Defendant subjected those officers to an unlawful policy by omitting such payments from their overtime or CTO cash-out calculations. *Id.* at *6. Accordingly, the Court granted Plaintiff's motion for conditional certification, but limited the scope of the collective action to only firefighters.

***Allchin, et al. v. Volume Services*, 2017 U.S. Dist. LEXIS 123669 (S.D. Cal. Aug. 4, 2017).** Plaintiffs, a group of concession employees, filed a class action alleging that Defendant violated the overtime provisions of the California Labor Law. Plaintiffs filed a motion for class certification, which the Court denied. Plaintiffs sought to certify four classes, including: (i) an "overtime class" of all current and former non-exempt employees of Defendant compensated, at least in part, by service charge distributions and who worked overtime hours; (ii) a "late pay sub-class" of any member of the overtime class who also did not receive all their full overtime wages upon termination or resignation; (iii) an "inaccurate pay statement class" of all current and former non-exempt employees of Defendant not provided with an accurate, itemized pay statement; and (iv) a derivative "UCL class." *Id.* at *7-8. Plaintiffs argued that Defendant failed to include service charges in the calculation of employees' regular pay rates for purposes of determining the proper overtime rate. Plaintiffs further argued that Defendant's pay statements violated the California Labor Code because they did not include all hourly rates or the name and address of the employer. *Id.* at *8-9. As to the overtime and late pay sub-classes, the Court found that Plaintiffs failed to demonstrate the presence of commonality, typicality, or predominance. Plaintiffs provided pay stubs in support of their motion, but failed to explain how the pay stubs demonstrated a miscalculation of his overtime pay, much less a miscalculation common to the entire class. Furthermore, the Court determined that even if Plaintiffs were able to show that overtime pay was miscalculated, they offered no evidence to show that class members were injured in a common manner. *Id.* at *12. Because Plaintiffs offered no evidence of other class members' injuries, the Court ruled they failed to establish that named Plaintiffs were typical to the class. *Id.* at *14. As the Court held that Plaintiffs failed to satisfy the commonality requirement because they offered no facts showing that class members were injured through a common course of conduct, they necessarily failed to show that common questions predominated over individual ones. *Id.* at *15. As to the inaccurate pay statement class, Plaintiffs stated that they were confused by their pay stubs. The Court found that even if Plaintiffs confusion was enough to establish injury to them personally, Plaintiffs offered no evidence that the confusion was uniform throughout the proposed class. *Id.* at *25. Plaintiffs also argued that class members were injured

because class members' pay stubs included an inaccurate employer name and address. The Court noted that there was no evidence in the record that the address appearing on Plaintiffs' pay stubs was inaccurate. *Id.* at *27. Finally, Plaintiffs argued that Defendant's pay statements were inaccurate because employees' compensation stemming from services charges was not included in the hourly rates. *Id.* at *29. The Court, however, determined that Plaintiffs did not cite any legal support for their claim that "applicable hourly rates" should include the service charges. *Id.* at *30. Further, the Court opined that Plaintiffs failed to establish that the claim that employees' service charges were not included in their hourly rate was amenable to class proof. *Id.* The Court further held that Plaintiffs failed to show that proving that the alleged inaccurate statements were made knowingly and intentionally, a requirement under § 226, was subject to common proof. *Id.* at *31. The Court noted that overtime rates were calculated separately by individuals at each location, based on the location-specific constraints. *Id.* at *32. The Court determined that the site-specific differences complicated any common proof of whether misstatements were knowing and intentional. *Id.* at *32-33. Because the Court denied certification of the overtime class, the late pay sub-class, and the inaccurate pay statement class, the Court also denied certification of the derivative UCL class. Accordingly, the Court denied all aspects of Plaintiffs' motion for class certification.

***Alonzo, et al. v. Akal Security, Inc.*, 2017 U.S. Dist. LEXIS 192204 (D. Ariz. Nov. 21, 2017).** Plaintiff, an air security officer ("ASO"), filed a collective action alleging that Defendant deducted an hour lunch breach from his pay every day whether or not he actually took a lunch break, and that this practice violated the FLSA. Plaintiff moved to conditionally certify a collective action consisting of ASOs working for Defendant in Arizona on the grounds that they were similarly-situated to Plaintiff within the meaning of 29 U.S.C. § 216(b). *Id.* at *2. Plaintiff alleged that ASOs provided services during return flights home, including cleaning up the aircraft, collecting and inventorying supplies, filling out paperwork, and generally preparing for the next mission. *Id.* at *5. Plaintiff further alleged that a one-hour meal break was automatically deducted, and that he did not actually take a "lunch break" because any meal he ate was done while performing services for the company. *Id.* Plaintiff also asserted that similarly-situated employees lost the same one-hour of pay pursuant to Defendant's lunch break policy. *Id.* Plaintiff also described activities that ASOs were precluded from doing during their lunch breaks due to being confined on an airplane, and therefore contended that ASOs were not given *bona fide* meal breaks within the meaning of the FLSA. *Id.* at *5-6. In support of his motion for conditional certification, Plaintiff submitted his own declaration that essentially reiterated the factual allegations of the complaint. Under even the lenient standards of the notice stage of § 216(b), the Court found that Plaintiff's allegations and sole declaration were insufficient to show the existence of a group of similarly-situated individuals. *Id.* at *6. The Court held that Plaintiff described his own experience, but had provided no evidence to show that others were similarly-situated to him, and therefore Plaintiff failed to demonstrate a factual nexus that could bind putative collective action members. *Id.* at *7. The Court also noted that, even if Plaintiff had established that similarly-situated individuals existed, Plaintiff failed to sufficiently allege that the group of workers was subjected to an illegal plan or policy. *Id.* at *8-9. The Court explained that an automatic meal deduction is not *per se* illegal under the FLSA, because although confined to an airplane, the ASOs' inability to enjoy entertainment or run errands was not in itself a violation of the *bona fide* meal break regulations. *Id.* at *9. Accordingly, the Court found that Plaintiff failed to show that other ASOs were similarly-situated or that they were subjected to an illegal policy of working without compensation during their meal breaks. *Id.* at *10. The Court therefore denied Plaintiff's motion for conditional certification of a collective action.

***Angeles, et al. v. US Airways*, 2017 U.S. Dist. LEXIS 20161 (N.D. Cal. Feb. 13, 2017).** Plaintiffs, a group of Fleet Service Agents ("FSAs"), brought a class action alleging that Defendants failed to pay them for all hours worked in violation of the California Labor Code. Plaintiffs, among other things, handled bags, mail, and cargo, as well as waved in, pushed back, and cleaned aircraft. In 2008, Defendant implemented time-keeping software called "Workbrain." *Id.* at *3. FSAs clocked-in and out electronically using the software, which tracked their time and pay. Each FSA's schedule was programed into Workbrain for each bid period so that if an FSA was clocked-in during their scheduled time, Workbrain automatically logged that period as paid time. Conversely, when an FSA clocked in before or remained clocked-in after their scheduled time, Workbrain logged this time as unpaid time. Many FSAs clocked-in before their scheduled shift or remained clocked-in after their shift ended. Workbrain automatically logged this time as unpaid, regardless of whether they were working or engaging in personal activities. Plaintiffs allege that they were not paid for work performed during these periods. The Court

had previously granted class certification of the two grace period sub-classes, and following discovery, Defendant moved to decertify the sub-classes. Plaintiff's class members included all former US Airways FSAs "who worked as Fleet Service Agents in the State of California at any time on or after June 22, 2008, until the date of certification and who are members of one or more of Plaintiffs' sub-classes." *Id.* at *4. Sub-class 2 was made up of FSAs who, while clocked-in, engaged in pre-shift work, and were therefore owed compensation for hours worked. Sub-class 3 was comprised of FSAs who, while clocked-in, engaged in post-shift work and were owed compensation for hours worked. Defendant asserted that post-certification discovery revealed that each California station had station-specific policies and practices for tracking grace period work for which an FSA should have been paid*. Id.* at *5. The Court determined that Plaintiffs failed to establish the commonality requirement of Rule 23(a)(2) or the predominance requirement of Rule 23(b)(2). The Court concluded that Plaintiffs failed to provide evidence that Defendant had a common policy requiring FSAs to report to work early or perform work before and after their shifts. Instead, the Court found that the record demonstrated that employees made personal choices about how early to show up before their shifts and how late to leave afterwards. *Id.* at *9. Further, the Court opined that FSAs routinely engaged in personal activities during the grace periods, including watching TV, talking, and playing on their phones. *Id.* at *9-10. The Court reasoned that there was no way for common evidence to determine who was working, how long they were working, whether they reported working, and whether they were not paid for working. *Id.* at *10. The Court therefore ruled that it was impossible to conclude that common questions predominated over individual ones. Accordingly, the Court granted Defendant's motion for decertification of Plaintiffs' grace period sub-classes.

***Apodaca, et al. v. Costco Wholesale Corp.,* 675 Fed. Appx. 663 (9th Cir. 2017).** Plaintiff, an employee, filed an action alleging that Defendant failed to pay minimum wage and overtime compensation in violation of the California Labor Code. *Id.* at 664. Plaintiff alleged that Defendant provided inaccurate wage statements in violation of § 226 of the California Labor Code. Plaintiff filed a motion for class certification of her § 226 claims and for injunctive relief. The District Court denied class certification, and on appeal, the Ninth Circuit affirmed. At the outset, the Ninth Circuit stated that to establish a § 226 claim, Plaintiff must demonstrate both a violation of § 226(a) and an injury under § 226(e). Plaintiff asserted that she was entitled to relief as a result of Defendant's "knowing and intentional" failure to list on the wage statement the total hours and the separate hourly rates for vacation pay and vacation pay at the overtime rate on the line "vacation pay/non-exempt salaried vacation or float overtime." *Id.* at 665. In response, Defendant argued that it complied with § 226(a) because it listed the total hours worked, provided corresponding hourly rates, and that any alleged violation of § 226(a) was not "knowing and intentional" under § 226(e). *Id.* The California Labor Code provisions at issue require that an employer provide an accurate itemized wage statement listing "total hours worked by the employee," and "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." *Id.* The District Court concluded that the line at issue – "vacation pay/non-exempt salaried vacation or float overtime" – did not reflect "total hours worked," but instead represented paid time-off. *Id.* at 665-66. The Ninth Circuit agreed and explained that in the line "vacation pay/non-exempt salaried vacation or float overtime," Defendant included additional information not required by the statute, *i.e.,* information regarding paid vacation, and therefore Defendant's policy did violate § 226(a). The Ninth Circuit thereby found that Defendant's wage statements satisfied the requirements of § 226(a) because they listed the total hours worked and the corresponding hourly rates. The Ninth Circuit opined that the hours worked and hourly rate could be "promptly and easily determined from the wage statement alone." *Id.* Therefore, because Plaintiff had not established a § 226 claim, the Ninth Circuit found that the District Court properly denied Plaintiff's request for class certification and injunctive relief, and affirmed the District Court's decision.

***Ayala, et al. v. U.S. Xpress Enterprises,* 2017 U.S. Dist. LEXIS 125247 (C.D. Cal. July 27, 2017).** Plaintiff, a truck driver, brought a class action alleging that Defendant failed to provide meal and rest breaks, failed to pay for all hours worked, and failed to provide itemized wage statements in violation of the California Labor Code. Plaintiff filed a motion for class certification pursuant to Rule 23, which the Court granted. Defendant paid drivers for completed deliveries based on the computerized miles attributable to each delivery and certain accessorial wages. Plaintiff alleged that, as a result of Defendants' policy of paying drivers based on miles driven, he and the putative class members were not paid for off-the-clock work, not paid minimum wage, not provided meal and rest periods or a premium in their absence, not given properly itemized pay statements or accurate and complete time and pay records, and not paid accrued wages at the end of employment in violation of California's

wage & hour laws. *Id.* at *4. Plaintiff initially sought class certification of a class of all truck drivers who worked in California for Defendant after the completion of training at any time since four years from the filing of the action until such time as there was a final disposition of the lawsuit. *Id.* at *5 The Court denied Plaintiff's motion because the nationwide scope of the class that included drivers residing in 47 states would require individualized choice-of-law analyses. The Court's primary concern was that it would need to perform separate analyses for the class members residing in each state. *Id.* at *6. Plaintiff subsequently amended his class definition to include only California residents, and provided additional evidence that he claimed would allow him to prove his substantive claims on a class-wide basis with limited individualized inquiry. Defendants argued that Plaintiff failed to satisfy the predominance requirement of Rule 23(b)(3), and maintained that individualized inquiries would still dominate common ones with regard to both choice-of-law as well as Plaintiff's legal claims. *Id.* at *10. Defendants did not contest Plaintiff's ability to meet the other requirements of Rule 23. The Court agreed with Plaintiff that the new class definition solved the predominance issues related to choice-of-law. This is because the Court would no longer need "to perform a conflict-of-law analysis for each of the 48 states that the putative members reside in." *Id.* at *12. Further, the Court noted that as to Plaintiff's legal claims, Plaintiff contended that Defendants maintained a per mile compensation rate that failed to compensate employees for time spent on non-productive work tasks, and that Defendants not only failed to pay class members for time spent performing these tasks, but also required that class members perform certain tasks all of the time, including when they were on meal and rest breaks or during sleeper berth time. *Id.* at *27. As a result, the Court found that several common issues emerged that make resolution of the core of Plaintiff's claims amenable to class-wide proof. The Court briefly addressed the Rule 23(a) requirements and found that Plaintiff met all of the requirements as well. Accordingly, the Court granted Plaintiff's motion for class certification.

***Barker, et al. v. U.S. Bancorp,* 2017 U.S. Dist. LEXIS 93302 (S.D. Cal. June 16, 2017).** Plaintiffs, a group of former in-store branch managers ("IBMs") filed a class and collective action alleging that Defendant improperly classified them as exempt employees in violation of the FLSA and the California Labor Code. Plaintiffs asserted that the exempt classification was improper because they spent more than half of their time performing non-managerial duties similar to those of a "universal banker," which is a non-exempt position. *Id.* at *2. Plaintiffs filed a motion for class certification of their California Labor Code claims pursuant to Rule 23(b), which the Court denied. Plaintiffs sought to represent a class consisting of "all current and former in-store branch managers who, at any time since July 23, 2011, were: (i) employed in California; (ii) classified as exempt from overtime; and (iii) for at least one workweek, spent over 50% of their time performing the same duties as non-exempt in-store bankers. *Id.* at *3-4. The Court found that a determination of whether IBMs were misclassified would require an individualized inquiry into how each IBM actually spent his or her time at work. *Id.* at *6. The Court held regardless of whether the class was defined as all California IBMs, or as California IBMs who spent more than 50% of their time on what Plaintiffs believe to be non-exempt work, the only IBMs who would be entitled to recovery would be ones who actually spent more than 50% of their time on non-exempt work. *Id.* at *6-7. The Court reasoned that Plaintiffs' proposed class definition demonstrated that Defendant's policies affected each IBM differently depending on the IBM's specific working conditions. *Id.* at *7-8. The Court noted that as IBMs would not be class members simply by virtue of being an IBM, an inquiry into the individual circumstances of each IBM class member would be necessary to determine whether that class member had been misclassified. *Id.* at *8. The Court opined that Plaintiffs did not offer any method to determine membership in the proposed class using common evidence, which further highlighted how individual inquiries predominated and how a class action would not be superior to other means for adjudication. *Id.* at *9. In sum, the Court ruled that with their class definition, Plaintiffs essentially conceded that Defendant's policies did not cause all IBMs to spend more than 50% of their time on non-exempt tasks such that each IBM would be a class member merely by virtue of being an IBM. *Id.* Therefore, the determination of whether an IBM actually spent more than 50% of her time on non-exempt tasks and was misclassified as exempt required the presentation of evidence that "varies from member to member." *Id.* at *9-10. Thus, the Court held that Plaintiffs failed to meet their burden under Rule 23(b)(3). Accordingly, the Court denied Plaintiffs' motion for class certification.

***Barker, et al. v. U.S. Bancorp*, 2017 U.S. Dist. LEXIS 162717 (S.D. Cal. Oct. 2, 2017).** Plaintiffs, a group of in-store branch managers ("IBMs") filed a collective action alleging that Defendant misclassified them as exempt employees and therefore failed to pay overtime compensation in violation of the FLSA and the California Labor Code. The Court previously granted Plaintiffs' motion for conditional certification and certified a collective action

of "all persons currently or formerly employed by Defendant in the United States as an in-store branch manager or any other similar position and classified as exempt at any time since July 23, 2012." *Id.* at *2-3. Following conditional certification, over 500 IBMs filed consents to join the lawsuit. Defendant subsequently moved to decertify the collective action on the grounds that: (i) there was no evidence that a uniform policy caused Plaintiffs' alleged injuries; (ii) Plaintiffs worked in disparate factual and employment settings; (iii) Defendant individualized defenses to Plaintiffs' claims could not be resolved on a collective basis; and (iv) collective treatment was neither fair nor efficient given the facts in evidence. *Id.* at *5. The Court first looked at whether Plaintiffs had differing job titles or duties, worked in different geographical locations, and worked under different supervisors. *Id.* at *5-6. Defendant argued that during depositions, several named Plaintiffs testified to differences in how they spent their time at work, and illustrated significant variations in how they executed their duties and spent their work time. *Id.* at *7. Defendant contended that each IBMs' experience varied depending on a myriad of factors, which in turn demonstrated that Plaintiffs were not similarly-situated. The Court agreed, and found that Plaintiffs had not offered substantial evidence of a company-wide, uniformly enforced policy of improperly classifying IBMs as exempt employees. The Court noted that Plaintiffs offered 29 "fill in the blank" declarations from numerous opt-in Plaintiffs. The Court stated that it was unlikely that 29 branch managers had identical experiences and described them in exactly the same words, and therefore the uniformity of the declarations provided little insight into the declarants' actual duties and experiences. *Id.* at *8. The Court found that even if taken at face value, the declarations of the 29 IBMs and two named Plaintiffs did not support a finding that the hundreds of other IBMs managing 734 in-store branches were subject to widespread misclassification. *Id.* at *9. The Court held that Plaintiffs simply made generally conclusory allegations regarding overarching policies based on carefully chosen deposition excerpts without producing substantial evidence of a "single decision, policy or plan." *Id.* at *11. Additionally, the Court concluded that determining each Plaintiff's primary duty would require individualized inquiries and fact-specific analysis in order to establish misclassification and that their disparate employment settings weighed in favor of decertification. *Id.* at *12. The Court determined that the wide variation in Plaintiffs' descriptions of their job duties and responsibilities during depositions was indicative of the fact that Plaintiffs' misclassification claims were not well-suited for collective action treatment and that the members of the collective action were not similarly-situated. *Id.* Further, the Court stated that Defendant would have to introduce evidence that was inherently individualized because determining whether Plaintiffs were exempt was fact specific. Given the need for such individualized inquiries and the lack of substantial evidence that Plaintiffs were subjected to a uniform decision, policy, or practice of misclassification, the Court was persuaded that proceeding collectively would be "unmanageable, chaotic, and counter-productive." *Id.* at *13. Accordingly, the Court granted Defendant's motion for decertification.

***Benson, et al. v. HG Staffing, LLC*, 2017 U.S. Dist. LEXIS 176064 (D. Nev. Oct. 23, 2017).** Plaintiffs, a group of room attendants formerly employed by Defendants, brought a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Specifically, Plaintiffs alleged that Defendants required them to arrive 20 minutes or more prior to their regularly scheduled start time to present themselves to their shift supervisors for room/floor assignments, a uniform inspection, and to retrieve tools necessary to complete their work tasks. Plaintiffs' case stemmed from an on-going case entitled *Sargant et al. v. HG Staffing, et al*., Case No. 13-CV-453. *Id.* at *2. In *Sargant*, the Court decertified a conditionally certified collective action because Plaintiffs were not similarly-situated as required by the FLSA. *Id.* After the collective action was decertified in *Sargent*, Plaintiffs filed an independent complaint to initiate this proceeding. *Id.* at *2-3. Plaintiffs sought to certify the proposed collective action for discovery and trial purposes based on a narrower collective action definition than that presented in *Sargent.* Plaintiffs' proposed collective action consisted of all current and former non-exempt employees employed by Defendants as room attendants who were required to perform pre-shift work activities without compensation at any time during the relevant time period. *Id.* at *3. Defendants opposed the motion for certification, arguing the doctrine of issue preclusion barred the proposed certification, the first-to-file rule barred the proposed certification, the FLSA procedures had yet to be fulfilled by Plaintiffs, and Plaintiffs did not meet the requirements for a collective action certification. *Id.* at *4. The Court found that the FLSA procedures were not fulfilled by Plaintiffs and denied the motion. The Court did not reach the parties' remaining arguments. *Id.* at *5. The Court held that Plaintiffs relied on actions taken in *Sargent* to argue that satisfaction of the FLSA procedural steps here. *Id.* at *6-7. However, the Court determined that this action was independent from *Sargent*, and even if Plaintiffs in *Sargent* sought conditional certification and joined with opt-in Plaintiffs as required by the FLSA, Plaintiffs were required to satisfy the FLSA requirements in this case independently. *Id.* at

*7. While the Court recognized that the parties intended to use a substantial amount of discovery from the *Sargent* matter, the Court still required this independent matter to undergo the first step of conditional certification to provide the opportunity of an opt-in process for similarly-situated Plaintiffs. *Id.* The Court stated that otherwise Plaintiffs here have no right to represent a collective action brought under the FLSA. The Court thereby held that Plaintiffs skipped the procedural steps required for FLSA certification, rendering their motion for conditional certification premature. *Id.* As a result, the Court denied Plaintiffs' motion for conditional certification without prejudice.

***Blanco, et al. v. City Of Rialto,* Case No. 17-CV-994 (C.D. Cal. Oct. 30, 2017).** Plaintiffs, a fire captain and a police sergeant, alleged that Defendant excluded cash paid for foregoing healthcare benefits and/or healthcare contributions made of their behalf from the regular rate when calculating overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court denied. Plaintiffs sought certification of all of Defendant's current and former employees who received cash payments in lieu of healthcare benefits and/or received contributions made on their behalf toward the purchase of healthcare benefits and worked overtime since May 18, 2014. *Id.* at 2. In support of their motion, Plaintiffs submitted declarations describing Defendant's alleged FLSA violations and five different memoranda of understanding ("MOU") between different bargaining units and Defendant. *Id.* at 3. The Court found that the MOUs that Plaintiffs provided were not evidence that all collective action members were subject to the same policy over the same time period, as they covered different time periods and outlined different pay and overtime policies. *Id.* The Court further determined that Plaintiffs declarations were deficient because they did not include any evidence that other collective action members were improperly paid for their work. *Id.* Plaintiff stated that their base rates were improperly calculated, but the Court opined that they did not offer any evidence that other workers' overtime was improperly calculated. *Id.* The Court reasoned that Plaintiffs have not provided substantial evidence that there were other similarly-situated potential collective action members. *Id.* at 4. The Court concluded that while the standard for conditional certification was lenient, it requires some evidentiary support that proposed collective action members are similarly-situated. *Id.* Accordingly, the Court denied Plaintiffs' motion for conditional certification of a collective action.

***Bolding, et al. v. Banner Bank*, 2017 U.S. Dist. LEXIS 206742 (W.D. Wash. Dec. 15, 2017).** Plaintiffs, a group of current and former mortgage loan officers, filed a collective action alleging that Defendant failed to pay them overtime compensation and that it required Plaintiffs to work off-the-clock in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted in part. Plaintiffs alleged that their daily functions could not be accomplished during normal business hours, that Defendant required mortgage loan officers to be available whenever clients needed them, and that Defendant knew that the mortgage loan officers were working more than 40-hours per week but discouraged accurate reporting of overtime hours and refused to compensate for overtime hours that were not pre-approved. *Id.* at *4. In support of these allegations, Plaintiffs provided job descriptions for loan officers, which identified both in-office and out-of-office functions as essential to the position. Plaintiffs also provided three declarations and a deposition transcript from four mortgage loan officers. The declarations supported the allegations that the loan officer positions, the way that hours were tracked, and compensation calculations were centrally controlled and did not vary from branch to branch or regional office to regional office. The declarations also stated that many of their tasks and responsibilities could not be performed in the office or during normal business hours, they were required to make themselves available to customers and potential leads after hours and on weekends, and that Defendant knew the mortgage loan officers were working additional hours outside the office, but pressured employees not to record overtime and/or refused to approve timesheets that recorded overtime hours. *Id.* at *4-5. Plaintiffs further alleged that their overtime compensation rate was not correctly calculated, which resulted in under-payment of wages. *Id.* at *5. In response, Defendant offered employee declarations stating that Defendant expected loan officers to work around 40 hours per week and that it had policies that specifically prohibit working "off-the-clock" and/or failing to record all hours worked. *Id.* at *6. The Court held that Defendants' challenges would be considered after discovery was completed during the second stage of the collective action analysis. The Court determined that at this stage of the litigation, Plaintiffs had sufficiently supported their allegations of a uniform policy resulting in unpaid hours and that other loan officers were similarly impacted by these practices. Accordingly, the Court granted Plaintiffs' motion for conditional certification of a collective action as to Plaintiffs' off-the-clock claims. However, with regard to Plaintiffs' overtime calculation claims, the Court held that Plaintiffs'

allegations were not substantiated and their evidence was non-existent. *Id.* at *8. The Court determined that Plaintiffs provided no information regarding the basis for their belief that they had been short-changed and there was no evidence of the calculations Defendant used, no pay stubs, and no facts raising a plausible inference of wrongdoing. *Id.* at *9. Accordingly, the Court denied conditional certification as to the overtime calculation claims.

***Bowerman v. Field Asset Services,* 2017 U.S. Dist. LEXIS 39000 (N.D. Cal. Mar. 17, 2017).** Plaintiffs, a group of vendors who perform property preservation services, brought a class action alleging violations of California Labor Code ("CLC"), the Unfair Competition Law ("UCL"), and the Private Attorney General Act ("PAGA"). *Id.* at *22. Plaintiffs moved for partial summary judgment as to their status as employees and their entitlement to overtime pay and expenses. *Id.* at *25. Defendant moved to decertify the class on grounds of commonality, predominance, and superiority. *Id.* at *34. The Court noted that Defendant's argument as to decertification was that the factual variations among vendors precluded class treatment because neither side could establish that every vendor was either an employee or an independent contractor. *Id.* at *35. The Court found that this was insufficient to negate class certification and denied Defendant's motion to decertify. *Id.* The Court granted Plaintiffs' motion on the basis that Plaintiffs were employees, and therefore Defendant was liable for failure to pay overtime and business expenses. *Id.* at *74. The Court noted that pursuant to California law, Plaintiffs presented evidence that they provided services to Defendant and hence they established a *prima facie* case that the relationship was one of employer/employee. *Id.* at *53. The Court relied on a right of control test and ruled that the overwhelming weight of the evidence supported a finding that Defendant retained and exercised the right to control the manner and means of the vendors' work. *Id.* at *3. Plaintiffs presented Defendant's own documents, such as vendor qualification packets, work orders, vendor profiles, and training material to establish that Defendant retained the right to control. *Id.* at *50. The Defendant required work to be done within three days of receiving a work order and the Court found the fact that Defendant did not dictate the precise hours worked to be of little consequence. *Id.* at *55. The Court noted that some secondary factors for evaluating proper classification weighed in favor of independent contractor status, such as: (i) the parties' contract indicating independent contractor status; (ii) the opportunity for profit and loss for the Plaintiffs; and (iii) employment of others. *Id.* at *74. However, the Court ruled that Defendant could not overcome the strong evidence of control, as Defendant told vendors where to go, when to go, what to do, and when to get it done. This established that Plaintiffs were employees as a matter of law. *Id.* at *54. The Court denied Defendant's motion as to two class members finding that each of the businesses' level of success did not preclude a finding that they were employees because of the right to control that Defendant maintained. *Id.* at *84. However, the Court granted summary judgment as to one class member who never executed a contract with Defendant as the class included only those who were designated as independent contractors. *Id.* at *78. Accordingly, the Court denied Defendant's motion to decertify the class and granted Plaintiffs' motion for partial summary judgment. *Id.* at *84-85.

***Brown, et al. v. Permanente Medical Group, Inc.*, 2017 U.S. Dist. LEXIS 15789 (N.D. Cal. Feb. 2, 2017).** Plaintiffs, a group of advice nurses, brought a collective action alleging that Defendant failed to pay for all time worked, including overtime, as required by the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. The Court conditionally certified a collective action of "all current and former hourly advice nurses who work or have worked for Defendant at any time from October 20, 2013 through judgment." *Id.* at *2. The Court stated that the evidence of uniform policies and practices for advice nurses supported conditional certification. *Id.* Plaintiffs alleged in their declarations that Defendant's policies lead to systematic under-payment at the beginning, middle, and end of shifts, and they supported the declarations with documents submitted with their reply brief, including policy manuals and a job description for advice nurses. *Id.* at *3. The Court noted that Plaintiffs also all asserted that they were not paid for time they spent logging-in to software programs at the beginning of their shifts, preparing to resume taking calls at the end of meal breaks, and logging-out of the software programs and finishing phone calls at the end of their shifts. *Id.* In response to the Plaintiffs' declarations, Defendant submitted declarations from other employees, corporate policy documents, and portions of Plaintiffs' depositions that it contended contradicted Plaintiffs' declarations and the complaint's allegations. However, the Court determined that the corporate policy documents and arguments submitted by Defendant further supported Plaintiffs' contention that advice nurses were subject to uniform policies and training. *Id.* at *4. Defendant also pointed to some uncertainty in Plaintiffs' depositions about

practices at the Vallejo and Sacramento call centers. The Court noted that it did not have declarations from nurses at the Vallejo and Sacramento call centers; however, the inability of Plaintiffs to remember who they talked with from the other call centers was not enough to show that they were unaware of the practices at those call centers. *Id.* The Court stated that Plaintiffs all stated in their declarations that Defendant did not fully compensate them for working more than eight hours in a day or 40 hours in a week during some weeks. *Id.* at *5. The Court therefore granted Plaintiffs' motion for conditional certification and authorized notice to be sent to potential collective action members.

***Christian, et al. v. Furmanite America, Inc.,* 2017 U.S. Dist. LEXIS 20885 (E.D. Cal. Feb. 14, 2017).** Plaintiff, an hourly technician, filed a putative class action alleging that Defendants violated various provisions of the California Labor Code and associated California wage & hour requirements. Defendant, a large industrial company, provides a variety of services in the machining, piping, and engineering fields. Plaintiff alleged that he was not allowed to take a second meal break to which he was entitled on days when he worked for more than ten hours. *Id.* at *1-2. Plaintiff further alleged that all other technicians worked similar hours and were not allowed to take a second meal break. Plaintiff moved for class certification pursuant to Rule 23, which the Court denied. The Court found that Plaintiff failed to meet the superiority requirement of Rule 23(b)(3). The Court stated that Plaintiff made no argument as how the superiority requirement was satisfied, nor did he submit evidence to enable the Court to evaluate the four factors of Rule 23(b)(3). The Court found that Plaintiff only stated that certification was proper under Rule 23(b)(3) because a common legal issue predominated. *Id.* at *3. The Court held that predominance was only one half of the relevant standard, and accordingly, Plaintiff did not demonstrate that certification was warranted. *Id.* The Court declined to address whether the prerequisites of Rule 23(a) were satisfied or whether Plaintiff was correct that a common legal issue would predominate. *Id.* at *3-4. Therefore, since Plaintiff did not demonstrate that class resolution would be superior to other available methods for the fair and efficient adjudication, the Court denied Plaintiff's motion for class certification.

***Conde, et al. v. Open Door Marketing, LLC*, 223 F. Supp. 3d 949 (N.D. Cal. 2017).** Plaintiffs, a group of sales representatives, filed suit against Defendants alleging that they were misclassified as independent contractors in violation of the Fair Labor Standards Act ("FLSA") and California labor laws. Plaintiffs also asserted a claim under the Private Attorneys General Act ("PAGA"). Previously, the Court had granted Plaintiffs' motion for condition certification of the FLSA claims. Subsequently, Defendant 20/20 ("20/20") moved to deny class certification and for judgment on the pleadings with respect to the PAGA claim. At the same time, Plaintiffs moved to expand the scope of the certified collective action. In 2013, 20/20 began providing marketing services for providers of wireless service plans and cellular phones. 20/20 contracted directly with sales representatives and as part of the onboarding process the sales representatives were presented with a mutual arbitration agreement. In October 2014, Defendants jointly created Defendant Open Door ("Open Door") as a spinoff company from 20/20 in which sales representatives contracted directly with Open Door rather than 20/20. Open Door required sales representatives to execute an independent contractor agreement and starting in 2016 the agreement included a mandatory arbitration provision that did not contain an opt-out provision. *Id.* *954. Approximately 234 putative class members signed arbitration agreements with either 20/20 or Open Door, and neither named Plaintiff signed an arbitration agreement. At the outset, the Court noted that Rule 23 did not prelude 20/20 from bringing a preemptive motion to deny certification. *Id.* at *957. The Court rejected Plaintiffs' assertion that 20/20's motion to deny certification was premature because discovery had not yet taken place. The Court found that the discovery sought did not prevent the Court from ruling on 20/20's motion because 20/20's motion was premised on the fact that Plaintiffs did not sign arbitration agreements, but nevertheless intended to certify a class that included individuals who signed arbitration agreements. 20/20 asserted that Plaintiffs were unable demonstrate typicality, commonality, and superiority. The Court held that the named Plaintiffs were unable to demonstrate typicality because they did not sign arbitration agreements, and therefore they lacked the ability to challenge the arbitration agreements on behalf of the class members who had signed them. The Court granted Defendant's motion to deny class certification as to the individuals who signed arbitration agreements with 20/20, and denied the motion with respect to individuals who signed arbitration agreements with Open Door. The Court reasoned that 20/20 lacked an interest to enforce or rely on Open Door's arbitration agreements. *Id.* at *963. Plaintiffs moved to expand the scope of the certified collective action to include individuals who entered into arbitration agreements with 20/20 and Open Door and worked in California and Nevada. The Court rejected 20/20's argument that Plaintiffs lacked standing as they did not work

directly for 20/20, because Plaintiffs alleged that 20/20 was liable as a joint employer. The Court ruled that FLSA conditional certification was warranted because whether employees were employed by 20/20 or Open Door, the employees were similarly-situated because they alleged that they suffered violations because of their misclassification as independent contractors. The Court therefore expanded the collective action to include individuals who signed the arbitration agreements, but limited the expansion to include only individuals in California to ensure the manageability of the case. Finally, the Court denied 20/20's motion for judgment on the pleadings as to the named Plaintiff Jennings' PAGA claim on the basis that she failed to adequately exhaust her administrative remedies and provided inadequate written notice to the California Labor & Workforce Development Agency. *Id.* at *970. The Court ruled that her notice was sufficient as it tied the alleged violations to Plaintiffs' misclassification theory, and therefore it denied the motion for judgment on the pleadings with respect to the PAGA claim. *Id.* at *973.

***Culley, et al. v. Lincare, Inc.,* 2017 U.S. Dist. LEXIS 121834 (E.D. Cal. Aug. 2, 2017).** Plaintiff, a healthcare specialist, filed a class action alleging violations of the California Labor Code and claims under the California Private Attorneys General Act ("PAGA") for failure to pay overtime and to provide meal and rest breaks. *Id.* at *2. Defendant moved for summary judgment, to decertify the class, and to exclude expert testimony. *Id.* The Court granted the motion for summary judgment in part and denied it in part, granted the motion to decertify, and denied the motion to exclude. *Id.* at *21-22. As to Plaintiff's reporting time claim, the Court preliminarily found sufficient numerosity when it included all 45 employees in its analysis as having potential claims. *Id.* at *5. After the close of discovery, however, Plaintiff identified only 20 members of the class with potential reporting time claims. *Id.* The Court agreed with Defendant that the reporting time claim lacked numerosity and granted Defendant's motion to decertify as to that claim. *Id.* at *6. As to the meal period claim, under the California Labor Code, an employer must pay an hour of pay for each workday that a meal period is not provided. *Id.* at *9. However, an employer is not liable if an employee chooses not to take or to wait before taking breaks. *Id.* In support of her motion for class certification, Plaintiff stated that she was not alleging that Defendant violated the meal period law. Instead, Plaintiff alleged that Defendant violated the California Unfair Competition Law ("UCL") when it unfairly or deceptively failed to pay meal premiums for missed meal breaks. *Id.* at *10. Plaintiff sought one hour of pay for each time a meal break was not taken or taken late, regardless of whether Defendant committed a violation, without distinguishing between breaks that were missed or delayed due to the employee's own preferences. The Court decertified the meal break claim on the basis that this was inconsistent with the theory of certification and Plaintiff could not simultaneously admit that Defendant did not violate California's meal period law and then attempt to collect wages accrued only when meal period laws were violated. *Id.* at *11. The Court noted that Plaintiff's proposed damages model was unconnected to any specific loss resulting from Defendant's allegedly unfair and deceptive treatment of meal breaks. Accordingly, the Court granted Defendant's motions for summary judgment and to decertify as to the meal period claim. *Id.* at *12. As to her overtime claim, Plaintiff claimed that the bonuses that she and the class received were non-discretionary and improperly excluded from their regular rate of pay for purposes of calculating overtime. *Id.* at *13. The Court granted Defendant's motion to decertify the bonus overtime pay claim on the grounds that individual issues predominated as to whether the bonuses were discretionary. *Id.* at *15. Defendant also claimed that the waiting time penalties that Plaintiff sought were excessive. *Id.* at *17. However, because the parties had not established the amount of waiting time penalties to which Plaintiff was statutorily entitled, the Court declined to address the constitutionality of those amounts and denied Defendant's motion for summary judgment on the issue. *Id.* at *18. The Court further denied Defendant's motion for summary judgment as to the civil penalties sought pursuant to the PAGA for wage statement violations because Plaintiff had not properly pled the proper statutory provision for damages, since there was no authority to support the proposition that the exact measure of damages must be pleaded. *Id.* at *18. Defendant also sought to strike the statement of Plaintiff's attorney because it improperly offered an expert opinion as to damages. The Court disagreed and denied the motion to strike, ruling that the statement did not constitute expert testimony. *Id.* at *20. The Court, therefore, granted summary judgment in part, granted Defendant's motion to decertify, and denied Defendant's motion to exclude.

***Davidson, et al. v. O'Reilly Auto Enterprises, LLC,* 2017 U.S. Dist. LEXIS 213310 (C.D. Cal. Dec. 15, 2017).** Plaintiff, a delivery driver, filed a class action alleging that Defendant violated various provisions of the California Labor Code ("CLC"). Plaintiff filed a motion for class certification of two classes, including: (i) a wage statement class of all individuals who worked as non-exempt, hourly employees in California from March 29, 2016 to April

2017; and (ii) a rest period policy class consisting of all individuals who worked for Defendant as non-exempt, hourly employees in California from March 29, 2013 until the date of certification. *Id.* at *2. The Court denied Plaintiff's motion. The Court found that Plaintiff's wage statement class was predicated on violations of §§ 206(a)(8) and 1174(d) of the CLC, which it had previously dismissed with prejudice. *Id.* at *3. Accordingly, the Court denied certification of these claims on the grounds that they were moot. As to the rest period class, the Court determined that Plaintiff failed to meet the requirements of commonality and predominance. Plaintiff asserted that the common question across the class was whether Defendant's rest break policy was illegal. The Court found that while Plaintiff did provide evidence that, for a period of time, Defendant had a written rest break policy that violated California law, she failed to provide evidence showing how, or even if, that policy was consistently applied to all of the 21,000 proposed class members. *Id.* at *5. The Court determined that Plaintiff's evidence failed to implicate any illegal practices, and Plaintiff's own declaration did not state that she was ever denied proper rest breaks. *Id.* at *6. Moreover, in its opposition, Defendant offered declarations from 310 employees establishing several pertinent facts, including: (i) Defendant's policy was that rest breaks must be provided per California law; (ii) employees working between 6 and 10 hours were afforded the chance for a second 10-minute rest break; (iii) employees working from 10 to 12 hours were afforded the chance for a third 10-minute rest break; (iv) employees received a rest break every two hours; and (v) employees have never seen the rest break policy contained in the store operation manual. *Id.* at *11. The Court therefore held that Plaintiff failed to meet her burden to showing that Defendant not only maintained a facially effective policy, but also implemented unlawful practices pursuant to the policy. *Id.* Accordingly, the Court found that common issues did not predominate and it denied Plaintiff's motion for class certification.

***Delnoce, et al. v. Globaltranz Enterprises, Inc.*, Case No. 17-CV-1278 (D. Ariz. Sept. 25, 2017).** Plaintiffs, a group of logistics specialists, filed a collective action alleging that Defendant misclassified them as exempt employees and thereby failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification, which the Court denied. Plaintiffs submitted four declarations in support of their motion for conditional certification. The declarations contained largely the same information, including that Plaintiffs were paid a base salary of $40,000 and typically worked five to 25 hours of overtime per week without compensation. *Id.* at 6. Plaintiffs also alleged that they were expected to work off premises, outside of regular business hours, during lunch, and on weekends. *Id.* at 4. Plaintiffs further alleged that Defendant was aware of their work habits and did not keep records of, or provide compensation for, this work. *Id.* In response, Defendant submitted a declaration from its Vice President of Human Resources stating that Plaintiffs were actually employed in different positions than the members of the collective action they sought to certify, including as managers and a Vice President. *Id.* at 6. The Court found that Plaintiffs failed to carry their burden of showing that they were similarly-situated to other employees with the same job title. The Court noted that Plaintiffs' declarations were nearly identical, vague, conclusory, and did not discuss how they learned about Defendant's work expectations. *Id.* at 8. The Court further opined that Plaintiffs referred to Defendant's "policy" and "practice," but failed to identify a specific policy or practice that Defendant's used across the proposed collective action. *Id.* The Court also noted that Plaintiffs did not explain how it was that they knew that other employees are working more than 40 hours per week, or working after hours at home. *Id.* Accordingly, the Court stated that although the proposed collective action members may have had similar job descriptions and performed similar work, Plaintiffs had not shown a similarity of work schedules, experience with respect to Defendant's expectations, or that they were subjected to a single policy or plan. *Id.* at 9. The Court therefore denied Plaintiffs' motion for conditional certification of a collective action.

***Greene, et al. v. Jacob Transportation Services*, 2017 U.S. Dist. LEXIS 151525 (D. Nev. Sept. 19, 2017).** Plaintiffs, a group of limousine drivers, filed a class and collective action alleging that Defendants failed to pay overtime and minimum wages in violation of the FLSA and state wage & hour laws. Plaintiffs filed a motion for class certification of their state law claims, and the Court granted the motion. Plaintiffs' proposed class consisted of all current and former employees of Defendants who worked as limousine drivers at any time during the relevant limitation periods. *Id.* at *3. The Court found that Plaintiffs' proposed class consisted of over 500 employees and therefore met the numerosity requirement. *Id.* at *8. Plaintiffs asserted there were three questions common to the entire class, including: (i) whether Defendants failed to compensate class members for all the hours that they worked; (ii) whether Defendants failed to compensate class members at least the minimum wage for all the hours that they worked; and (iii) as a result of failing to compensate class members for

all the hours that they worked and their minimum wages, whether Defendants failed to compensate class members who were former employees all their wages due and owing at the time of their termination. *Id.* at *9. Moreover, Plaintiffs asserted that all class members worked under the same policies and procedures that resulted in the same injury to all class members. The Court determined that Plaintiffs posited questions of fact that were common to the class because the answers to these questions would provide a class-wide resolution. *Id.* at *10-11. Because the determination of the core issues of fact or law were common to the entire proposed class, the Court found that the commonality requirement was also satisfied. *Id.* at *11. Plaintiffs alleged that all limousine drivers suffered the same injury – the failure to pay wages pursuant to Nevada wage & hour law – stemming from Defendants' uniform off-the-clock policy. Plaintiffs and the class they sought to represent were all Defendants' employees and were subject to the same workplace policies. The Court stated that because they were subject to the same workplace policies, the proposed class was conceivably injured by the same course of conduct, and therefore the class met the typicality requirement. *Id.* at *12. As to adequacy, Plaintiffs maintained that neither the named Plaintiffs nor their counsel had "interests antagonistic to those of other class members." *Id.* at *12. As such, the Court found that pursuant to the proposed class' shared interest, Plaintiffs and their counsel would sufficiently prosecute the action, and therefore the adequacy requirement had been met. As to the predominance requirement, Plaintiffs claimed that their common question was "whether Defendants suffered or permitted Plaintiffs to perform unpaid work 'off-the-clock.'" *Id.* at *13-14. The Court held that this common question could be resolved for all members of the class in a single adjudication because the company-wide practices and policies impacted all members of the class that Defendants employed. *Id.* at *14. Accordingly, the Court opined that the common questions predominated over the individual questions that may arise, thereby satisfying the predominance requirement. The Court also stated that it would be more efficient and consistent to pool Plaintiffs' claims together, and the superiority requirement was thereby satisfied. *Id.* at *16. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Greer, et al. v. Dick's Sporting Goods,* 2017 U.S. Dist. LEXIS 57165 (E.D. Cal. April 13, 2017).** Plaintiffs, a group of employees, filed a class action alleging that Defendant violated the California Labor Code by: (i) requiring employees to wait, while off-the-clock, for an inspection of their personal belongings before exiting the store; and (ii) requiring employees to purchase apparel appropriate to their department without reimbursing employees for clothing-related expenses. Plaintiffs filed a motion for class certification of two classes, which the Court granted. Plaintiffs' classes included: (i) all non-exempt or hourly paid employees who worked for Defendant in its retail stores within California at any time from March 18, 2011 until January 31, 2015 (the "security check class"); and (ii) all non-exempt or hourly paid employees who worked for Defendant in its retail stores within California at any time from March 18, 2011 until the date of certification (the "business reimbursement class"). *Id.* at *4. Defendant did not dispute that Plaintiff's proposed classes met the requirements of Rule 23(a), but asserted that they could not meet the predominance and superiority requirements of Rule 23(b). As to the first class, the security check class, Plaintiff pointed to three common questions of fact and law to establish predominance, including: (i) whether Defendant's security check policy and practice resulted in employees undergoing security checks off-the-clock when leaving the store at the end of a shift; (ii) whether Defendant's security check policy and practice resulted in employees undergoing security checks off-the-clock when leaving the store for meal or rest breaks; and (iii) whether Defendant's security check policy and practice violated California law. Defendant argued that Plaintiff did not establish predominance because the amount of time spent off- the-clock was necessarily an individual determination because *de minimis* time is not compensable. The Court found that Plaintiff's declarations indicated nearly all class members were subjected to the security check policy, which therefore satisfied predominance. *Id.* at *18 . As to superiority, the Court noted that Plaintiff's claims were for relatively small amounts. The Court held that because class members had modest claims, individual litigation was unlikely to present a viable means of recovery. *Id.* at *25. Further, the Court noted that the number of potential Plaintiffs, as many as 9,000, also made joinder impracticable. *Id.* at *26. The Court concluded that the value of the claims was small enough to suggest individual actions would be inefficient, and therefore it ruled that the security check class also satisfied the superiority requirement. The Court then reviewed Plaintiff's business reimbursement class claims. Plaintiff relied on testimony from Defendant's corporate designees, his deposition testimony, and documents produced during discovery to support his argument that putative class members were required to purchase clothing appropriate to their department without reimbursement. *Id.* at *29. Plaintiff asserted that Defendant instituted a "look policy" that dictated what employees may wear and required employees to comply with one of three established looks and

provided employees with a list of acceptable and unacceptable clothing. *Id.* at *32-33. The Court found that the underlying policies provided common proof relevant to class-wide resolution, and that the common questions predominated over individual inquiries. *Id.* at *33. The Court stated that Defendant provided a look policy with specific requirements as to what was acceptable, and although the policy may not have been expressly required, Defendant maintained a *de facto* policy by explaining that compliance was "extremely important" and that non-compliance was a basis for dismissal. *Id.* at *34. The Court thereby found that the business reimbursement class met the predominance requirement. As to superiority, the Court found that the business reimbursement class satisfied the superiority requirement for the same reasons as the security check sub-class. The Court thereby held that both classes satisfied the requirements of Rule 23(a) and Rule 23(b)(3), and it granted Plaintiff's motion for class certification.

***Guinn, et al. v. Sugar Transportation Of The Northwest, Inc.*, 2017 U.S. Dist. LEXIS 209604 (N.D. Cal. Dec. 20, 2017).** Plaintiff, a truck driver, filed a class and collective action alleging that Defendant failed to pay overtime wages in violation of the FLSA, failed to timely pay wages or provide meal and rest periods in violation of California Labor Code, and engaged in unlawful and unfair business practices in violation of §§ 17200 of California's Business and Professions Code. *Id.* at *3. Plaintiff filed a motion for conditional certification of a collective action of Plaintiff's FLSA claims and for class certification of his state law claims pursuant to Rule 23. The Court denied the motion. Defendants contended that all of the claims of the putative members of the proposed collective action and class action turned on case-by-case, fact specific analyses of whether each driver was exempt from the overtime requirement under the Motor Carrier Act exemption. Plaintiff asserted that none of the drivers qualified for this exemption because the drivers never crossed California's state lines and thus did not engage in interstate transportation. *Id.* at *6. The Court explained that at this stage of the litigation, Plaintiff had the burden of proving that the members of the collective action satisfied the similarly-situated requirement. The Court held that Plaintiff's attempt to establish that the class was similarly-situated was based entirely upon the fact that the drivers never crossed California state lines, but that drivers do not need to actually cross state lines in order to qualify for this exemption. Rather, it is sufficient that drivers "hauled goods in the practical continuity of movement in interstate commerce." *Id.* at *7. The Court therefore determined that it would need to engage in an individualized analysis to determine which, if any, of the drivers could in fact be categorized as exempt from the FLSA. As to class certification pursuant to Rule 23, the Court determined that Plaintiff failed to meet the predominance requirement of Rule 23(b). With regard to Plaintiff's meal and rest break claims, the Court held that Plaintiff had not identified a specific policy that precluded the drivers from taking a break. *Id.* at *16. Accordingly, the determination of whether a break was missed, and why, would involve an individual analysis into the daily behavior of each particular driver. Although Plaintiff argued that Defendants' delivery schedules impeded the ability of drivers to take meal and rest breaks, the evidence indicated that drivers themselves had discretion to decide when and if to take such a break. *Id.* at *16. Accordingly, the Court held that Plaintiff failed to satisfy the predominance requirement of Rule 23(b) with regard to his meal and rest break claims. *Id.* at *17. As to Plaintiff's proposed wage claims, the Court noted that Plaintiff's wage claim, which was brought under both the FLSA and §§ 17200, centered on whether the drivers were exempt from overtime pay, which it already found would entail an individualized analysis and determination as to which of the drivers, if any, engaged in interstate transportation. Therefore, the Court reasoned that, for the same reason that Plaintiff did not satisfy the similarly-situated requirement necessary to maintain a FLSA collective action, he also failed to demonstrate that common issues would predominate over individual questions with regard to his state law overtime claim. Accordingly, the Court denied Plaintiff's motion for conditional certification of a collective action and for class certification of his state law claims pursuant to Rule 23.

***Hubbs, et al. v. Big Lots Stores,* 2017 U.S. Dist. LEXIS 85265 (C.D. Cal. May 23, 2017).** Plaintiffs, a group of retail employees, brought a putative class action alleging wage & hour violations under state law. *Id.* at *2. Plaintiffs moved to certify six classes pursuant to Rule 23. The Court granted certification in part and denied in part. The Court also denied Defendant's motion to exclude Plaintiff's expert. *Id.* at *3. The complaint proposed a single class, defined as all individuals who worked for Defendant in its California retail stores in a non-exempt, hourly-paid position, at any time during the past four years. *Id.* at *6. None of the six classes that Plaintiff sought to certify were defined in the complaint. *Id.* The first three proposed classes were based on allegations that were made in the complaint. The fourth, fifth, and sixth classes were not based upon allegations in the complaint. The Court denied certification as to those classes because they were not timely. *Id.* at *10. The Court ruled that

certification of those classes would be unduly prejudicial to Defendant as it had not had the opportunity to conduct discovery on those classes. *Id.* The Court certified class one, a class that consisted of non-exempt employees of Defendant, who worked one or more closing shift at any store in which Defendant's record-keeping systems reflected a gap between the closing shift class members' end of shift time and the time the store's alarm was set. *Id.* at *23. The Court rejected Defendant's argument that the time worked off-the-clock by putative class members was *de minimis* and was not compensable under California law, ruling that Defendant had the burden of proving the affirmative defense. *Id.* at *22. The Court also denied certification as to proposed class two, which consisted of all non-exempt employees of Defendant who were subjected to security checks at Defendant's stores in California. *Id.* at 28. The Court ruled that Plaintiffs had not presented sufficient evidence to show that there was a common and consistent policy among the stores that all employees were subject to off-the-clock bag checks. *Id.* Plaintiffs presented insufficient evidence that managers at certain stores may have required off-the-clock bag checks. *Id.* As a result, the Court opined the requirements of Rule 23 as to commonality, predominance, numerosity, manageability, and superiority had not been shown. *Id.* at *29. The Court also denied certification as to the rest break class, consisting of non-exempt employees of Defendant in California who worked shifts longer than three and one-half hours at any time during the relevant period. Plaintiffs alleged that Defendants did not inform them of the California law on rest breaks and were not compensated when such breaks were missed. *Id.* at *30. As Defendant's handbook stated the legal policy for rest breaks, the Court rejected Plaintiffs' argument that the stores did not comply with the policy, and ruled that when an employer has a facially valid policy, there is a risk that substantial individualized inquiries will be necessary to determine liability. *Id.* at *36. Accordingly, the Court denied certification as to the rest break class because Plaintiffs failed to show sufficient evidence of a common policy that violated the law and Plaintiffs failed to propose a viable means of identifying those employees who claimed to have missed breaks. *Id.* at *36. In addition, the Court denied Defendant's motion to exclude Plaintiffs' expert, rejecting Defendant's contention that the expert failed to consider certain evidence, misapplied evidence as to factual matters, and did not give certain evidence sufficient weight. *Id.* at *47. The Court ruled that these objections did not address the reliability of the expert's opinions and were not a basis to exclude them, but instead went to the weight that should be given to his testimony. *Id.* Accordingly, the Court denied Defendant's motion to exclude the expert and granted Plaintiffs' motion for certification in part and denied it in part. *Id.* at *47-48.

***Humes, et al. v. First Student, Inc.,* 2017 U.S. Dist. LEXIS 109858 (E.D. Cal. July 14, 2017).** Plaintiffs, a group of bus drivers, filed a class action alleging that Defendant violated various provisions of the California Labor Code. Plaintiffs filed a motion for class certification pursuant to Rule 23(b)(3). The Court denied the motion, finding that Plaintiffs failed to meet the commonality, typicality, and predominance requirements. Plaintiffs alleged that Defendant: (i) failed to pay regular wages; (ii) failed to pay wages within the time allowed; (iii) failed to pay the minimum wage; (iv) failed to provide accurate itemized statements; (v) violated § 17200 of the Business and Professions Code with unlawful, unfair, and fraudulent business practices; and (vi) breached an oral contract. *Id.* at *3. Plaintiffs moved to certify a class of all current and former bus drivers who were employed by Defendant at its Fresno Yard location from October 28, 2011 to the present. The Court found that the parties submitted substantial contradictory evidence, including deposition excerpts and supporting declarations clearly demonstrating the absence of a common or uniform policy of failing to compensate drivers for additional time worked. *Id.* at *22. For example, Plaintiffs submitted evidence that drivers were not paid for additional time reported and that drivers were directed to change the times reported or that hours were reduced to conform to Defendant's default times. *Id.* at *22. Defendant, however, submitted evidence supporting its position that it paid for all hours worked. *Id.* Given the discrepancies, the Court held that Plaintiffs had not offered sufficient evidence that the compensation policy about which they complained was commonly applied to all class members. *Id.* at *23. Further, the Court determined that Plaintiffs failed to identify uniform policies and systemic practices that applied uniformly to the class of employees. Given the discrepancies between the drivers' experiences, including payment discrepancies between Plaintiffs' own declarants, the Court found that there was no indication that Plaintiffs suffered the same or similar injuries as all class members. *Id.* at *24. The Court therefore determined that Plaintiffs also failed to meet the typicality requirement. The Court also noted that Plaintiffs had not adequately explained or defined the proposed class to account for changes in the time recording process, nor did they adequately explain how the blend of class members who used several different processes would result in common questions that predominated across the proposed class. *Id.* at *28. As a result, the Court opined that there would be individualized inquiries specific to apparent different sub-sets of

class members, and to individuals within those sub-sets, all of which demonstrated that the proposed class was not sufficiently cohesive to satisfy the Rule 23(b)(3) predominance requirement. *Id.* at *29. Further, since the Court held that that Plaintiffs had not met their burden to establish commonality, typicality, and predominance, it concluded that a class action would not be a superior method for resolving this litigation. The Court therefore denied Plaintiffs' motion for class certification.

***Jama, et al. v. GCA Services Group*, 2017 U.S. Dist. LEXIS 174239 (W.D. Wash. Oct. 20, 2017).** Plaintiff, a bus driver, filed a class action alleging that Defendants failed to minimum wage required by SeaTac Municipal Code § 7.45 (the "Ordinance") and sought back pay. Plaintiff filed a motion for class certification pursuant to Rule 23, which the Court granted. Plaintiff sought to certify a class of all employees of Defendant GCA Services jointly employed by Defendant Avis-Budget employed as hospitality workers or transportation workers and who worked one or more hours within the City of SeaTac at any time during the time period between January 1, 2014, to April 2016, who were paid less than the prevailing minimum wage. *Id.* at *2-3. The Avis-Budget Defendants opposed class certification and argued that some or all Plaintiffs were atypical and/or unrepresentative of the class and objected to the proposed class definition on the ground that it would create an impermissible "fail safe" class. *Id.* at *3. The Court noted that Plaintiffs submitted declarations stating that GCA Services and the Avis-Budget Defendants jointly employed approximately 80 people at the SeaTac facility, which it found sufficiently numerous to justify a class action. *Id.* at *6. The Court further determined that common questions existed as to Defendants' alleged failure to pay the prevailing wage and the answer to these questions would be the same for every class member. *Id.* at *7. Accordingly, the Court held that commonality was satisfied. The Court also found that each class member had claims based on the same alleged wrong as Plaintiffs, *i.e.*, a joint employer's failure to pay the prevailing wage. The Court stated that if Plaintiffs were to establish Defendants' statutory liability, such proofs would also establish the claims of the absent class members, and therefore Plaintiffs met the typicality requirement. *Id.* at *14. The Court also concluded that both Plaintiffs and Plaintiffs' counsel demonstrated a commitment to vigorously prosecuting the action on behalf of the class and would do so in an adequate manner. *Id.* at *17. The Court held that common questions predominated because whether Plaintiffs were able to establish their joint employer theory and liability under the Ordinance would also establish Defendants' liability to the absent class members. Accordingly, the underlying questions concerning Defendants' liability predominated over any individual issues related to the calculation of back wages for each employee. *Id.* at *18. The Court ruled that Plaintiffs also met the superiority requirement because the relative small recovery amounts suggested that each class member would not have a "significant interest in litigating his or her claims separately." *Id.* at *20. Further, the Court was unaware of any other litigation pending against the Avis-Budget Defendants for the claims Plaintiffs asserted, and therefore treating Plaintiffs' claims as a class action appeared to promote judicial economy. *Id.* at *21. The Court reasoned that managing a single class action would require fewer judicial resources than managing separate suits. However, the Court determined that Defendants correctly noted that Plaintiffs' initial class definition failed to set forth characteristics that could be identified at the outset of the litigation and instead required adjudication of the joint employer issue before one would know whether he or she was a class member. *Id.* The Court found that such class definitions are unfair to Defendants because they allow putative class members to seek relief in Court without being bound by an adverse judgment. Accordingly, Plaintiffs redefined the class definitions by reference to GCA Services' contract with the Avis-Budget Defendants so that class members were employee of GCA Services who worked as part of the contract between GCA Services and the Avis-Budget Defendants. The Court therefore granted Plaintiffs' motion for class certification.

***Luviano, et al. v. Multi Cable, Inc.*, Case No. 15-CV-5592 (C.D. Cal. Jan. 3, 2017).** Plaintiffs, a group of installation technicians ("ITs"), filed putative class and collective actions alleging that Defendants failed to pay overtime, pay minimum wage, provide rest-time and meal periods, and itemized wage statements. Plaintiffs alleged that the Defendants violated the FLSA because Defendants improperly classified Plaintiffs as independent contractors, while treating them as employees. Plaintiffs brought motions to certify their class actions and collective actions. Defendant opposed both motions and moved to strike the declarations of Plaintiffs' expert. The Court conditionally certified Plaintiffs' collective actions, certified their class claims under Rule 23, and granted Defendants' motion to strike, in part, portions of Plaintiffs' expert declarations. Plaintiffs allege that Defendants employed Plaintiffs as independent contractors for purposes of compensation, paying them per job and not keeping time records, while essentially treating them as employees. Defendants controlled

the jobs they performed, required them to wear uniforms, and display decals on vehicles. Plaintiffs were required to work more than 40 hours a week without overtime compensation. As to Plaintiffs' class certification motion, Defendants asserted that Plaintiffs' class definition created a fail-safe class and was not ascertainable. *Id.* at 19. Therefore, Defendants asserted that the class should not be certified. The class was defined as "all ITs paid as faux "independent contractors rather than employees." *Id.* The Court agreed that the adjective "faux" and phrase "paid as independent contractors rather than employees" incorporated improper legal conclusions. The Court modified the proposed class definition to include "all persons who entered into a contract for cabling services" and performed services between the relevant time-period. *Id.* at 22. The Court further found that the Plaintiffs satisfied the numerosity, commonality, and typicality requirements. However, Defendant asserted that the representative Plaintiff was not an adequate representative because he lacked integrity due to evidence that he had obtained employment through fraud, using a falsified driver's license, social security number, and insurance documents. The Court agreed that the credibility issues were well-founded and conditioned certification upon the satisfactory substitution of an adequate representative Plaintiff. The Court also found that Plaintiffs satisfied the Rule 23(b)(3) requirements that common questions predominate and that class action was a superior method of adjudication. Plaintiffs also moved for conditional certification of a collective action under the FLSA pursuant to 29 U.S.C. § 216(b). The Court granted the motion by applying the more lenient first-stage standard. Defendant asserted the heightened standard was the appropriate standard because the parties had already exchanged initial discovery and completed 12 depositions. The Court disagreed because discovery was not yet complete and as additional discovery might be necessary. Defendant also raised a § 7(i) FLSA exemption defense, but the Court refused to hear the merits of the FLSA exemption defense as it did not preclude conditional certification. The Court found that Plaintiffs' allegations as to the FLSA collective action satisfied the similarly-situated requirement, thereby rejecting Defendants' argument that Plaintiffs failed to set forth tests distinguishing between an employee and an independent contractor and did not show that the collective action members were not similarly-situated. Further, the Court noted that Defendants' assertions could be appropriately addressed at the second stage of § 216 certification. Accordingly, the Court also conditionally certified Plaintiffs' collective action.

***Manigo, et al. v. Time Warner Cable*, Case No. 16-CV-6722 (C.D. Cal. April 4, 2017).** Plaintiffs, a group of cable dispatchers, filed a class action alleging that Defendant failed to pay for meal and rest breaks in violation of California Labor Code. Plaintiffs filed a motion for class certification, which the Court denied on the basis that Plaintiffs failed to establish typicality, commonality, predominance, or superiority. Plaintiffs asserted that Defendant had a *de facto* policy requiring them to remain at their desks for the entirety of the workday due to understaffing. *Id.* at 1. Plaintiffs also asserted that they were required to work off-the-clock downloading computer programs. Defendant argued that its policies and procedures complied with the Labor Code and provided declarations from nine other workers confirming that Defendant enforced those policies and that they were not subjected to meal or rest break violations. *Id.* at 2. The Court found that Plaintiffs failed to identify common questions for which the answers would resolve any issue central to Defendant's alleged liability. The Court stated that understaffing was not an unlawful practice, nor was requiring employees to answer incoming calls. *Id.* at 7. While Plaintiffs alleged that these purported circumstances resulted in a *de facto* policy depriving the putative class of timely meal and rest breaks, the Court opined that the evidence fell short of establishing that connection. *Id.* The Court determined that even if Plaintiffs could show that all putative class members worked in a dispatch center that was understaffed, and that they were all subject to a policy requiring them to answer incoming calls, these circumstances did not establish that the class was uniformly denied the opportunity to take timely meal and rest breaks. *Id.* The Court also found that Plaintiffs could not show an injury common to the class, as Defendant provided evidence from nine workers who confirmed that they were not the victims of any meal or rest break violations and therefore not injured at all. *Id.* at 8. The Court also found that Plaintiffs' off-the-clock claims failed to satisfy Rule 23(a) because Plaintiffs had not identified any class-wide policy or procedure that required them to load computer programs before clocking-in or to clock-out before logging-out of those programs. *Id.* Plaintiffs also failed to demonstrate an injury common to the class regarding the off-the-clock claims. In addition, the Court held that Plaintiffs' claims would require individualized inquiries of each putative class members as to why breaks were not taken or were late, and why he or she worked off-the-clock and whether the work was *de minimis. Id.* at 9-10. Accordingly, the Court concluded that Plaintiffs did not meet the predominance requirement of Rule 23(b). The Court therefore denied Plaintiffs' motion for class certification.

***Mann, et al. v. The Boeing Co.,* 2017 U.S. Dist. LEXIS 7671 (W.D. Wash. Jan. 18, 2017).** Plaintiff, a first line leader ("FLL"), brought an action alleging that Defendant violated Washington state law by wrongfully denying overtime pay to employees through improper invocation of the executive exemption and administrative exemption. *Id.* at *2. Plaintiff previously moved for class certification, which the Court had denied on the grounds that Plaintiff's proposed class definition failed to meet the commonality requirement of Rule 23. *Id.* Plaintiff subsequently filed a renewed motion for class certification. In Defendant's system of job classification, it assigned managers to particular operations and sub-divided them further into "job families," identifiable by a classification code. Defendant classified Plaintiff's position as DAKU-K, or a Level K Manufacturing Manager. Defendant submitted that, even within the DAKU-K classification, managers might have varying levels of responsibilities fundamentally different from those described by Plaintiff. In response, Plaintiff narrowed the class definition to include DAKU-Ks "directly supervising IAM members engaged directly in the assembly of 777 . . . aircraft in the Everett facility." *Id.* at *5. The Court held that the redefined class definition still included managers across all three of Defendant's business units, each of which had different responsibilities and different senior management. Defendant provided evidence that the responsibilities of a DAKU-K worker varied widely depending on his or her business unit, shift, the degree of supervision required by their crew, and the leadership abilities of the DAKU-K worker. *Id.* at *6. The Court opined that variation among the tasks actually performed by a group of workers with a single role within a company does not *per se* disqualify those workers from inclusion within a certified class. However, the Court determined that Plaintiff's own class definition indicated that employees within the proposed class had different authority and responsibilities, as the class definition excluded DAKU-Ks "whose principal supervisory responsibilities were related to training, tooling, staffing, quality control or who held Boeing Production System positions or other positions involving cross operational initiatives including Tactical Manager positions." The Court found that this suggested that DAKU-Ks had different "principal supervisory responsibilities," and though Plaintiff sought to exclude the ones that might qualify for the overtime exemption, his proposed class definition left open the possibility that a variety of "principal supervisory responsibilities" remained. *Id.* at **6-7. The Court therefore held that Plaintiff could not meet the commonality requirement without showing commonality of "principal supervisory responsibilities." *Id.* at *7. The Court reasoned that even if employees in Plaintiff's proposed class were incorrectly classified as exempt, Plaintiff failed to show that every employee in the proposed class was classified incorrectly for the same reasons. *Id.* Since the Court held that Plaintiff's proposed class failed the commonality requirement of Rule 23(a)(2), it did not evaluate whether Plaintiff's claims were typical of the class under Rule 23(a)(3) or whether a class action could be maintained under Rule 23(b)(3). Accordingly, the Court denied Plaintiff's motion for class certification.

***Mares, et al. v. Swift Transportation Co. Of Arizona,* Case No. 15-CV-7920 (C.D. Cal. May 23, 2017).** Plaintiff, a truck driver, brought a putative class action alleging violations of the California Labor Code ("CLC") for failure to provide rest periods. Plaintiff filed a motion to certify the putative class and the Court denied the motion on the basis that Plaintiff failed to satisfy Rule 23(b)(3)'s requirements of predominance and superiority. Plaintiff sought to certify a class of California residents who were employed by Defendant as truck drivers and were paid on a piece-rate basis. The Court found that the class was ascertainable and that numerosity was satisfied. Defendant objected on the basis that Plaintiff failed to satisfy the commonality requirement. Plaintiff argued that the common question for litigation was whether as a matter of law a piece-rate pay plan failed to compensate employees for rest time. Defendant asserted that Plaintiff failed to present a common question because the CLC did not provide a remedy for Plaintiff's theory of liability and there was no evidence that Defendant had a common policy or practice of not providing breaks in violation of CLC. The Court rejected Defendant's arguments because Defendant attacked the merits of Plaintiff's complaint and this was not a proper inquiry at the certification stage. The Court ruled that Plaintiff presented evidence of the common policy of not providing breaks. Therefore, Plaintiff satisfied the commonality requirement. The Court also found that Plaintiff's claims were typical. Defendant asserted that they were not typical because Plaintiff did not always take his rest breaks and he spent only about 25% of his worktime in California. The Court rejected Defendant's arguments, ruling that whether Plaintiff took his rest breaks was not relevant and many of the drivers delivered goods outside of California. The Court found that the claims arose from the same course of conduct that gave rise to the claims of the putative class member and was based upon the same legal theory. Accordingly, the Court found that typicality was satisfied. The Court likewise ruled that Plaintiff was an adequate representative and that Plaintiff's counsel was adequate. Nevertheless, the Court determined that individual issues predominated as to whether

each putative class member suffered damages. Thus, Plaintiff's claims failed to satisfy the predominance requirement. Plaintiff claimed that putative class members were entitled to separately compensated rest breaks under Wage Order 9, which states that employees who worked at least three and a half hours a day in California were entitled to rest periods. The Court opined that to find that each driver's damages stemming from Defendant's actions, it would first need to determine whether each driver worked in California for at least three and half consecutive hours. The Court would need to examine each class member's wage statement and load files to determine if they were in California long enough to be entitled to a rest period. Then, the Court would be required to manually review each putative class members wage statements. Further, Defendant showed that it had 29 methods of pay and 10 methods of hourly rates. Thus, any hourly employee was not injured by Defendant's piece-rate pay policy, and individual questions would predominate whether a member even had any damages. As to the superiority requirement, the Court found that the likely difficulties of managing the class action were extensive because the Court would need to find each driver's damages stemmed from the Defendant's action that created legal liability. Accordingly, a class action would not be the superior method of adjudicating the putative class' claims. Because Plaintiff failed to satisfy Rule 23(b)(3)'s requirements, the Court denied Plaintiff's motion to certify the class.

***Marino, et al. v. CACafe, Inc.,* 2017 U.S. Dist. LEXIS 186307 (N.D. Cal. Nov. 9, 2017).** Plaintiff, an in-store demonstrator ("ISD"), filed a collective action alleging that Defendants misclassified demonstrators as exempt employees and thereby failed to pay minimum wage, overtime, meal and rest break penalties, late payment penalties, and reimbursement of expenses in violation of the FLSA. *Id.* at *2. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff performed demonstrations in Costco warehouse stores to encourage sales of Defendant CDS' coconut-infused coffees and teas. Plaintiff contended that all ISDs were classified as independent contractors and paid solely based on the number of jars of product sold in Costco's stores on days they performed product demonstrations at Costco. *Id.* at *2-3. Plaintiff submitted evidence that the conditions of the in-store demonstrations were dictated by the policies in Costco's standard operating procedures ("SOP"), which in turn were enforced by CACafe. CDS event managers conducted in-person, daily inspections of ISDs' performance, dress, and observance of safety rules at all Costco warehouses pursuant to Costco's SOP. *Id.* at *4. CDS also retained the right to "fire" ISDs for failing to be "in complete compliance with Costco and CDS guidelines and policies." *Id.* at *5. Plaintiff sought conditional certification of a collective action of all persons who work or worked for Defendants as in-store demonstrators and any other employees performing the same or similar duties for Defendants, within the United States, at any time from three years prior to the filing of the complaint to the final disposition of the case. *Id.* at *8. The Court found that Plaintiff submitted evidence from members of the proposed collective action, as well as evidence about Defendants' policies and practices, to support the argument that ISDs were subject to uniform conditions of work and daily supervision. *Id.* at *8-9. The Court further determined that Costco, acting through CDS and CACafe, retained the right to exert discipline over ISDs to ensure that they did not perform in an "un-Costco way." *Id.* at *9-10. Based on the evidence presented by Plaintiff, the Court held that conditional certification was appropriate since it met the "modest factual showing" threshold for conditional certification under the FLSA. *Id.* at *10. Defendants argued that the action should not be conditionally certified as against them, contending that Plaintiff had not established a sufficient showing that they were joint employers of the members of the collective action. Costco and CDS further contended that, barring denial of the motion, the Court should delay conditional certification as to them because they intended to file motions for summary judgment on the joint employer issue. *Id.* at *11. The Court stated that Defendants did not file a motion despite the pendency of the action for more than a year and Defendants' prior representations that they would bring such a motion. *Id.* The Court opined that delaying conditional certification would prejudice members of the collective action, whose claims would not be tolled until the motion was granted. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***McLeod, et al. v. Bank Of America, N.A.*, 2017 U.S. Dist. LEXIS 205273 (N.D. Cal. Dec. 13, 2017).** Plaintiff, a mortgage loan officer, filed a class action alleging that Defendant violated various provisions of the California Labor Code. Plaintiff filed a motion for class certification pursuant to Rule 23, which the Court granted. *Id.* at *1-2. In support of her motion, Plaintiff presented eight declarations from putative class members (including Plaintiff herself) working in different offices and different regions across California, all claiming that loan officers were not aware their mileage could be expensed under the company's written policy, that they had not been instructed to

make reimbursement requests for mileage, and that they regularly used their vehicles for business purposes, ranging from dozens to hundreds of miles per week. *Id.* at *11-12. The Court found that there was no dispute that the class included at least 1,881 individuals, and therefore Plaintiff clearly met the numerosity requirement. *Id.* at *14. The Court determined that Plaintiff presented substantial evidence of a common, class-wide practice of non-reimbursement for mileage incurred. *Id.* at *18. The Court reasoned that whether Defendant had constructive notice under § 2802 of the California Labor Code that loan officers were incurring mileage expenses and were not being reimbursed was a common question that could be resolved on a class-wide basis. *Id.* at *25. The Court also held that there were key common liability questions, such as whether Defendant had constructive knowledge of the regular failure to reimburse expenses incurred and whether Defendant satisfied its duty by promulgating its expense reimbursement policy and establishing an expense-reporting system. *Id.* at *31. The Court stated that the answer to those questions depended not on the actions of Plaintiff or individual loan officers, but Defendant's actions, and Plaintiff's claims would therefore be typical of the claims of the class. *Id.* The Court also reasoned that Plaintiff had prosecuted the case by producing discovery, attending a mediation session, cooperating with her counsel, assisting in the investigation of claims, and preparing for and attending her deposition; therefore, there was no reason to doubt her adequacy as a class representative. *Id.* at *33. The Court likewise determined that Plaintiff's counsel was adequate to represent the class. *Id.* at *34. As to Rule 23(b) factors, Defendant argued that any common question would be overcome by individualized inquiries into each loan officer's mileage reimbursement facts surrounding each trip taken and each reimbursement requested. *Id.* at *36-37. The Court found that the issues Defendant advanced did not defeat the predominance requirement, as many were irrelevant as a matter of law. The Court opined that Plaintiff need only prove Defendant's constructive knowledge that mileage was being incurred without being reimbursed, not actual knowledge of each individual trip. *Id.* at *38. The Court ruled that the fact that common questions predominated demonstrated that a class action would be a superior method of adjudication. Further, the Court held that class members would have minimal interest in pursuing independent suits considering the relatively small amount of individual damages; there was no other individual litigation underway that would be disrupted; there was nothing undesirable about concentrating California claims in this forum; and any future difficulties could be adequately managed. *Id.* at *43. Accordingly, the Court granted Plaintiff's motion for class certification.

***McQueen, et al. v. Chevron Corp.,* Case No. 16-CV-2089 (N.D. Cal. Feb. 21, 2017).** Plaintiffs, a group of site managers, brought a collective action asserting that Defendant violated the FLSA. Plaintiffs sought conditional certification of a collective action of a group of site manager who were classified as independent contractors or consultants and were paid a day rate at any time within three years of the filing of the complaint through the trial. *Id.* at 1. The Court granted the motion, and found that Plaintiffs met their burden to demonstrate that conditional certification was appropriate under the lenient standard applicable at the first stage of 29 U.S.C.§ 216(b). *Id.* at 3. The Court found that Plaintiffs presented substantial allegations and evidence in the form of multiple declarations regarding the status of the proposed collective action members. *Id.* The Court further noted that Plaintiffs made allegations and offered evidence that all proposed collective action members acted as site managers, were required to follow Defendant's policies and use their equipment, performed similar duties, were classified as independent contracts, and were paid a day rate with no overtime premiums. *Id.* Defendant asserted that Plaintiffs and the proposed collective actions members had different contracts and intermediary relationships with third-party contracting companies, which would be inconsistent with a finding that they were similarly-situated. *Id.* The Court held that Defendant's argument was better addressed at the second stage of certification of 29 U.S.C.§ 216(b). *Id.* at 4. Accordingly, the Court granted Plaintiffs' motion for conditional certification of the proposed collective action.

***Mendis, et al. v. Schneider National Carriers Inc.,* 2017 U.S. Dist. LEXIS 17291 (W.D. Wash. Feb. 7, 2017).** Plaintiffs, a group of current and former truck drivers, filed a class action alleging that Defendant failed to pay drivers for all hours worked, made unlawful wage deductions, failed to provide itemized wage statements, and failed to pay drivers for rest breaks to which they were entitled in violation of Washington law. Plaintiffs filed a motion for class certification of pursuant to Rule 23 of a proposed class of all current and former employees who worked as drivers for Defendant while residing in Washington from December 30, 2011 to the date of the filing of the complaint. *Id.* at *2-3. Defendant asserted that Plaintiffs failed to meet Rule 23's commonality, typicality, and adequacy requirements. The Court found that Plaintiffs met the numerosity requirement as the proposed class consisted of between 150 and 890 members. *Id.* at *4. As to commonality, Plaintiffs argued that their claims

presented numerous common factual and legal issues, including whether, under Washington law: (i) Defendant was obligated to compensate class members for rest breaks; (ii) Defendant's per diem program resulted in a deduction from the wages of class members who are enrolled in the program to the benefit of Defendant; (iii) Defendant's fuel card program resulted in deductions from the wages of class members who use those cards to the benefit of Defendant; (iv) Defendant obtained a benefit from the wage deductions it took from class members to pay for safety equipment drivers are required to purchase as a condition of their employment; (v) Defendant was obligated to pay overtime compensation to class members; and (vi) Defendant willfully withheld wages. *Id.* at *5-6. Defendant argued that because some putative class members parked their trucks or began and ended their routes in Portland, Oregon, they were not Washington-based employees. *Id.* at *7. Plaintiffs asserted that the putative class members were residents of Washington, had Washington-issued commercial driver's license, Washington was listed as the driver's state of residence on her paystub, and Defendant paid Washington-specific taxes. The Court found that given the significant contacts with the state, Washington's wage & hour laws applied to the proposed class members. *Id.* at *8. Defendant further argued that Plaintiffs' overtime claim should not be certified because it would require individualized inquiries. Defendant asserted that because each driver earned a different percentage of the established hourly and overtime rate, the jury would have to determine liability for each individual Plaintiff. The Court opined that although each damage inquiry would be different, damages determinations are individual in nearly all wage & hour class actions and the presence of individualized damages could not, by itself, defeat class certification. However, the Court determined that creation of sub-classes was appropriate and it created two sub-classes. *Id.* at *12. The Court ruled that Plaintiffs' claims were typical of the claims of other class members because they arose out of the same alleged conduct and were based on the same legal theories. The Court held that the named Plaintiffs would adequately represent the class and that Plaintiffs' counsel were competent to prosecute the action. *Id.* at *13. Defendant further contended that Plaintiffs failed to meet the predominance requirement because the question of whether Washington law applied would require separate adjudication of that defense for every class member. The Court stated that the primary issue for resolution was whether Defendant's uniform policies and practices as they relate to compensation for rest breaks, alleged wage deductions, and overtime pay, violated Washington law. *Id.* at *17. The Court determined that a class action was superior to other available methods of adjudicating the class members' claims because filing multiple and duplicative lawsuits may yield different results. The Court thereby granted Plaintiffs' motion for class certification.

***Metrow, et al. v. Liberty Mutual Managed Care,* 2017 U.S. Dist. LEXIS 73656 (C.D. Cal. May 1, 2017).** Plaintiffs, a group of Nurse Case Managers ("NCMs"), brought a class action alleging that Defendant violated the California Business and Professions Code, the California Labor Code, and the Private Attorneys General Act by failing to pay overtime compensation and all wages due and because Defendant misclassified them as exempt. Plaintiffs filed a motion for class certification, which the Court granted. In support of their motion, Plaintiffs submitted a declaration of Plaintiffs' counsel and numerous exhibits. *Id.* at *3-5. Defendant is a property and casualty insurance provider, and provides integrated managed care services, whereby claims adjusters assign a NCM to the claim to assess the prescribed medical treatment and develop return to work strategies. *Id.* at *6. Plaintiffs alleged that they were misclassified as exempt employees and asserted that they should not be exempt from overtime pay or meal and rest breaks under the administrative exemption because as NCMs, they do not have ultimate decision-making power and none of their job duties allow them to exercise their independent judgment and discretion. *Id.* Plaintiffs moved to certify a class pursuant to Rules 23(a) and 23(b)(3) of "[a]ll individuals who are or previously were employed by Defendant Liberty Mutual Managed Care, LLC as Telephonic Nurse Case Managers in California between February 24, 2012 to the present." *Id.* at *10. Plaintiffs' proposed class contained 51 current and former employees in California in the job positions at issue, which the Court opined was sufficient to make joinder of all class members' claims impracticable. Accordingly, the Court found that numerosity was satisfied. As to commonality, the Court stated that it was undisputed that all members of the putative class were classified as exempt from overtime pay under the administrative exemption, none of the NCMs received overtime pay, and their work was designated under the same general job description. *Id.* at *17. The Court held that the members of the proposed class, therefore, all suffered from the same injury and Plaintiffs advanced sufficient common questions for which adjudication would offer common answers. As to typicality, the Court held that Plaintiffs' claims were all premised on the contention that Defendant misclassified each putative class member based upon the same misapplication of federal and California law. Defendant, moreover, failed to point to any unique defenses that might render Plaintiffs' claims atypical. *Id.* at *20.

Accordingly, Plaintiffs fulfilled the typicality requirement. Defendant argued that the named Plaintiff Rose Ann Gainor was not an adequate class representative because the discrepancy between her performance reviews and how she has subsequently characterized her job duties raised "significant credibility issues." *Id.* at *22. The Court disagreed, and opined that Gainor would adequately represent the interests of the class as her interest in the action did not differ from those of the other class members in any materially significant way. *Id.* at *23. The Court further determined that class counsel had substantial experience handling large employment-related class actions and was found to be qualified class counsel in prior actions. *Id.* at *24. Defendant also argued that Plaintiffs could not satisfy the predominance requirement of Rule 23(b) because Plaintiffs lacked common proof that would enable the Court to adjudicate liability without individual inquiries overwhelming the trial. *Id.* at *26. The Court found that Plaintiffs' job responsibilities constituted common proof because the deposition testimony and Defendant's own admissions showed these descriptions and policies reflected the work that all Plaintiffs realistically performed. All Plaintiffs were also expected to complete each case on the same time-frame, perform each task within a standardized amount of time, and conform conduct to clearly delineated procedures and policies. *Id.* at *31. The Court stated that the proposed action was manageable as the class involved only California-based employees, making this forum appropriate and desirable. The Court opined that a class action was the superior method of resolving the class members' claims because it would "achieve economies of time, effort, and expense . . . without sacrificing procedural fairness or bringing about other undesirable results." *Id.* at *48-49. The Court concluded that Plaintiffs met the burden of demonstrating that the class satisfied the requirements of Rules 23(a) and 23(b)(3), and it therefore granted class certification.

***Nguyen, et al. v. Wells Fargo,* 2017 U.S. Dist. LEXIS 155632 (N.D. Cal. Sept. 22, 2017).** Plaintiffs, a group of home mortgage consultants, brought a putative class action alleging violations of California Labor Code ("CLC") for failure to reimburse for marketing programs and failure to timely pay commissions. *Id.* at *2. Plaintiffs claimed that Defendant's policy of not reimbursing the home mortgage consultants for Defendant's marketing programs, websites, and client communications program violated the CLC. *Id.* at *5. Defendant encouraged Plaintiffs to subscribe to these marketing programs, touting their advantage in job performance, although use of the programs was optional. *Id.* at *7, 9. Only a minority of the home mortgage consultants employed by Defendant chose not to use the programs. *Id.* at *10. Plaintiffs also alleged that Defendant did not timely pay commission to the home mortgage consultants based on when commissions were earned in violation of the CLC. *Id.* at *2. Plaintiff moved for class certification and the Court granted certification, finding that all the requirements of Rule 23(a) and 23(b)(3) were satisfied. The Court certified three sub-classes, including: (i) the expense reimbursement sub-class, consisting of employees who participated in either marketing program; (ii) the commission pay stub sub-class, consisting of employees who did not receive their commissions timely; and (iii) the waiting-time penalties sub-class, consisting of all employees who did not receive all wages owed at the time of separation. *Id.* at *28. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Orozco, et al. v. Illinois Tool Works, Inc.*, 2017 U.S. Dist. LEXIS 23179 (E.D. Cal. Feb. 17, 2017).** Plaintiffs, a group of non-exempt employees, brought a putative class action alleging that Defendant failed to pay them overtime compensation in violation of California's Unfair Competition Law ("UCL"). The Court previously certified one of the Plaintiffs' two proposed classes. Plaintiffs now moved to certify a modified version of their second proposed class pursuant to Rule 23, which the Court granted. Plaintiffs are former material processors who worked for one of Defendant's forty business facilities in California. *Id.* at *1-2. Plaintiffs alleged that the hazards of the manufacturing process at the facility sometimes prevented material processors from taking their scheduled meal and rest breaks. *Id.* at *2. Plaintiffs alleged that Defendant's policies for providing mealtimes were unfair under the UCL. *Id.* at *3. Plaintiffs' proposed UCL class consisted of all individuals who are or previously were employed as material processors by Defendant in California as non-exempt employees during the period March 27, 2010 to the present. *Id.* at *4. The Court found that the class was sufficiently numerous because it consisted of 44 members. *Id.* at *5. Defendant contended that Plaintiffs' UCL cause of action presented no single question, but instead a multitude of questions about why a particular employee took a meal break when he or she did on any given day. *Id.* at *5-6. The Court opined that while the reasons for any one delayed meal break could vary, there was a common, predominant question among the workers as to whether Defendant had a policy or practice that deprived them of their statutory right to opt for a meal break within the first five hours of work. *Id.* at *6. The Court stated that class-wide litigation was apt to generate a common answer of whether that scheme unfairly pressured employees into forgoing their statutory right to a meal break.

Id. at *6-7. The Court found that Plaintiffs met the typicality requirement because all material processors were subject to the same meal break policy. As to the adequacy requirement, the Court determined that Plaintiffs have committed to seeing the litigation to its conclusion, and Plaintiffs' counsel was already found qualified by the Court. *Id.* at *9. The Court stated that Plaintiffs only needed to provide evidence of undue pressure resulting from the team-based, manufacturing-process-informed approach to determining when meal breaks are taken, not individualized evidence as to why any one meal break was taken at any particular time. Thus, the Court determined that Plaintiffs satisfied the predominance requirement. *Id.* at *10. The Court also found that class action was superior to alternative methods of adjudication because individuals likely had little interest in pursuing litigation themselves, especially given potential fears of employment retaliation. *Id.* at *11. Accordingly, the Court granted Plaintiffs' motion to certify their UCL class.

***Patakay, et al. v. The Brigantine, Inc.,* 2017 U.S. Dist. LEXIS 70098 (S.D. Cal. May 8, 2017).** Plaintiffs, a group of food servers, brought a collective action alleging that Defendant violated various provisions of the FLSA, the California Unfair Competition Law, and the California Business & Professions Code. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Plaintiffs alleged that Defendant maintained an unlawful "tip pooling" policy, under which Plaintiffs, who were paid tips from Defendant's customers, had to "tip out" significant portions of their earned tip income to other employees who do not provide direct table service to customers, such as Defendant's kitchen staff. *Id.* at *3-4. Plaintiffs sought to certify a collective action of all current or former employees of Defendant who had worked on and after February 22, 2014 as "servers," including the job titles of food servers, cocktail lounge servers, dining room servers, and bartenders. *Id.* at *4-5. Defendant opposed Plaintiffs' motion for conditional certification on grounds that: (i) there was no corporate or company-wide policy regarding tip pooling or tip distributions; (ii) Defendant's "tipping suggestions" sheet did not reflect a company-wide policy, but rather reflected a suggestion created by two employees; and (iii) Plaintiffs had not offered evidence regarding tip pooling at any of Defendant's restaurants, other than Brigantine Seafood in Coronado, during the relevant class period. *Id.* at *7-8. Defendant contended that if conditional certification was granted, the Court should narrowly certify a collective action limited only to the Brigantine Seafood restaurant in Coronado. *Id.* at *9. Plaintiffs asserted that Defendant's mandatory and enforced tip pooling policy required servers to tip out portions of their earned tip income to kitchen staff who do not provide direct table service to customers, and that the tip pooling policy for servers was similar or identical across all of Defendant's restaurants. *Id.* at *10. Defendant asserted that Plaintiffs lacked evidence regarding policies at other restaurants owned and operated by Defendant, since all three Plaintiffs provided evidence of managers requiring servers to contribute to a tip pool with kitchen staff at the Coronado location only. *Id.* at *12-13. The Court found that while Defendant offered evidence disputing Plaintiffs' allegations and affidavits, Defendant's argument went to the merits of Plaintiffs' claims, and thus the Court declined to rule on the merits at this stage. *Id.* at *14-15. The Court determined that Defendants' evidence did not negate the evidence offered by Plaintiffs, particularly Plaintiffs' testimony regarding personal experiences with managers requiring Plaintiffs to tip out to kitchen staff. *Id.* at *16. The Court opined that simply because the corporate office may not have issued a formal company-wide policy on mandatory tipping pools did not negate the possibility that such an undocumented policy existed. *Id.* Further, the Court found that Plaintiffs provided an identifiable legal and factual nexus binding together various claims of the proposed collective action, *i.e.*, a uniform or substantially similar tipping policy across Defendant's restaurants that violated 29 U.S.C. §§ 203(m) and 206 by including in the tipping pool employees who did not customarily and regularly receive tips. *Id.* At this stage, the Court held that Plaintiffs met their lenient burden to show that they are similarly-situated to potential collective action members. *Id.* at *16-17. Accordingly the Court granted Plaintiffs' motion for conditional certification of a collective action.

***Quiroz, et al. v. City Of Ceres,* 2017 U.S. Dist. LEXIS 96747 (E.D. Cal. June 22, 2017).** Plaintiff, a police officer, filed a collective action alleging that Defendant failed by pay overtime compensation in violation of the FLSA. Plaintiff asserted that as part of a collective bargaining agreement, Defendant offered and he accepted an option to receive monetary compensation in lieu of certain Defendant-sponsored health benefits. *Id.* at *1-2. Plaintiff further alleged that, for the three years prior to the commencement of his action, Defendant failed to include the in-lieu payments in its calculation of Plaintiff's regular rate of pay, resulting in an under-payment of overtime compensation. *Id.* at *2. Plaintiff filed a motion for conditional certification, which the Court granted. The Court found that Plaintiff met his burden of showing at the first step that conditional certification was warranted. The parties did not dispute defining those similarly-situated as "all current or former employees of the City of

Ceres who have worked statutory overtime and received cash payments in lieu of health care benefits or savings payments if they chose coverage through the City that does not utilize the full dollar allowance." *Id.* at *4. Plaintiff also contended that his decision to receive monetary compensation in lieu of health benefits was part of a broader uniform policy affecting other employees. *Id.* Plaintiff further alleged that Defendant similarly excluded such in-lieu compensation from its calculation of regular rates of pay for purposes of overtime compensation. *Id.* at *4-5. The Court determined that based on these representations, Plaintiff met his burden at this stage of the litigation. The Court conditionally certified a collective action comprised of all current or former employees who worked statutory overtime and received cash payments in lieu of health care benefits or savings payments, between February 17, 2014 and the date of entry of the order. *Id.* at *6-7.

***Ramirez, et al. v. HG Staffing, LLC,* Case No. 16-CV-318 (D. Nev. Oct. 23, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant violated the FLSA. Plaintiffs moved to conditionally certify a collective action for discovery and trial purposes. The Court denied the motion. The matter stemmed from an on-going case entitled *Sargent, et al. v. HG Staffing*, Case No. 13-CV-453 (D. Nev.). The Court in *Sargent* had decertified a conditionally certified collective action. Plaintiffs from that action filed this new lawsuit seeking to certify a narrower collective action than presented in *Sargent*. *Id.* at 2. Defendant argued that the doctrine of issue preclusion and the first-to-file rule barred certification. *Id.* The Court found that Plaintiffs' motion to certify the collective action failed because Plaintiffs had yet to seek conditional certification and had yet to join with opt-in Plaintiffs. *Id.* The Court determined that in filing their motion for conditional certification, Plaintiffs relied on actions taken in *Sargent*. However, the Court stated that this matter was independent from *Sargent*, and Plaintiffs herein must satisfy the FLSA requirements independently. *Id.* at 4. While the Court recognized that Plaintiffs intended to use a substantial amount of discovery from *Sargent*, it found that Plaintiffs still must provide an opportunity for an opt-in process for similarly-situated Plaintiffs. Accordingly, the Court denied Plaintiffs' motion for conditional certification without prejudice.

***Ridgeway, et al. v. Wal-Mart Stores Inc*., Case No. 08-CV-5221 (N.D. Cal. May 1, 2017).** Plaintiffs, a group of truck drivers, filed a class action alleging that Defendant violated various provisions of the California Labor Code. Following a trial, the jury returned a verdict in favor of Plaintiffs on four of the 11 causes of action at issue including performing pre-trip inspections, performing post-trip inspections, taking 10-minute rest breaks, and taking 10-hour lay-overs. *Id.* at 1. The jury awarded damages of over $55 million. Defendant filed a motion for judgment as a matter of law and a motion for a new trial and for decertification. The Court denied the motions as to the litigated claims, and granted Defendant's motion as a matter of law with respect to the claims that were not tried. Defendant's primary argument for a new trial was that Plaintiffs failed to establish class-wide damages through common proof and representative evidence. Defendant contended that the evidence adduced at trial showed that the duration and frequency with which drivers took rest breaks, pre-trip and post-trip inspections, and lay-overs varied greatly, such that Plaintiffs' reliance on their expert was an improper basis for the jury's verdict. Defendant asserted that the jury verdict was not supported by substantial evidence, which entitled it to judgment as a matter of law, or alternatively, that the jury verdict was against the clear weight of the evidence, warranting a new trial and class decertification. *Id.* at 2. However, the Court determined that Defendant cross-examined Plaintiffs' expert on all issues and called its own witness to counter Plaintiffs' expert. *Id.* The Court found that there was substantial evidence to support the opinions of Plaintiffs' expert and to support the jury's verdict with respect to rest breaks, pre-trip and post-trip inspections, and lay-overs. The Court stated that Plaintiffs did not oppose Defendant's motion to enter judgment in favor of Defendant on Plaintiffs' untried claims, including violations of failing to provide off-duty meal periods, failing to authorize and permit rest breaks, for waiting time penalties, and for itemized wage statements. *Id.* at 3. Accordingly, the Court granted Defendant's motion with respect to Plaintiffs' untried claims and denied it in all other respects.

***Riveria, et al. v. Saul Chevrolet, Inc*., 2017 U.S. Dist. LEXIS 120094 (N.D. Cal. July 31, 2017).** Plaintiff, a service counter salesperson, filed a class and collective action alleging that Defendant failed to provide meal and rest breaks, and failed to provide minimum wages and overtime compensation in violation of the FLSA and the California Labor Code. Plaintiffs filed a motion for conditional certification of a collective action, and the Court denied the motion. Plaintiff argued that he was similarly-situated to the putative collective action members because Plaintiff and the putative collective action members: (i) worked overtime without pay for overtime work; (ii) shared similar job duties, including a mixture of sales and non-sales work; and (iii) shared roughly the same

pay structure. *Id.* at *11. Defendant argued that Plaintiff had not provided adequate evidence that a "single decision, policy, or plan" affected all of the putative collective action members, or that the job responsibilities and pay structures for the putative collective action members were similar. *Id.* Defendant also argued that Plaintiff had not sufficiently shown that positions, job duties, and pay structures were similarly administered at the dealerships where Plaintiff did not work. *Id.* at *11-12. The Court agreed with Defendant that Plaintiff had not identified the "single decision, policy, or plan" that affected all of the putative collective action members. *Id.* at *12. Although Plaintiff argued that the putative collective action members' compensation did not include overtime, he failed to allege how that overtime was accrued and not compensated. *Id.* at *13. Furthermore, although Plaintiff stated that he was non-exempt, he did not argue or provide evidence that the putative collective action members were non-exempt. *Id.* Thus, the Court found that from Plaintiff's allegations and evidence, he failed to identify a "single decision, policy, or plan" that applied to the members of the putative collective action. *Id.* at *14. Regardless, the Court found that even if Plaintiff sufficiently demonstrated a "single decision, policy, or plan," Plaintiff failed to satisfy his burden of showing that conditional certification of the putative collective action was appropriate. First, the Court noted that Plaintiff failed to provide any evidence that anyone but Plaintiff worked unpaid overtime, as his declaration did not state that any other putative collective action member worked in excess of 40 hours per week and was not paid overtime as a result. *Id.* at *16. Moreover, Plaintiff's declaration does not discuss any putative collective action member who worked unpaid overtime at any of the dealerships owned by Defendant. *Id.* at *16. Second, Plaintiff failed to provide sufficient evidence that Plaintiff and members of the putative collective action members had similar job responsibilities and pay structures. *Id.* at *14-15. The Court reasoned that Plaintiff only provided job listings for a sub-set of the positions in the putative collective action. *Id.* at *22. Third, Plaintiff did not provide sufficient evidence that whatever decision, policy, or plan existed in this case extended to all of Defendant's dealerships. Accordingly, the Court ruled that Plaintiff failed to demonstrate that he and putative collective action members were similarly-situated, and therefore the Court denied Plaintiff's motion for conditional certification.

***Riveria, et al. v. Saul Chevrolet, Inc.*, 2017 U.S. Dist. LEXIS 182190 (N.D. Cal. Nov. 2, 2017).** Plaintiff, a service counter salesperson, filed a class and collective action alleging that Defendants failed to provide meal and rest breaks, and failed to provide minimum wages and overtime compensation in violation of the FLSA and the California Labor Code. Plaintiffs had previously filed a motion for conditional certification of a collective action, and the Court denied the motion because Plaintiff: (i) failed to identify the "single decision, policy, or plan" that affected all of the putative collective action members; (ii) failed to provide any evidence that anyone but Plaintiff worked unpaid overtime; (iii) failed to provide sufficient evidence that Plaintiff and members of the putative collective action members had similar job responsibilities and pay structures; and (iv) failed to provide sufficient evidence that whatever decision, policy, or plan exists in this case extended to all Defendants and their dealerships. *Id.* at *4-5. Plaintiff sought certification of a collective action consisting of all non-managerial employees at any of Defendant's dealerships from October 11, 2013 to present who worked as parts salespeople, counter-people, associates, auto salespeople, or maintenance employees and who were paid a base amount, whether by salary or by draw, with the possibility of a commission payment. *Id.* at *5-6. The Court found that Plaintiff again failed to provide any evidence that anyone but Plaintiff worked unpaid overtime and that he did not provide sufficient evidence that whatever decision, policy, or plan existed in this case extended to all Defendants and their dealerships. *Id.* at *12. Plaintiff submitted a declaration stating that he worked 52 hours per week on average and that he was not paid overtime for the hours in excess of 40 hours in the week. Plaintiff's declaration also stated that he observed co-workers work more than 8 hours per day and more than 40 hours in a week and surmised that employees at Defendants' other nearby dealerships worked overtime based on the timing of phone calls and the things that employees told him over the phone. *Id.* at *13. The Court found that although the statements in Plaintiff's declaration constituted evidence that other workers employed by Defendants worked overtime hours, Plaintiff failed to provide any facts that demonstrated that these other workers were not paid overtime wages for their overtime hours. *Id.* at *14. The Court further determined that Plaintiff also failed to offer any evidence that the alleged policy of withholding overtime pay extended to all Defendants and their dealerships. *Id.* at *16. Accordingly, the Court denied Plaintiff's motion for conditional certification of a collective action. In addition, since the Court found that Plaintiff was unable to cure the deficiencies following the denial of Plaintiff's first motion for conditional certification, the Court denied the motion with prejudice.

***Rodriguez, et al. v. Penske Logistics, LLC*, 2017 U.S. Dist. LEXIS 152379 (E.D. Cal. Sept. 19, 2017).** Plaintiff, a truck driver, brought a class action alleging that Defendant's "pay-by-the-mile" compensation policy violated various provisions of the California Labor Code. *Id.* at *1. Plaintiff filed a motion for class certification, which the Court granted. Plaintiff's proposed class consisted of all California-based non-exempt truck driver employees who worked under a piece-rate or pay-by-the-mile compensation policy from September 5, 2010 through to the earlier of: (i) preliminary approval of the Court; or (ii) November 1, 2016. *Id.* at *2. At the outset, the Court noted that the case must be understood in the context of a change in state law. Plaintiff filed his action in light of state court decisions that held that a failure to pay employees for time spent performing tasks other than those paid on a piece-rate basis violated California law. The Governor then signed California Assembly Bill 1513 ("AB 1513"), which not only codified the law as articulated by California state courts, but also created an affirmative defense for employers. *Id.* at *4-5. The Court explained that an employer could avail itself of this affirmative defense if it paid employees either: (i) the amount it owes plus interest; or (ii) 4% of the W-2 reported wages of the worker from July 1, 2012 through December 31, 2015. *Id.* at *5. Because the affirmative defense affected many of Plaintiff's claims, and because the "safe harbor" period substantially overlapped with the putative class period, the adoption of AB 1513 significantly reduced the value of the claims. *Id.* However, as to class certification, the Court noted that Plaintiff estimated the class included 723 California drivers, which was sufficiently numerous so that joinder was impractical. *Id.* at *13-14. The Court found that Plaintiff and class counsel sufficiently pursued the action on behalf of the class, and it was persuaded they would adequately protect the interests of the class. *Id.* at *15-16. As to typicality and commonality, the Court was satisfied that assuming common questions existed, Plaintiff's claims were typical of the class as he and class members were allegedly employed in the same position at roughly the same time. *Id.* at *17. Further, Plaintiff and class members were allegedly subjected to the same policies regarding compensation, meal and rest periods, and reimbursement for expenses. *Id.* Furthermore, the Court held that Defendant's policies presented several questions common to the class that predominated over any individualized inquiry. *Id.* at *18. The Court was also satisfied that a class action was superior to any alternative means of vindicating the individual rights placed in issue by the complaint. Defendant calculated it would cost $775,272 to take advantage of the safe harbor provision for all California drivers, which meant the 723 putative class members would receive an average payment of just over $1,000 each. *Id.* at *21. The Court opined that this amount would be too small to incentivize individual litigation. Accordingly, the Court ruled that Plaintiff met the requirements of Rule 23(a) and Rule 23(b)(3), and granted Plaintiff's motion for class certification.

***Rodriguez, et al. v. RCO Reforesting,* 2017 U.S. Dist. LEXIS 93308 (E.D. Cal. June 16, 2017).** Plaintiffs, a group of temporary forestry workers employed pursuant to the H-2B visa program, brought an action asserting various wage & hour and employment law claims under the FLSA and California law. Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court denied. Plaintiffs alleged that Defendant had a policy of not paying Plaintiffs for overtime work and not reimbursing Plaintiffs for their travel and visa costs, as required by the H-2B visa program. Plaintiffs sought to conditionally certify an FLSA collective action defined as "all non-exempt workers employed by Defendant at any time between May 5, 2014 through the present, either under the terms of an H-2B job order or who were engaged in corresponding employment." *Id.* at *3. In support of their motion, Plaintiffs submitted affidavits and copies of Defendant's H-2B applications for temporary employment for 2013 through 2016, which defined the scope of the H-2B visa workers' job duties. *Id.* at *4. Plaintiffs asserted that they were not paid overtime for the hours worked over eight in one day, were not paid more than 40 hours per week regardless of how many hours worked, and they were not reimbursed for their visa costs or travel costs from Mexico to the company office. The named Plaintiff Rodriguez additionally declared that he was not paid for time spent traveling from his lodging to the worksite and back to his lodging, which was upwards of three hours each way, further reducing his wages. Plaintiffs also asserted that they were aware that other employees were subjected to the same conditions. *Id.* at *5. The Court found that Plaintiffs' proposed collective action was overly broad because there were not "substantial allegations that the putative collective action members were subject to a single illegal policy, plan or decision." *Id.* at *6. The Court explained that the collective action must be limited to individuals who have FLSA claims. The Court noted that Plaintiffs did not allege that Defendant had a policy of never reimbursing travel costs and never paying overtime, yet Plaintiffs' proposed collective action included all H-2B workers and all workers in corresponding employment. Therefore, the Court determined that Plaintiffs proposed collective action would necessarily include workers who had no FLSA claim. *Id.* The Court held that, at the very least, Plaintiffs must narrow their proposed collective action to

non-exempt workers employed by Defendant at any time between May 5, 2014 through the present, either under the terms of an H-2B job order or who were engaged in corresponding employment who either were not paid for overtime or were not reimbursed for their travel and visa costs such that they made less than minimum wage. *Id.* at *6-7. The Court stated that while Plaintiffs' allegations and affidavits may suffice to conditionally certify a narrower collective action, the allegations did not justify conditionally certifying a collective action composed of all non-exempt H-2B visa workers and those in corresponding employment, regardless of whether they were subjected to FLSA violations. *Id.* at *7. Accordingly, the Court denied Plaintiffs' motion for conditional certification.

***Salazar, et al. v. McDonald's Corp.,* 2017 U.S. Dist. LEXIS 9641 (N.D. Cal. Jan. 5, 2017).** Plaintiffs, a group of restaurant crew members at McDonald's franchisees, brought a putative class action alleging that Defendants – both the franchisees and McDonald's Corp., the franchisor ("McDonald's") – failed to pay them wages for all hours worked and denied them overtime wages in violation of the California Labor Code. Previously, McDonald's moved for summary judgment on the ground that it did not jointly employ Plaintiffs. The Court granted the motion in part, but allowed Plaintiffs to proceed with their claims against McDonald's under an ostensible agency theory. Plaintiffs subsequently filed a motion for class certification and McDonald's filed a motion to deny class certification and to strike Plaintiffs' representative claims under the Private Attorneys General Act ("PAGA"). The Court granted McDonald's motions and denied Plaintiffs' motion. The Court stated that as a threshold matter, Plaintiffs must show that their claims under the theory of ostensible agency were amenable to class-wide treatment. McDonald's argued that Plaintiffs could not satisfy Rule 23's commonality or predominance requirements. The Court observed that applicable case law authorities describe three requirements necessary before recovery could be had against a principal for the act of an ostensible agent, including: (i) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; (ii) the belief must be generated by some act or neglect of the principal sought to be charged; and (iii) the third person relying the agent's authority must not be guilty of negligence." *Id.* at *9. As to whether Plaintiffs had actual belief that the franchise was an agent to McDonald's, the Court found that the record showed that crew members did not all receive the same orientation materials, see the same job training videos, or attend the same orientation sessions. *Id.* at *11. Further, testimony of crew members demonstrated that some class members understood that McDonald's did not employ them, and some did not. *Id.* Thus, the Court opined that these differences precluded an inference of common belief among class members. As to the second factor of a reasonable, non-negligent belief, the Court held that Plaintiffs failed to show how reasonable belief can be established on a class-wide basis, because that belief depended upon information known or available to each individual party. *Id.* at *13. As to the reliance factor, the Court determined that whether each class member knew, or should have known his or her employer, was necessarily an individual inquiry, and therefore could be established through common questions. *Id.* at *17. The Court concluded that Plaintiffs could not establish commonality because individual inquiries would be required to establish liability under the theory of ostensible agency and thereby denied Plaintiffs' motion for class certification. The Court also denied certification under Rule 23(b) because Plaintiffs failed to describe the injunctive relief sought. *Id.* at 13. Finally, the Court denied Plaintiffs' motion for certification of their proposed PAGA class because the class was unmanageable. The Court reasoned that although Plaintiffs asserted claims on behalf of hourly, non-exempt, non-managerial workers, they offered no easy way to identify those who actually might be aggrieved under the ostensible agency theory. *Id.* at *22. The Court opined that the proposed class contained over 1,200 putative class members, all of whom received different orientation, training, hiring documents, and had different understandings of the franchise relationship. *Id.* The Court thus ruled that Plaintiffs' PAGA claims were unmanageable and it struck the representative claims. Accordingly, the Court granted McDonald's motions and denied Plaintiffs' motion.

***Saleh, et al. v. Valbin Corp.*, 2017 U.S. Dist. LEXIS 182184 (N.D. Cal. Nov. 2, 2017).** Plaintiff, a former non-exempt role player at a military training facility, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Defendant provided simulation training in fabricated Middle Eastern villages, other terrains, and simulated battlefields featuring native role players. *Id.* at *2. During rotations lasting between three and 19 days, the role players inhabited the villages and other terrain. *Id.* Plaintiff alleged that during a rotation, role players were required to be in character 24 hours per day and were not allowed to leave the base for any reason. Plaintiff filed a motion for conditional certification of a collective action, which the

Court granted. In support of his motion for conditional certification, Plaintiff submitted his own declaration, as well as the declarations of two opt-in Plaintiffs and a copy of a PowerPoint slide deck that Defendant used as part of an employee orientation. *Id.* at *9. The declarations stated that Defendant's general policies and procedures applied to all role players, that that they were required to remain in character at all times during a training rotation; that they were required to sleep in the fabricated villages, military tents, or similar accommodates with no running water or electricity; they were compensated a maximum of 13 hours per day; they were not paid for all of their overtime hours worked while on rotation; and they were not allowed to leave for any reason. *Id.* at *10. Defendant argued that Plaintiff failed to meet his burden to show that he was similarly-situated to the other collective action members he sought to represent because role players were divided into two types with three different job descriptions. The Court disagreed, and found that Plaintiff met his burden under the fairly lenient first stage standard. The Court determined that the detailed allegations in the declarations went beyond "boilerplate and legal conclusions without support" that Defendant did not pay overtime and provided a "reasonable basis" for concluding that Defendant's alleged policies applied to all role players. *Id.* at *16. The Court stated that the mere fact that there were different types of role players did not defeat conditional certification. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Sanchez, et al. v. Capital Contractors, Inc.,* 2017 U.S. Dist. LEXIS 87585 (N.D. Cal. June 7, 2017).** Plaintiffs, a group of former employees, brought a class action alleging that Defendant violated the California Labor Code by improperly classifying them as independent contractors instead of employees, and thereby failed to provide overtime compensation and rest periods. Defendant provided cleaning services to major industrial clients throughout California. Plaintiffs alleged that each of them entered into an independent contractor agreement ("ICA"), under which each agreed to provide certain services to Defendant, including janitorial work. *Id.* at *4. Plaintiffs filed a motion for class certification pursuant to Rule 23, and the Court denied the motion. Plaintiffs sought certification under Rule 23(b)(2) and Rule 23(b)(3). First, as to Rule 23(b)(2), the Court found that Plaintiffs sought a judicial declaration that ICs were employees of Defendant, and corresponding injunctive relief, as well as a judicial order directing Defendant to cease its unlawful practice of classifying ICs as independent contractors and failing to provide the protections afforded to employees under the California Labor Code. *Id.* at *5-6. The Court noted that a Plaintiff seeking to certify a class under Rule 23(b)(2) must have standing to seek the declaratory and/or injunctive relief sought on behalf of the class. To do so, a Plaintiff "must demonstrate that he is realistically threatened by a repetition of the violation." *Id.* at *6. The Court stated that Plaintiffs were former employees, and Plaintiffs pointed to no other evidence that they were "realistically threatened" by Defendant's classification decisions and alleged violations of the California Labor Code. *Id.* The Court found that therefore Plaintiffs had failed to show that any of them had any likelihood of being injured in the future by Defendant's practices. *Id.* at *7. Therefore, the Court found that Plaintiffs failed to show certification under Rule 23(b)(2) was proper. As to Rule 23(b)(3), the Court noted that it provides for certification of a class where "the Court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* Plaintiffs sought to establish that the members of the proposed class should have been classified as "employees" of Defendant, and thus Defendant wrongfully failed to provide them with statutory benefits to which employees are entitled under California law, such as overtime pay, meal/rest breaks, reimbursement for necessary expenses, and timely payment of wages upon termination of employment. *Id.* at *7. The Court stated that even assuming that employment status could be determined on a class-wide basis, Plaintiffs had not shown their claims alleging Defendant's failures to provide overtime pay, meal breaks, and rest breaks were appropriate for determination on a class-wide basis. The Court held that Plaintiffs failed to cite any evidence that could support a finding that Defendant had any uniform policy or practice that had the effect of requiring ICs to work more than eight hours a day or more than 40 hours in a week, thereby entitling them to overtime pay. The Court further determined that Plaintiffs failed to submit any evidence that Defendant had any uniform policy or practice that had the effect of requiring ICs to work for more than five hours a day, thereby entitling them to a meal break, or the effect of requiring them to work for Defendant at least three and a half hours per day, thereby entitling them to a rest break. *Id.* at *16. In the absence of any such evidence, the Court held that a trier of fact would be required to consider testimony from each class member in order to determine whether he or she worked for Defendant more than eight hours in a day and whether a class member worked for

Capital the requisite number of hours to entitle him or her to meal and rest breaks. *Id.* at *17. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Schroeder, et al. v. Envoy Air*, 2017 U.S. Dist. LEXIS 145335 (C.D. Cal. Aug. 30, 2017).** Plaintiffs, a group of airline employees, filed a class action alleging that Defendant violated various provisions of the California Labor Law. Plaintiffs filed a motion for class certification of several sub-classes pursuant to Rule 23. The Court granted in part and denied in part Plaintiffs' motion. Plaintiffs sought to represent several classes and sub-classes of similarly-situated employees, including: (i) a sick leave class; (ii) an overtime sub-class; (iii) a meal and rest break sub-class; (iv) a wage statement sub-class; a living wage ordinance sub-class; and (v) a former employer sub-class. *Id.* at *4-5. Plaintiffs submitted declarations and exhibits in support of their contention that Defendant had policies common to the class or sub-class as to each of the issues. *Id.* at *5. As to the sick leave class, Defendant introduced a policy allowing employees to trade shifts and days off (a "shift swap") under certain circumstances. *Id.* at *9. Defendant's shift swap policy stated that if an employee calls in sick twice within a one year period, the employee's shift swap privileges will be suspended for 30 days, unless a doctor's note is provided. *Id.* at *10. Plaintiff argued that the policy treated paid sick leave as an absence in violation of § 234 of the Labor Code, and thus was a *per se* violation of § 233. Plaintiff argued that whether Defendant's shift swap policy was a *per se* violation of § 233 was a question common to the class, and which predominated over individualized questions for purposes of resolving the claim on a class-wide basis. *Id.* at *11. The Court concluded that the commonality and predominance requirements were met, and granted certification to the sick leave class. Plaintiffs contended that the overtime sub-class also presented common questions of liability, which predominated over individualized issues because Plaintiffs challenged two policies that were "facially apparent from the wage statements and readily accessible from electronic databases of information." *Id.* at *13. Plaintiffs contended that Defendant improperly failed to add in applicable bonus payments when calculating employees' overtime rates. *Id.* at *14. Plaintiffs also contended that Defendant improperly failed to pay employees overtime wages for attending training or company meetings that extended their working day past eight hours, or their workweek past 40 hours. The Court found that whether bonuses should have been included in class members' regular rate of pay was likely to produce common answers across easily identifiable cross sections of the class, and individual issues as to any given class member were unlikely to affect the analysis. *Id.* at *17-18. However, with respect to attending training and meetings, the Court held that some of the meetings were voluntarily and some were federally mandated, and figuring out which was which would result in individualized liability issues overwhelming any common issues. *Id.* at *20. Accordingly, the Court granted the motion in part as to the overtime sub-class. *Id.* As to the meal and rest break sub-class, Plaintiffs contended that Defendant implemented three policies that violated the Labor Code, including: (i) a policy requiring employees to be "alert" and on-call even during meals and rest breaks; (ii) a policy of denying employees rest breaks until after the first four hours worked; and (iii) a policy of denying employees a third meal break for shifts of 16 hours or longer. The Court concluded that only the third policy was amenable to class treatment. However it determined that Defendant's policy authorized rest breaks every four hours, as required by the Labor Code. Accordingly, the Court denied the motion as to the wage payment sub-class. As to the living wage ordinance sub-class, the Court stated that individualized issues would overwhelm any common issue as to whether the previous payments adequately compensated Plaintiffs. *Id.* at *33. The Court found that it would need to determine whether each member of the sub-class received all of the compensation to which he or she was entitled under the ordinance. Further, the amount to which each employee was entitled depended on whether the employee received health benefits, and the value of those benefits, which were part of the wage calculation. *Id.* Finally, the Court determined that the former employee sub-class was derivative of the overtime, meal and rest break, and living wage ordinance sub-classes. *Id.* at *34. The Court therefore granted certification to the extent that sub-class members were also members of the bonus overtime sub-class and meal and rest break sub-classes; and denied certification to the extent that sub-class members were only members of the training and meetings overtime or living wage ordinance sub-class. *Id.* Accordingly, the Court granted in part and denied in part Plaintiffs' motion for class certification.

***Snipes, et al. v. Dollar Tree Distribution*, 2017 U.S. Dist. LEXIS 195460 (E.D. Cal. Nov. 27, 2017).** Plaintiff, an employee, filed an action alleging that Defendant's uniform time-keeping practices wrongfully excluded compensable time and operated to deprive employees of their legally guaranteed uninterrupted rest and/or meal periods in violation of the California Labor Code. *Id.* at *1-2. Plaintiff filed a motion for class certification pursuant

to Rule 23, which the Court granted. Plaintiff asserted that non-exempt employees, who were paid in 15-minute increments, could not clock-in more than seven minutes in advance of their scheduled shift, or more than seven minutes after their shifts ended, which resulted in under-payment to employees since they never monetarily benefited from Defendant's automatic practice of rounding to the nearest 15-minute intervals. Plaintiff further alleged that by forcing multiple employees to clock-in and clock-out at a limited number of terminals, rest and meal breaks were compromised as a result of long lines. *Id.* at *3. Plaintiff also claimed that Defendant's wage statements were inaccurate because they failed to include non-discretionary bonuses when calculating an employee's regular rate of pay. *Id.* at *4. Plaintiff sought to certify numerous classes and sub-classes. The Court determined that Plaintiff easily established numerosity with 783 potential class members. *Id.* at *6. The Court also held that Plaintiff's allegations involved questions of law or fact common to the purported classes. Further, given the fact that Plaintiff's claims were predicated on allegedly uniform policies and practices that applied equally to all proposed class members, the Court opined that Plaintiff's claims and injuries were typical of those suffered by the purported classes. *Id.* at *7. As to adequacy, Plaintiff claimed to seek vindication not only for himself, but also for his fellow employees, and Plaintiff stated that he was ready, willing, and able to accept his role as class representative and would dutifully represent the interests of the class. *Id.* at *9. The Court accordingly found Plaintiff to be an adequate class representative. The Court stated that Plaintiff's counsel were seasoned litigators with significant experience in wage & hour disputes and class actions, and therefore also met the adequacy of representation requirement. *Id.* at *10. The Court further found that Plaintiff met the requirements of Rule 23(b). The Court reasoned that if Defendant's wage & hour practices were determined to be unlawful through any of the theories espoused by Plaintiff, the same rationale as to that unlawfulness would apply to each potential class member. *Id.* at *12. Because this outcome was amenable to determination on a class-wide basis without any particular individualized inquiry, the Court found that common questions predominated. *Id.* Finally, the Court held that relative to the cost of litigation each proposed member's individual claim was relatively small and therefore adjudication by a class action was the superior method to handle the issues. Accordingly, the Court concluded that Plaintiff met all requirements necessary for class certification pursuant to Rule 23, and it therefore granted Plaintiff's motion.

***Soares, et al. v. Flowers Foods, Inc.,* 2017 U.S. Dist. LEXIS 100418 (N.D. Cal. June 28, 2017).** Plaintiffs, a group of delivery distributors, brought a class and collective action alleging that Defendant misclassified them as independent contractors in violation of the FLSA and the California Labor Code. Plaintiffs filed a motion for class certification and the Court denied the motion on the basis that Plaintiff failed to meet the predominance and superiority requirements of Rule 23(b). Defendant's distributors purchased the exclusive right to sell Defendant's products in given geographic territories and are responsible for delivering, displaying, and selling the products in their areas. *Id.* at *4. The Court found that the nature of the businesses – namely the differences in their operations – would require individual inquiries and therefore common questions did not predominate for purposes of Rule 23(b)(3). While the Court noted that the class was limited to distributors who "personally serviced" their routes, the determination of which distributors did so, and when, was not able to be answered in one fell swoop, since some of the distributors were "absentee" territory owners who never personally serviced their own routes; others always performed their own routes and did not hire helpers, and others hired helpers or employees who performed the routes only some of the time. *Id.* at *46. The Court found that neither party had records disclosing which distributors "personally serviced" their routes and which did not, let alone when they did so or for how many days or hours. *Id.* Further, some distributors provided delivery services to other companies currently performing distribution services for Defendant and others drove exclusively for Defendant. *Id.* at *47. As a result, the Court found trying the case as a class action presented manageability issues given the individual inquiries necessary to establish Defendants' liability for each of the putative class members. For example, the Court would need to hold mini-trials to determine which drivers "personally serviced" their routes, when, and for how many hours and whether they did deliveries for other companies in order to analyze whether a particular driver was engaged in a business distinct from other class members or even whether the Distributor qualified as a class member. *Id.* at *55-56. The Court opined that there would also need to be individualized inquiries into how to treat distributors who may have owned more than one territory. Because class members have an interest in individually controlling separate actions, as evidenced by the many individual Distributors who have filed their own actions, and trying these claims as a class action created manageability issues, the Court concluded that class-wide resolution was not the superior method of adjudicating Plaintiffs' claims.

***Stiller, et al. v. Costco Wholesale Corp.*, 673 Fed. Appx. 783 (9th Cir. 2017).** Plaintiffs, a group of hourly employees, brought a collective action and class action alleging that Defendant violated the FLSA and California wage & hour laws through the implementation of closing procedures that resulted in unpaid off-the-clock ("OTC") time. Plaintiffs alleged that they and other hourly non-exempt employees were regularly forced against their will to remain locked inside of Defendant's warehouses after clocking-out at the end of their closing shifts during which Defendant's supervisors and managers performed closing activities, such as removing jewelry from cases and emptying cash registers. *Id.* at 784. The District Court certified Plaintiffs' class claims under Rule 23, and conditionally certified their FLSA claims under 29 U.S.C. § 216(b). Subsequently, Defendant moved to decertify the collective action and the class action. The District Court found that Plaintiffs failed to show that issues common to the class predominated over individual issues, and it granted Defendant's motion. On appeal, the Ninth Circuit affirmed the District Court's ruling. Plaintiffs contended that the District Court erred in granting decertification because it required that common questions resolve the liability for every class member. *Id.* The Ninth Circuit disagreed and opined that the District Court did not impose a "100%" predominance requirement. *Id.* The Ninth Circuit reasoned that the District Court correctly looked to the three elements of an "off-the-clock claim" under California law. The Ninth Circuit found that Defendant put forward sufficient evidence to show that the individual policies comprising the policy at issue were not implemented and applied uniformly as to all potential class members. The Ninth Circuit held that the District Court properly determined that proving that class members actually performed unpaid work – as required to establish liability – would require class members to present evidence that varied from class member to class member. *Id.* at 784-85. As such, the Ninth Circuit found that whether class members actually performed unpaid work was not a common question capable of class-wide resolution. The Ninth Circuit therefore concluded that the District Court did not abuse its discretion in ruling that individualized issues would predominate over common issues. Accordingly, the Ninth Circuit affirmed the District Court's ruling granting Defendant's motion for decertification.

***Thomas, et al. v. Kellogg Co.,* 2017 U.S. Dist. LEXIS 171734 (W.D. Wash. Oct. 17, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant misclassified them and others similarly-situated and thereby failed to pay all wages in violation of the FLSA. The Court had previously conditionally certified a collective action. Defendant argued that given the recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017) the Court did not have specific personal jurisdiction over the out-of-state Plaintiffs' claims against it, as it was an out-of-state Defendant. *Id.* at *2. Defendant sought dismissal of the claims of 821 of the 858 Plaintiffs who had opted-in to the case. Defendant stated that a group of employees had filed a second, similar case in Nevada – *Smith v. Kellogg*, Case No. 17-CV-1914 (D. Nev.) – seeking similar damages for similar violations in a different, later time period. *Id.* at *3. Defendant thereby sought decertification of the collective action on the basis that a second collective action was pending in another jurisdiction. *Id.* Defendant further argued that the collective action should be decertified because Plaintiffs had no expert testimony supporting their claim that their evidence was representative. Plaintiffs argued that Defendant waived its objection to personal jurisdiction by failing to assert such a defense, vigorously litigating for four and a half years, and moving for dismissal only a month before trial. *Id.* Plaintiffs asserted that *Bristol Myers* involved only the "straightforward application" of "settled principles" of specific personal jurisdiction, and that it did not purport to be the "game changing," "transformative" opinion that Defendant argued. *Id.* at *4. The Court agreed with Plaintiffs. Further, the Court stated that *Bristol Myers* concerned only the "due process limits on the exercise of specific jurisdiction by a state." *Id.* Therefore the Court found that it was not even clear that *Bristol Myers* applied. Accordingly, the Court denied Defendant's motion to dismiss the out-of-state opt-ins' claims. The Court also denied Defendant's motion for decertification based on *Smith*. Finally, the Court stated that Defendant's effort to decertify the collective action based on Plaintiffs' lack of expert testimony relied primarily on the representation of Plaintiffs' attorney that they would identify an expert. *Id.* at *5. However, the Court found that none of the cases Defendant cited supported the claim that an expert is necessarily required, and further, that it was unclear what evidence Defendant claimed could not be introduced without an expert opinion. *Id.* Further, the Court noted that Plaintiffs cited numerous cases holding that expert testimony was not necessarily required, so long as Plaintiffs were similarly-situated. Accordingly, the Court denied Defendant's motion to decertify the collective action based on Plaintiffs' lack of expert testimony.

***Torres, et al. v. Wells Fargo Bank, N.A.*, 2017 U.S. Dist. LEXIS 60119 (C.D. Cal. Mar. 21, 2017).** Plaintiffs, a group of current and former home mortgage consultants ("HMCs"), brought a class action alleging that

Defendant violated several provisions of the California Labor Code by making unlawful deductions from wages, denying overtime wages, and denying meal and rest periods. All HMCs were covered by the home mortgage incentive compensation plan for HMCs (the "compensation plan"). *Id.* at *2. Pursuant to the compensation plan, HMCs received compensation in the form of: (i) hourly pay (advances on commissions); (ii) commissions, bonuses, and other incentives earned per the plan's terms in excess of advances; and (iii) overtime premiums. Defendant previously moved for summary judgment on Plaintiffs' first, second, fifth, and sixth causes of action. The Court granted the motion and dismissed Plaintiffs' claims that Defendant improperly deducted uncollected fees. Additionally, because Plaintiffs' second (failure to pay overtime), fifth (failure to pay wages at termination or discharge), and sixth (unfair competition) causes of action were derivative of the first cause of action, the Court also granted summary judgment on those claims. Plaintiff subsequently sought to certify a narrower class of "[a]ll California home mortgage consultants who worked for Defendant Wells Fargo who received a meal period premium during the time period when incentive pay was earned from September 15, 2011 to the present." *Id.* at *3-4. The proposed class was based on Plaintiff's alleged theory that Defendant had a policy and practice of paying missed meal premiums at class members' base rate of pay instead of the regular rate of pay as required under California law. *Id.* at *3. Since September of 2007, Defendant employed an "automatic California meal/rest period premium pay" procedure under which employees who self-reported that they did not take a compliant meal period automatically received a meal period premium in their next paycheck. *Id.* Beginning in approximately May of 2012, Defendant paid the meal premiums in any instance when an HMC self-reported that he or she did not take a compliant meal break, regardless of the validity of the claim or the reason for not having an opportunity to take a meal break. *Id.* Defendant asserted that Plaintiff's theory of liability was not amenable to class treatment because it failed to satisfy the commonality requirement under Rule 23(a) and the predominance requirement under Rule 23(b)(3). *Id.* at *5. In her motion, Plaintiff identified a single common question of whether Defendant's policy and practice concerning the rate of pay used for missed meal premiums was consistent with the California Labor Code. Defendant argued that the question could not drive the resolution of the action on a class-wide basis because it went only to the measure of damages, and therefore there was no commonality that would allow the Court to determine liability in a single stroke. *Id.* at *6-7. The Court agreed, and found that in seeking to certify a class based on the alleged under-payment of wage premiums under § 226.7, Plaintiff failed to identify a common question of liability that was "apt to drive the resolution of the litigation." *Id.* at *7. The Court stated that seeking to be part of a § 226.7 class would necessarily require an individualized inquiry into the underlying question of Defendant's liability as to every class member. *Id.* at *8. Moreover, the Court held that the necessity of an individualized inquiry into Defendant's failure to provide meal breaks also undermined the predominance requirement of Rule 23(b)(3). *Id.* at *11. The Court determined that each class member's recovery would depend on factual questions particular to that individual's failure to take a meal period and the reasons for that failure. *Id.* at *12. Accordingly, the Court ruled that Plaintiff did not demonstrate that her theory of recovery involved predominantly common issues that could be adjudicated on a class-wide basis. *Id.* at *14. Because the Court found that Plaintiff did not meet Rule 23's commonality requirement or that common questions predominated, the Court did not address the Rule 23's remaining requirements. Accordingly, the Court denied Plaintiffs' motion for class certification.

***Wagner, et al. v. County Of Inyo,* 2017 U.S. Dist. LEXIS 192913 (E.D. Cal. Nov. 20, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. *Id.* at *1. The parties filed a stipulation agreeing to conditional certification of a collective action, which the Court granted. Plaintiffs alleged that Defendant failed to pay overtime over a three year period because Defendant did not include compensation in lieu of healthcare coverage in the regular rate of pay used to calculate the overtime. *Id.* The Court examined the pleadings and the record to determine whether to grant the motion for conditional certification. It found that under the lenient first stage of conditional certification, Plaintiffs only need to show that the putative collective action members were together the victims of a single decision, policy, or plan. The Court held that conditional certification of the claims of the collective action members was appropriate because they were the result of a single policy. *Id.* at *3. The Court explained that notice would apprise potential collective action members of the nature of the claims alleged, the steps they must take to be included in the action, and the consequences of joining. *Id.* Accordingly, the Court granted conditional certification of the collective action.

***Wallace, et al. v. City Of San Jose*, 2017 U.S. Dist. LEXIS 200190 (S.D. Cal. Dec. 5, 2017).** Plaintiffs, a group of firefighters, filed a class and collective action alleging that Defendant failed to properly pay overtime compensation in violation of the FLSA and the California Labor Code. The Court had previously granted conditional certification of Plaintiffs' FLSA collective action. Defendant subsequently moved to decertify the collective action, and the Court granted the motion. Plaintiffs' collective action consisted of all current and former employees: (i) employed as a fire recruit, firefighter, fire engineer, fire captain, fire prevention inspector, arson investigator, or battalion chief at any time on or after March 11, 2013 (for willful FLSA violations) or March 11, 2014 (generally); and (ii) who had opted-in or will opt-in on or before April 25, 2017. *Id.* at *2-3. Defendant argued that Plaintiffs failed to meet their burden of establishing that the collective action members were similarly-situated under the FLSA. The Court stated that there was no dispute that Plaintiffs had different job titles and duties and worked different types of shifts. Plaintiffs did not dispute these differences, but contended that everyone was similarly-situated because they were "firefighter employees" who worked within the City; reported to the same fire chief; were subject to the same rules, regulations, and operating procedures; were compensated according to the same pay scales; and were subject to being called back to work overtime hours and might also incur FLSA overtime. *Id.* at *7-8. Plaintiffs argued that any differences were outweighed by these commonalities. Plaintiffs further contended that any variations in shift assignments were already accounted for in the City's payroll system and were simply a matter of calculating individual damages, which was not a basis for decertification. *Id.* at *9. The Court found that Plaintiffs presented no consistent evidence as to a uniform policy that would result in systematic FLSA violations across the membership of the collective action. *Id.* at *14. The Court further reasoned that resolution of liability and damages issues would essentially require individualized inquiries as to each opt-in to determine whether they have actually been injured in the way Plaintiffs claimed. The Court also stated that it would need to consider each employee's set of different background facts based on work activities in any given pay period. Thus, the Court concluded that representative testimony would not accurately capture the situation of each individual Plaintiff. *Id.* at *20. In view of the varied job duties, shifts, and employment settings of Plaintiffs and the collective members, as well as the lack of any evidence that any of the opt-ins actually were under-paid pursuant to Plaintiffs' theory, the Court granted Defendant's motion for decertification.

***Zayers, et al. v. Kiewit Infrastructure West Co.*, 2017 U.S. Dist. LEXIS 183001 (C.D. Cal. Oct. 26, 2017).** Plaintiff, a field laborer, filed a class action alleging that Defendant failed to provide or pay for second meal and third rest breaks and off-the-clock work, and that his wage statements were inaccurate in violation of the California Labor Code. Plaintiff filed a motion for class certification, which the Court denied. Plaintiff sought certification of: (i) a class of all current and former non-exempt employees employed by Defendant in the field in the State of California at any time from May 18, 2012 through the date of the certification; and (ii) a waiting time sub-class consisting of all class members who had separated their employment from Defendant from May 18, 2013 through the date of certification. *Id.* at *2-3. Defendant argued that Plaintiff's theory of liability was not amenable to class-wide treatment because it failed to satisfy the commonality, numerosity, typicality, and adequacy requirements under Rule 23(a), and the predominance requirement under Rule 23(b)(3). *Id.* at *5-6. Plaintiff argued that there were common questions of law and fact regarding whether Defendant's meal period and rest break policies, off-the-clock policies, and wage statements violated the California Labor Code. As to the meal period claims, Plaintiff argued that Defendant's official second meal period policy was compliant with the law, but in practice a second meal period was not provided to employees. Plaintiff further alleged the "common proof" of Defendant's pay stubs and time records would establish Defendants engaged in such a practice as to all class members. *Id.* at *6. However, the Court found that Plaintiff's timesheets showed he always received premium payments for late meal breaks, and in his deposition he could not identify a single occasion when he or anyone else missed a meal break altogether or was not given the opportunity to take one. *Id.* at *8. The Court therefore concluded that whether Defendant failed to give its employees the opportunity to take a second meal break necessarily required an individualized inquiry as to every class member as to whether they took second meal breaks, whether they were denied the opportunity to take them, or whether and why they waived them. *Id.* at *9. Plaintiff also claimed that Defendant failed to authorize a third rest break when employees worked shifts longer than 10 hours and failed to pay rest period premiums when a third rest break was not permitted. Again, the Court reasoned that even if Plaintiff could prove that a rest break violation did occur as to each and every employee, the question of why the employees did not take a third rest break was an individualized one, and Plaintiff failed to show how that question could be resolved on a class-wide basis. *Id.* at *12. Plaintiff also argued

that Defendant failed to pay for off-the-clock work and stated that foremen only recorded scheduled work time even if the crew started working before their shifts. *Id.* at *14. However, the Court held that Plaintiff failed to provide evidence that this practice occurred on a class-wide basis and did not even offer evidence that it happened to him. *Id.* Finally, the Court found that conflicting evidence on Plaintiff's own crew and job-site demonstrated that proving Plaintiff's claims would require an individual assessment of each employee's work habits, timesheets, and pay stubs. *Id.* at *15. The Court thus concluded that Plaintiff failed to meet the commonality requirement of Rule 23(a). Moreover, the Court opined that the necessity of an individualized inquiry into Defendant's alleged California Labor Code violations also undermined the predominance requirement of Rule 23(b)(3). *Id.* at *16. Because the Court determined that Plaintiff had not met Rule 23(a)'s commonality requirement or shown that common questions predominate as required by Rule 23(b)(3), the Court declined to address the Rule's remaining requirements. Accordingly, the Court denied Plaintiff's motion for class certification.

(x) Tenth Circuit

***Aguila, et al. v. Management & Training Corp.,* 2017 U.S. Dist. LEXIS 122429 (D.N.Mex. Aug. 3, 2017).** Plaintiffs, a group of detention officers, alleged that Defendant failed to pay for some of their hours worked on assignment for a prison in violation of the FLSA and the New Mexico Minimum Wage Act ("NMMWA"). Plaintiffs contended they were: (i) required to spend time on-duty inside the prison, without pay, before and/or after their shift, gathering and securing equipment, and passing through prison security areas; and (ii) that Defendant's use of the "rounding" method of time-keeping allegedly caused under-payment in calculating wages. *Id.* at *7. According to Plaintiffs, of the 170 total detention officers employed at the prison, 10% rotated on and off transport duty. Plaintiffs sought to designate detention officers who were named Plaintiffs or who have opted-in and were assigned to the transport duty post as a sub-group asserting a sub-claim per 29 U.S.C. § 216 (b). The Court denied Plaintiffs' motion. First, the Court noted that it previously denied Plaintiffs' motion to amend the complaint to include missed meal break claims. *Id.* at *4. The Court concluded that the motion was both untimely, and that amendment would be futile, thus precluding any claim for missed meal breaks. The Court determined that there was no sense in allowing a sub-group for Plaintiffs asserting a claim that did not exist in the lawsuit. Second, the Court noted that even if such a claim had been initially asserted, the Court failed to see how designating a sub-group would allow it to manage the case more efficiently. The Court stated that the issues were not complex, and the differences were too minor to warrant a separate sub-group. *Id.* at *5. Third, the Court found that creation of a new sub-group would involve further discovery, as discovery would have to be undertaken regarding Defendant's defenses for each individual in the sub-group. The Court had already denied Plaintiffs' motion to amend on other grounds, but the need for further discovery after the deadline had passed also militated against adding a sub-group. Finally, the Court stated that the small size of the sub-group diminished even further any point in designating one, as the group would encompass only nine possible employees. The Court concluded that any factual differences between the claims of those who worked transport duty and missed a meal break and those who remained on shift assignment as detention officers could be resolved by individual handling of damages after liability was established. Accordingly, the Court denied Plaintiffs' motion for conditional certification of a sub-group.

***Beltran, et al. v. Interexchange, Inc.*, Case No. 14-CV-3074 (D. Colo. Mar. 30, 2017).** Plaintiffs, a group of au pairs, filed a collective action alleging that Defendants conspired to set weekly wages for au pairs below minimum wage in violation of the FLSA. Plaintiffs filed a motion for conditional certification of their FLSA claims, which the Court granted. Plaintiffs alleged that Defendants determined that au pairs would be paid $195.75 per week for up to 45 hours of work, or approximately $4.35 per hour. *Id.* at 3. Plaintiffs further alleged that they routinely worked in excess of 40 hours per week without receiving overtime compensation, they paid fees to Defendants before being permitted to work, Defendants deducted room and board from their wages, and they were required to participate in mandatory training without compensation. *Id.* Plaintiffs sought certification of 11 collective actions. *Id.* at 4-5. Defendants asserted several arguments, most of which the Court determined went beyond the lenient burden required for first-stage conditional certification. The Court concluded that Plaintiffs adequately alleged that they were subject to a single decision, policy, or plan that Plaintiffs and others were similarly-situated. Plaintiffs also submitted declarations relating their own experiences securing employment as au pairs and a number of representations made by Defendants concerning compensation policies. *Id.* at 9. The Court found that the declarations reiterated the allegations in the complaint and referenced the uniformity of the

compensation policies, which further established that other au pairs employed by Defendants were similarly-situated. Accordingly, the Court held that Plaintiffs met their burden to warrant conditional certification, and granted Plaintiffs' motion pursuant to 29 U.S.C. § 216(b).

***Cavallo, et al. v. Bull Rogers, Inc.,* 2017 U.S. Dist. LEXIS 115630 (D.N.Mex. July 25, 2017).** Plaintiffs, a group of casting employees, filed a collective action alleging that Defendant violated the overtime provisions of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. Defendant employed non-exempt workers ("NEEs") to provide casting services to Defendant's customers, but failed to track or count hours worked by casting employees ("CEs") when these employees were paid on a quantity of work/piece-rate basis and as a result, under-reported the overtime hours worked by CEs. *Id.* at *9. Plaintiffs submitted declarations of the named Plaintiff Calvillo and Raytonio Moore. Both stated that Plaintiffs were subjected to the same illegal policies as other NEEs, that other casting employees worked under the same overtime conditions where their hours were either not tracked or miscounted, and that they did not receive pay for the overtime worked. *Id.* at *9-10. As a result, Plaintiffs alleged that these non-exempt employees were not paid for all overtime hours when paid quantity-based pay and/or they did not receive pay at the legally required rate. *Id.* at *10. Defendant contended that Plaintiffs' assertion that they were not compensated conflicted with Defendant's practice that casting employees were required to report all hours worked and were paid for all hours worked. Defendant also argued that conditional certification was not appropriate because Plaintiffs failed to offer evidence – other than conclusory allegations – that their alleged experience of not being paid for off-the-clock activities was shared by other employees. *Id.* at *10-11. However, the Court found that Defendant's contentions went more to the merits of the case rather than to conditional certification, which at the initial stage requires no actual evidence to be presented, but only "substantial allegations" that the putative collective action members were together "victims of a single decision, policy or plan." *Id.* at *11. Defendant further asserted that Plaintiffs had no knowledge of Defendant's pay practices regarding fellow casting employees during the bulk of the limitations period because they worked for Defendant over two years ago. *Id.* The Court held that this issue would be taken up in the second stage of the analysis which uses a stricter standard to determine whether Plaintiffs were similarly-situated and would include a review of the disparate factual and employment settings of the individual Plaintiffs. Finally, Defendant argued that conditional certification should be denied because evidentiary hearings for each collective member would be necessary to determine damages. *Id.* at *11-12. The Court stated that individualized damages had no bearing at the conditional certification stage. The Court reasoned that the "similarly-situated" inquiry under immediate consideration required only a colorable basis showing the putative collective action members were victims of a single decision, policy or plan, and the Court found that Plaintiff satisfied that lenient test. *Id.* at *12. The Court determined that the putative Plaintiffs worked for the same employer, performed largely similar duties, and their allegations of FLSA violations were derived from the same alleged practices of either not paying for overtime hours worked or miscalculating those hours. *Id.* at *13. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Kuri, et al. v. Addictive Behavioral Change Health Group, LLC*, 2017 U.S. Dist. LEXIS 187005 (D. Kan. Nov. 13, 2017).** Plaintiff, an hourly nurse, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff sought to represent a collective action composed of nurses employed on an hourly basis, who worked for Defendant from October 5, 2013 to the present and who alleged they were not paid for all straight time and overtime premiums of all hours worked in excess of 40 hours per workweek. *Id.* at *3-4. Although Plaintiff did not submit declarations or supporting affidavits with her motion, Defendant did not dispute that her allegations satisfied the low threshold for an order conditionally certifying Plaintiff's claims as a collective action under the FLSA. *Id.* at *6. Furthermore, the Court found that Plaintiff met the low threshold of providing substantial allegations that she and the putative collective action members were together the victims of a single policy, sufficient to warrant conditional certification. *Id.* Plaintiff alleged that Defendant engaged in the policy and practice willfully, thereby invoking a three-year statute of limitations. *Id.* at *7. Therefore, with regard to putative Plaintiffs who would receive notice of the action, the Court applied a three-year statute of limitations period to the putative collective action members. *Id.* Under the FLSA, the statute of limitations for each Plaintiff runs until the date he or she files a written consent to join the action, unless the limitations period is equitably tolled, and the Court therefore limited the collective action definition to "November 9, 2014 to the present." *Id.* Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Landry, et al. v. Swire Oilfield Services,* 2017 U.S. Dist. LEXIS 66497 (D.N.Mex. May 2, 2017).** Plaintiffs, a group of oilfield laborers, brought a putative collective action pursuant to the Fair Labor Standards Act ("FLSA") alleging wage & hour violations. *Id.* at *1**.** Plaintiffs moved to conditionally certify a collective action with respect to two groups consisting of: (i) a salaried group of manual laborers who worked without overtime; and (ii) a fluctuating workweek group of manual laborers who were not paid minimum wage**.** Plaintiffs asserted that Defendant misclassified most Plaintiffs in the salaried group as exempt and this was illegal because the FLSA did not provide an overtime exemption for low-level field employees. *Id.* at *18. Plaintiffs also asserted that while Defendant paid hourly workers overtime under the fluctuating workweek method, it failed to satisfy the FLSA's requirements, as there was no clear mutual understanding between Defendant and Plaintiffs concerning the fluctuating workweek method and at times the wages paid were below minimum wage. The Court granted Plaintiffs' motion to conditionally certify the collective action. Defendant objected and argued that the proposed salary group and fluctuating workweek group were not similarly-situated, because Plaintiffs had different job positions and failed to identify a single decision, policy, or plan to violate the collective action members' FLSA rights. *Id.* at *33. The Court determined that the proposed salary group and fluctuating workweek group were similarly-situated because Plaintiffs made substantial allegations that: (i) the proposed group included employees with similar positions; and (ii) Defendant had a single decision, policy, or plan to not pay the salaried group overtime and to not pay the fluctuating workweek group's minimum wage. *Id.* at *97, 105. The Court rejected Defendant's assertion that conditional certification was precluded because the putative collective action members' specific job duties differed. *Id.* at *94. The Court reasoned that at the notice stage, Plaintiffs need only show that their positions were similar, not identical, to the positions held by the putative collective action members. *Id.* at *95. The Court rejected Defendant's argument that it did not have a single decision, policy, or plan to violate the FLSA rights of the salaried group because some manual laborers were not paid on salary. The Court reasoned that the different pay provisions were immaterial and because Plaintiff alleged that Defendant made a company-wide decision to classify nearly all operators as exempt from the FLSA's overtime requirements, and paid them on a flat salary basis or on a salary basis with a day rate payment, Plaintiffs were similarly-situated. *Id.* at *98. As to the fluctuating workweek group, Defendant argued that it began transitioning hourly workers to the fluctuating workweek after it had made the other alleged decision, policy, or plan to improperly classify certain positions as exempt. Defendant argued that these various decisions did not amount to a single decision, policy, or plan. *Id.* at *101. The Court rejected this argument, as Plaintiffs defined two groups that corresponded to each compensation plan and Defendant's argument assumed the existence of only one group. *Id.* at *102. Finally, Defendant argued that the proposed collective action members were not similarly-situated because certain collective action members had already settled their claims with Defendant. *Id.* at *106. The Court rejected this argument as a basis for defeating conditional certification, even though employees who had already settled could not recover. *Id.* at *107. Defendant also requested that the Court limit the scope of the collective action to employees in New Mexico, Texas, Oklahoma, and North Dakota, because Plaintiffs' only declarations were from employees in those states. The Court rejected this argument and ruled that there was a reasonable basis to conclude that the compensation systems applied nationwide, as the declarations were from employees from multiple locations. *Id.* at *111. Accordingly, the Court granted Plaintiffs' motion to conditionally certify the collective action. *Id.* at *125.

***McFeeters, et al. v. Brand Plumbing*, 2017 U.S. Dist. LEXIS 19542 (D. Kan. Feb. 10, 2017).** Plaintiff, a plumber, brought an action alleging that Defendant failed to pay him and others similarly-situated overtime compensation in violation of the FLSA. Plaintiff submitted a sworn declaration in which he stated that Defendant compensated plumbers on an hourly basis. Plaintiff further stated that plumbers frequently worked more than 40 hours a week. Plaintiff contended that Defendant's policy provided that plumbers could not take work trucks home and thus plumbers had to report to Defendant's central business location to pick up and return the truck each day. Plaintiff alleged that Defendant did not pay for the time it took to drive back from the last job of the day to the central location. In addition, Plaintiff stated that Defendant did not fully compensate plumbers for their drive time for jobs outside of Wichita. *Id.* at *2. Plaintiff moved for conditional certification of a collective action, which the Court granted. *Id.* at *2-3. Defendant contended that Plaintiff was, in reality, a "plumber's helper" and not a licensed plumber. *Id.* at *5. Defendant provided an affidavit that stated that it had employees who are licensed plumbers that are not paid on an hourly basis. *Id.* at *5-6. Thus, Defendant requested that the proposed class state "plumber's helper" instead of plumber. *Id.* at *6. Plaintiff contended that although Defendant stated that its owners were plumbers and were not paid on an hourly basis, Defendant did not assert that any other

licensed plumber or plumber was not paid on an hourly basis, nor did Defendant point out that the position of plumber was exempt from overtime requirements under the FLSA. *Id.* The Court determined that at this initial stage of conditional certification, there was no evidence that Defendant distinguished between job duties or pay structures for licensed plumbers, plumbers, or plumber's helpers. *Id.* The Court therefore revised the class definition to include the individuals that Plaintiff contended were covered and the individuals that Defendant asserted were covered. Accordingly, the Court held that the proposed collective included "plumbers, licensed plumbers, or plumber's helpers." *Id.* at *7. Defendant further objected to the class definition because it included employees "who were not paid overtime as a consequence of not being credited and compensated for driving time in a company truck." *Id.* Defendant argued that this definition was overly broad. Defendant requested to define the class as individuals who were not credited or compensated for: (i) the time it took to drive from the last job location to the office; and (ii) the time spent driving to and from job locations outside of Wichita. *Id.* The Court noted that in Plaintiff's motion for conditional certification, he sought conditional class certification for plumbers, similarly-situated to him, who were not properly compensated with overtime premium for all hours worked due to drive time at the end of the day and drive time for travel outside of Wichita. *Id.* at *8. Thus, the Court held that Defendant's proposal appeared consistent with Plaintiff's contentions. Accordingly, the Court found it appropriate to include Defendant's limiting language in the class definition. Accordingly, the Court granted conditional certification of the collective action with an amended definition.

***Roberts, et al. v. PATCO Electrical Services, Inc.,* 2017 U.S. Dist. LEXIS 93548 (W.D. Okla. June 19, 2017).** Plaintiffs, a group of apprentice electricians, filed a collective action alleging that Defendant violated the FLSA by not paying overtime compensation until after working 50-hours per week and by deducting hour-long meal periods when they did not receive an hour off of work. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted in part. Plaintiffs defined the proposed collective action as "all current and former hourly-paid electricians, including journeymen and apprentice electricians as well as all other electricians who were employed by Defendant during the three-year period preceding the filing of the complaint." *Id.* at *3. Plaintiffs alleged that the proposed collective action members had similar job duties and responsibilities, were required to expend a significant amount of time traveling to their different jobsites and traveling to pick up parts and equipment, and worked schedules similar to and were compensated in a manner similar to Plaintiffs. *Id.* at *4. Defendant asserted that Plaintiffs' allegations regarding the lunch time deductions were clearly not a single policy, plan, or decision that affected all of the members of the putative collective action and that only one of Defendant's supervisors made the decision to use shorter lunch breaks when a specific job required that he do so. *Id.* at *5. Defendant further argued that Plaintiffs could not show that they were similarly-situated to the members of the putative collective action as defined because Plaintiffs were part of a unique limited group of employees, *i.e.,* apprentice electricians at the Calumet location, and that due to the unique nature of the Calumet facility, Defendant decided to provide a per diem payment/travel time allowance to each of the hourly employees at the Calumet location. *Id.* at *5-6. The Court found that Plaintiffs had not shown that the other putative collective action members were similarly-situated because they did not demonstrate all current and former hourly-paid electricians, including journeymen and apprentice electricians as well as all other electricians who were employed by Defendant, were together the victims of a single decision, policy, or plan. *Id.* at *6. The Court reasoned that because of the unique nature of the Calumet facility, Plaintiffs were unable to show the requisite substantial similarity for conditional certification of their proposed collective action. However, the Court held that Plaintiffs did demonstrate that the other apprentice electricians who worked at the Calumet location were similarly-situated. *Id.* at *6-7. Accordingly, the Court granted Plaintiff's motion for conditional certification of a modified collective action consisting of all current and former apprentice electricians who worked at the Calumet facility any time from June 24, 2013 to the present.

***Sobolewski, et al. v. Boselli & Sons, LLC,* 2017 U.S. Dist. LEXIS 170657 (D. Colo. Oct. 16, 2017).** Plaintiff, a McDonald's employee, filed a collective action alleging that Defendants failed to pay for break time in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Magistrate Judge recommended granting. On Rule 72 review, the Court accepted the Magistrate Judge's recommendation. Defendants argued that certification should be provided to hourly employees only at Defendants' Monument, Colorado location, because Plaintiff only worked at that location of Defendants' 12 stores. Defendant therefore asserted that Plaintiff's allegations were insufficient to indicate that employees at the other 11 locations were subject to the same allegedly unlawful policies. *Id.* at *5. However, the Court noted that Plaintiff's declaration

offered in support of his motion for certification specifically stated he "mostly worked at the McDonald's in Monument, Colorado but also worked at three other Boselli McDonald's." *Id.* Similarly, Plaintiff's declaration specifically stated the matters of which he complained occurred "during the time he worked at McDonald's," which the Court held was sufficient to include the other three McDonald's locations where he was employed. *Id.* As for the other eight locations, the Court found that Plaintiff was relying on the testimony of Defendant's Rule 30(b)(6) designee that hourly employees at all 12 locations were subject to the same break policy and same computerized time-keeping system. *Id.* at *6. Defendants asserted the fact that the stores used the same time-keeping system had no bearing on whether all locations should be included for purposes of the conditional certification because Plaintiff's allegations related to management's alleged unlawful actions, not to an error in the time-keeping system itself. *Id.* The Court disagreed and opined that the testimony showed that one of the violations allegedly occurred at all 12 locations until the time-keeping problem was fixed, *i.e.*, if an employee was clocked-out for 10 minutes they were paid, but if they clocked-out between 10 minutes and 30 minutes they were not paid. *Id.* at *7. The Court concluded that these allegations were not of "rogue" management decisions limited to some stores, but rather were of the same time-keeping system and policies applicable to all 12 stores. *Id.* Accordingly, the Court accepted the Magistrate Judge's recommendation granting Plaintiff's motion for conditional certification of a collective action.

***Whitlow, et al. v. Crescent Consulting LLC,* 2017 U.S. Dist. LEXIS 128742 (W.D. Okla. Aug. 14, 2017).** Plaintiff, a drilling consultant, filed a collective action alleging that Defendant failed to pay him and others similarly-situated overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff alleged that he and other drilling consultants were improperly classified by Defendant as independent contractors, and paid a day rate without overtime for hours worked in excess of 40 in any given workweek. *Id.* at *5. Plaintiff contended he worked more than 40 hours each week while engaged by Defendant, and that Defendant's failure to compensate him for these hours violated the FLSA. Plaintiff also presented evidence that Defendant retained persons it identified as independent contractors to serve as drilling consultants for third-parties, such as Sandridge Energy and Chesapeake Energy. These individuals were allegedly paid a set day rate, regardless of the number of hours worked in a day, and without regard to whether they worked more than 40 hours in a given workweek. Plaintiff alleged the putative Plaintiffs were subject to a compensation-scheme that violated the FLSA because they were not properly considered exempt from the overtime provisions of the Act, but received no overtime pay. *Id.* at *5-6. Plaintiff also submitted affidavits from other drilling consultants that supported his contention that they were similarly-situated in that they were paid according to the same structure and performed similar duties on well sites. *Id.* at *6. The Court found that the allegations and evidence submitted were sufficient to establish that the putative Plaintiffs were similarly-situated so as to permit conditional certification. Defendant contended that conditional certification was inappropriate because the issue of whether any particular Plaintiff was an employee of Defendant, rather than an independent contractor, would require an individualized analysis under the economic realities test. *Id.* at *6-7. The Court disagreed, and found that Plaintiff sufficiently alleged and presented evidence to support his burden at step one of conditional certification under 29 U.S.C. § 216(b). Each of the identified Plaintiffs alleged payment at a day rate, regardless of the number of hours worked in a week, and each putative Plaintiff was engaged by Defendant to serve as drilling consultant and assigned to the jobsite of a client. *Id.* at *9. Further, the Court noted that putative Plaintiffs described their job duties similarly. The Court therefore rejected Defendant's argument that it should delve into the economic realities test, and granted Plaintiff's motion for conditional certification of a collective action.

(xi) Eleventh Circuit

***Adams, et al. v. Gilead Group, LLC,* 2017 U.S. Dist. LEXIS 205294 (M.D. Fla. Nov. 17, 2017).** Plaintiff, a field collection agent, filed a collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff specifically alleged that Defendants shaved hours off of pay and required him to work off-the-clock. *Id.* at *2. Plaintiff sought to certify a collective action consisting of all field collection agents who worked for Defendants nationwide from August 1, 2013 to the present, who worked in excess of 40 hours in one or more workweeks, and who were not paid overtime compensation. *Id.* Defendants argued that certification should be denied because Plaintiff failed to establish that a sufficient number of similarly-situated employees wished to join the action, as only five individuals had expressed a desire to opt-in. *Id.* at *3. However, Plaintiff pointed to a

complaint filed with the U.S. Department of Labor ("DOL") in Missouri and a lawsuit filed in Texas alleging similar wage & hour violations as evidence that other employees would likely join in the action if it was certified as a collective action. *Id.* at *3-4. Defendant also argued that the collective action members were not similarly-situated because they provided services to several different cable companies. Plaintiff countered that the proposed collective action needed only to be similar, not identical, and all members were compensated hourly, performed similar duties, and were subject to the same payment policy. *Id.* at *4. The Court agreed with Plaintiff that the collective action members were similarly-situated. Finally, Defendants argued that its time records proved that Defendant paid field collection agents overtime during the relevant time period. *Id.* Plaintiff contended that the collective amount of overtime pay from the time records equated to only 53 cents per workweek. *Id.* at *5. Based on the record, the Court found that Plaintiff met the low burden for conditional certification, and it granted Plaintiff's motion. The Court also stated that Plaintiff averred that the relevant employees who performed similar duties were subject to a national payment policy, and the Court therefore granted conditional certification of a nationwide collective action.

***Albert, et al. v. HGS Colibrium,* 2017 U.S. Dist. LEXIS 67180 (N.D. Ga. May 3, 2017).** Plaintiffs, a group of sales representatives ("SRs"), filed a collective and class action alleging that Defendant violated the overtime provisions of the FLSA. Plaintiffs moved for conditional certification, which the Court granted. To support their motion for conditional certification of a collective action, Plaintiffs submitted their individual declarations and the declarations of two opt-in Plaintiffs in support of their motion. Defendant is a technology services company that markets health insurance products. Plaintiffs sold products to customers in Colorado, and claimed that Defendant required all SRs to perform work off-the-clock for which they were not fully compensated. *Id.* at *2. Plaintiffs also asserted that their duties routinely required them to work more than eight hours per day and over 40 hours per week. *Id.* at *3. Plaintiffs also stated that they clocked-in at the beginning of their shifts, and their supervisors directed them to log-out each day before eight hours had passed, regardless of whether they had completed their work, and that when they did not log-out and continued to work more than eight hours, managers would change the time records to reflect that they had not worked over 40 hours in a week. *Id.* Plaintiffs sought to represent a collective action of all persons employed by Defendant as non-exempt sales representatives at its Roswell, Georgia facility who sold or renewed policies for Colorado HealthOp between September 1, 2014 and March 31, 2015, and who were: (i) not paid for all work performed while clocked-in; (ii) were not paid for all work performed while off-the-clock; and (iii) were not compensated for time worked over 40 hours per week at overtime rates. *Id.* at *3-4. The Court determined that since two individuals have already opted-in to the litigation, Plaintiffs met the requirement of showing that others desired to opt-in. *Id.* at *6-7. In opposing conditional certification, Defendant argued that a collective action was not appropriate because many SRs never worked 40 hours a week, and liability therefore could not be established on a group-wide basis. *Id.* at *9-10. Defendant further contended that there were significant differences among the 62 potential members of the collective action, including the number of hours they worked per week, their time-keeping practices and receipt of overtime pay, and that determining liability would require "thousands of highly individualized determinations of each [SR's] daily activities, using a variety of data sources." *Id.* at *10. The Court found that Defendant's arguments went to the merits of the underlying claims and the suitability of allowing the case ultimately to proceed as a collective action, and were therefore more appropriate for consideration during the second stage of the certification process. *Id.* The Court determined that the evidence supported Plaintiffs' allegation that the opt-in Plaintiffs and other SRs worked "off-the-clock" hours, Defendant knew they did, and Defendant required them to log-out and continue working or manually reduced their recorded hours. *Id.* at *11. The Court held that Plaintiffs submitted evidence sufficient to show that Plaintiffs were similarly-situated to members of the proposed collective action. The Court accordingly granted Plaintiffs' motion for conditional certification.

***Allen, et al. v. Hartford Fire Insurance Co.*, 2017 U.S. Dist. LEXIS 136504 (M.D. Fla. Aug. 25, 2017).** Plaintiffs, a group of insurance salespersons, filed a collective action alleging that Defendant misclassified them as exempt employees and thereby denied overtime wages in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted. The Court first noted that in a related action entitled *Monserrate v. Hartford Fire Insurance Co.*, Case No. 14-CV-149 ("*Monserrate*"), Plaintiffs alleged that Defendant violated the FLSA by: (i) failing to pay its employees overtime compensation for hours worked in excess of 40 hours a week; (ii) failing to maintain accurate records of its employees' work hours; and (iii)

inaccurately classifying analysts as exempt from overtime pay despite knowledge that such analysts were non-exempt. *Id.* at *3-4. In *Monserrate*, Plaintiffs sought conditional certification of the claims of analysts, which the Court had previously granted. The parties ultimately settled the matter. *Id.* at *4. Plaintiffs then filed the instant action, which although factually similar to *Monserrate*, also referenced analysts employed by Defendant in Seminole County, Florida, Connecticut, New York, Georgia, and Minnesota. *Id.* Defendant argued that the Court should deny Plaintiff's motion for conditional certification because allowing them to use the second action as a vehicle to disseminate a second round of notices to an overlapping group of employees would render the opt-in deadline for collective actions insignificant and would not promote resolution of multiple claims in one proceeding. *Id.* at *6. The Court disagreed with Defendant that granting Plaintiffs' motion would be at odds with the goal of judicial economy. *Id.* at *7. The Court reasoned that the purpose of authorizing a § 216(b) class is "to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer." *Id.* Thus, "Court authorization of notice [to putative collective action members] serves the legitimate goal of avoiding a multiplicity of duplicative suits." *Id.* at *8. The Court opined that certification and the issuance of notice to a national class is more likely to reduce the amount of litigation against Defendant, as a collective action would resolve the claims of multiple Plaintiffs in one proceeding. *Id.* at *8-9. Plaintiffs contended that they were similarly-situated to putative collective action members because they were all: (i) subject to the same wrongful pay provisions by Defendant, who intentionally misclassified them as exempt; and (ii) deprived of overtime compensation to which they were entitled. *Id.* at *21. The Court noted that Plaintiffs provided 16 viable consent-to-joint notices each indicating that the employees: (i) have been employed as an analyst; and (ii) were not paid overtime compensation for hours worked in excess of 40 hours a week. *Id.* at *21-22. Based on the foregoing, the Court found that Plaintiffs submitted evidence that significantly advanced their position from the evidence in the record at the time of the *Monserrate* order, particularly as it related to a finding that analysts nationwide were similarly-situated. The Court thereby found that Plaintiffs demonstrated that they were similarly-situated to putative collective action members with respect to their: (i) job duties; (ii) pay provisions; and (iii) allegations that Defendant violated the FLSA by misclassifying them as exempt employees and denying them overtime compensation. *Id.* at *24. Accordingly, the Court granted Plaintiffs' motion for conditional certification.

***Cedeno, et al. v. Kona Grill, Inc.,* 2017 U.S. Dist. LEXIS 114618 (M.D. Fla. July 24, 2017).** Plaintiff, a restaurant employee, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiff filed a motion to conditionally certify a nationwide collective action of all current and former employees of Defendant after June 1, 2014, who worked overtime but were not paid overtime wages, and who held the positions of sous chef, assistant general manager of restaurant, assistant manager of restaurant, site development manager, lease administrator, development procurement manager, facilities manager, purchasing/facilities coordinator, project designer, manager of architecture, accounts payable manager, accountant, senior manager of tax, manager of IT, senior tax analyst, marketing manager, marketing coordinator, applications system support analyst, recruiter, training manager, and training coordinator. *Id.* at *2. The Court denied the motion, and found that Plaintiff failed to demonstrate that there were other similarly-situated employees who desired to opt-in to the action. Plaintiff's motion relied heavily on the affidavit of Lisa Ethelbah, Defendant's former human resources manager. According to Ethelbah, audits she performed during her employment reflected that Defendant had misclassified employees as exempt from the FLSA's overtime pay requirements throughout both the corporate office and restaurants. Ethelbah claimed that Plaintiff worked in one of the positions that she had identified as being misclassified as exempt. *Id.* at *4. However, the Court noted that neither Plaintiff nor Ethelbah stated that they were aware of other employees who desired to opt-in, and no individuals had filed notices of consent to join the lawsuit. *Id.* at *5. The Court determined that even if Plaintiff had provided sufficient evidence that other employees desired to opt-in this action, Plaintiff failed to establish that the employees were similarly-situated, as Plaintiff's proposed collective action included 21 different job titles that were completely unrelated with respect to their duties, compensation, supervision, location, and exemption classification. *Id.* at *6. Accordingly, the Court denied Plaintiff's motion for conditional certification of her FLSA claims.

***Goers, et al. v. L.A. Entertainment Group, Inc.,* 2017 U.S. Dist. LEXIS 2666 (M.D. Fla. Jan. 9, 2017).** Plaintiffs, a group of entertainers, brought an action alleging that Defendant maintained a policy of misclassifying them as independent contractors and requiring them to work as exotic dancers for up to and in excess of 40

hours per week without compensating them the applicable minimum wage and overtime rates. *Id.* at *2-3. Plaintiffs also alleged that Defendant required them to tip certain employees at the end of their shift, including the disc jockey, the manager, and the bouncer. *Id.* at *5. The Magistrate Judge previously recommended partially granting Plaintiffs' motion for conditional certification and found that all entertainers at Defendant's club were similarly-situated and there was a reasonable basis for concluding that other entertainers wished to opt-in to this action. *Id.* The Magistrate Judge also recommended denying Rule 23 class certification on Plaintiffs' state law claims because Plaintiffs failed to satisfy all of Rule 23's requirements. On Rule 72 review, the Court adopted the Magistrate Judge's recommendations. On Plaintiffs' motion for reconsideration of the ruling denying Rule 23 certification based on changes in controlling law, the Court found that Plaintiffs failed to meet the adequacy of representation requirement. Rule 23(a)(4) requires that counsel be able to "fairly and adequately" protect the interests of the class. *Id.* at *10. Accordingly, an adequacy determination turns on: (i) whether any substantial conflicts of interest exist between the representatives and the class; and (ii) whether the representatives will adequately prosecute the action. *Id.* Further, in determining adequacy of representation for class certification, the Court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources' counsel will commit to representing the class. Plaintiffs' attorneys submitted declarations detailing their class experience, which attested that they had "significant experience" in litigating wage & hour class and collective actions. *Id.* at *11. However, the Court opined that the cases they provided as evidence of that experience were either so new that Plaintiffs' counsel had yet to move for class certification, or the cases had been stayed or dismissed. *Id.* at *12. The Court further stated that while Plaintiffs' attorneys declared that they had long-standing histories of practice in civil litigation, they did not detail if that experience was in wage & hour claims or other fields. *Id.* at *13. The Court opined that in the litigation of this matter, Plaintiffs' counsel failed to grasp the concepts underlying the maintenance of a Rule 23 class action. *Id.* at *14. The Court also found that Plaintiffs' attorneys made no attempt to show that they had the necessary resources to foot the sometimes substantial costs associated with maintaining a sizeable class action matter, or that they had the support to do so while simultaneously managing numerous other active class action cases. *Id.* at *17. Further, the Court noted that Plaintiffs' counsel demonstrated numerous errors in litigating the matter thus far, including filing a procedurally improper request for class certification and providing three different class definitions. *Id.* at *20. The Court therefore concluded that the evidence showed that Plaintiffs failed to satisfy the adequacy requirement under Rule 23(a)(4) and upheld its previous order denying class certification, despite the change in controlling law.

***Gross, et al. v. Pelican Point Seafood,* 2017 U.S. Dist. LEXIS 122064 (M.D. Fla. Aug. 3, 2017).** Plaintiff filed a collective action alleging that Defendant denied him and others similarly-situated overtime compensation in violation of the FLSA. Plaintiff filed a motion to conditionally certify a collective action of current and former hourly-paid laborers who worked at Defendant's location in Pinellas County, Florida between May 22, 2014 and the present; who worked hours for which they were not compensated – in some cases working more than 40 hours per week – without lawful and proper and complete overtime compensation. *Id.* at *2. The Court denied Plaintiff's motion, finding that his proposed collective action was overly broad. The Court noted that although three individuals filed notices of consent to opt-in to the action, Plaintiff failed to establish that they were similarly-situated. Defendant is a wholesale and retail seafood supplier. In support of its opposition to Plaintiff's motion, Defendant provided the declaration of its President, who stated that employees worked in separate departments, and that Plaintiff worked as the only fish cutter during the relevant time. *Id.* at *4. In support of his motion, Plaintiff provided a declaration, which stated that he was similarly-situated to "hourly employees who performed labor related work" to the extent that they were not compensated for overtime wages. *Id.* The Court found that Plaintiff's declaration was insufficient to establish that there were other similarly-situated employees because a collective action of "hourly-paid laborers" would presumably cover nearly every employee, despite the fact that Defendant is comprised of four separate departments and the employees within those departments have different job titles and duties. *Id.* at *4-5. Moreover, the Court opined that Plaintiff's declaration did not address how the individuals who opted-in to the action were similarly-situated to Plaintiff with respect to their job duties and responsibilities, as Plaintiff was the only fish cutter. *Id.* at *5. Accordingly, the Court found that Plaintiff's proposed collective was too broad to meet the similarly-situated requirement, and denied Plaintiff's motion for conditional certification.

***Hazel, et al. v. Alimentation Couche-Tard,* 2017 U.S. Dist. LEXIS 136744 (N.D. Ala. Aug. 25, 2017).** Plaintiffs, a group of non-exempt store managers, filed a collective action alleging that Defendant misclassified them as exempt and thereby failed to pay required overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted in part. Plaintiffs sought to certify a collective action consisting of all current and formers store managers from June 9, 2013 to the present. Plaintiffs alleged that they worked more than 60 hours a week and that they spent a "vast majority" of their time performing the same tasks as hourly employees, including assisting customers with transactions and performing manual labor by cleaning, stocking, and organizing the store. *Id.* at *2. Plaintiffs asserted that because Defendant's stores were open 24 hours a day, any of the managers could be required to fill in for an hourly employee at any time. *Id.* at *3. Plaintiffs also testified that a Market Manager or other executive had authority over the store's budget, payroll, store hours, merchandise selection, and other management tasks, including hiring and termination decisions. In response, Defendant submitted 18 declarations averring that: (i) Market Managers treated store managers differently across different locations; (ii) even when store managers were doing non-management work, they were still responsible for supervising the store; and (iii) store managers are responsible for setting the store's work schedule. *Id.* at *4. The Court first found that each store had a store manager position and Defendant had a uniform job description for all store managers. Therefore, the Court determined that Plaintiffs and members of the proposed collective action shared the same job title. However, the Court noted that that the substantial majority of potential collective action members did not share a geographical location with Plaintiffs. The Court found that Plaintiffs submitted evidence showing a reasonable basis for concluding she and the collective action members are similarly-situated. The Court opined that named Plaintiff's affidavit testimony established a common theory of store managers spending a substantial amount of their time on non-exempt tasks. *Id.* at *11. The Court ruled that certification of a collective action limited to store managers in Alabama was appropriate, and thereby granted Plaintiffs' motion in part.

***Herrera, et al. v. Mattress Firm, Inc.*, 2017 U.S. Dist. LEXIS 157453 (S.D. Fla. Sept. 26, 2017).** Plaintiffs, a group of delivery drivers, filed a collective action alleging that Defendants misclassified drivers as independent contractors and thereby failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court denied. Defendants argued that Plaintiffs' motion should be denied because Plaintiffs did not meet their burden to show members of the proposed collective action were similarly-situated to Plaintiffs or would be interested in joining the lawsuit. Plaintiffs submitted nearly identical declarations in support of their motion for conditional certification. The Court determined that Plaintiffs' declarations did not fully satisfy the Court that the employees in the proposed collective action were indeed subject to a common payroll scheme. *Id.* at *16. The Court noted that Plaintiffs did not allege in the complaint or in their declarations that other drivers in the putative collective action received a per-delivery rate of pay, as opposed to a per-day rate of pay. Defendants also insisted the Court consider whether the putative collective action members were similarly-situated with respect to the economic realities test that would inevitably apply to determine whether drivers were employees or independent contractors. *Id.* at *17. The Court explained that in making this determination, it would consider several "economic realities" factors, including: (i) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (ii) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (iii) whether the service rendered requires a special skill; (iv) the degree of permanency and duration of the working relationship; and (v) the extent to which the service rendered is an integral part of the alleged employer's business. *Id.* at *21. The Court found that only two of the factors were capable of collective treatment. The Court stated that presumably every delivery driver in the action would need a similar skill to complete his or her deliveries, regardless of the individualized circumstances of the employment relationship with Defendant. *Id.* at *22. Likewise, whether mattress deliveries constituted an integral part of Defendant's business could be addressed without an individualized analysis of each collective action member. *Id.* However, the Court found that the remaining factors required a case-by-case analysis. First, the nature and degree of the alleged employer's control as to the manner in which the work is to be performed would differ depending on whether a delivery driver was directly employed by Defendant or employed by an intermediary. *Id.* at *24. Plaintiffs also failed to demonstrate that each employee in the proposed collective action had a similar opportunity for profit or loss or exercised similar investment in materials as some drove their own personal delivery truck and some were provided trucks and the pay rates for delivery would depend on the option elected. *Id.* Accordingly, the

Court found that Plaintiffs failed to demonstrate that they were similarly-situated for purposes of conditional certification under 29 U.S.C. § 216(b), and denied Plaintiffs' motion.

***Lewis-Gursky, et al. v. Citigroup*, 2017 U.S. Dist. LEXIS 31135 (M.D. Fla. Mar. 6, 2017).** Plaintiffs, a group of hourly technology workers, brought a collective action alleging that Defendant violated the FLSA by failing to pay overtime compensation. Plaintiffs filed a motion for conditional certification pursuant to 29 U.S.C. § 216(b). The Court denied the motion, finding that Plaintiffs were not similarly-situated. Plaintiffs were employed at various positions with Defendant through four different staffing agencies at numerous locations across the country. *Id.* at *3. Plaintiffs alleged that they and other similarly-situated hourly workers were jointly employed by Defendant and various staffing agencies, and they sought to hold Defendant liable as the joint employer for the unpaid overtime claims under the FLSA. *Id.* at *4. Plaintiffs claimed that they were subjected to a common scheme of underpayment that applied to all hourly technology workers, regardless of staffing agency, location, or supervisor, in which Defendant required them to work more than 40 hours per week, but prohibited them from entering more than 40 hours on their timesheet. *Id.* Plaintiffs alleged that the staffing agencies in turn limited pay to 40 hours per week, leading to uncompensated overtime. Plaintiffs' proposed collective action contained all hourly technology workers supplied to Defendant through staffing agencies and paid on an hourly basis between three years prior to the date of the Court's decision on the motion and March 1, 2016. *Id.* at *5-6. Plaintiffs asserted that despite working at different facilities and business units and under different managers and vendors, the members of the proposed collective action were similarly-situated because the hourly technology employees were subject to the same common billing arrangement, which incentivized the vendors to underpay overtime. *Id.* at *12. Defendant asserted that even if it uniformly prohibited vendor employees from billing more than 40 hours in a week, Plaintiffs failed to show that this arrangement resulted in vendors underpaying employees. *Id.* at *13. Defendant claimed that there was no evidence of a common policy between Defendant and the vendors tying hours billed to hours compensated by the vendors. *Id.* The Court concluded that even if such a common scheme existed, conditional certification was inappropriate in this case because the diversity of the proposed collective action would lead to individual inquiries that would "eviscerate all notions of judicial economy that would otherwise be served by conditional class certification." *Id.* at *14. The Court stated that although Plaintiffs need not show they held identical positions, they must show that they and the putative collective action members held similar positions. The proposed collective action membership included a diverse group of employees from over 40 vendors with different job titles and different job duties, who worked for multiple affiliates of Defendant at over 60 different locations nationwide. *Id.* at *14-15. The Court held that collective certification of a group that diverse would result in individualized inquires that "would contravene the basic theory of judicial economy upon which the certification of collective actions is based." *Id.* at *15. The Court opined that applying joint-employment factors to the proposed collective action would result in unwieldy, as Plaintiff-specific inquiries that would run counter to the principles of judicial economy. *Id.* at *18. Additionally, the Court noted that the substantial diversity within the proposed collective action would lead to Plaintiff-specific inquiries as to whether or not an individual was exempt from the FLSA based on his or her job duties. *Id.* at *19. The Court concluded that Plaintiffs did not show a reasonable basis for their claim that the members of the proposed collective action were similarly-situated based on their job requirements and pay provisions. *Id.* at *23. The proposed collective action encompassed employees from different staffing agencies located in multiple states and offices, with materially different job titles and duties. *Id.* Therefore, the Court denied Plaintiff's motion for conditional certification of a collective action.

***Molina, et al. v. Ace Homecare, Inc.,* 2017 U.S. Dist. LEXIS 133260 (M.D. Fla. Aug. 21, 2017).** Plaintiffs, a group of nurses and home healthcare aides, filed a collective action alleging that Defendant failed to pay them any compensation for two weeks when it shut down its facilities. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted in part. Plaintiffs sought to certify two collective actions of employees who were allegedly denied minimum wage pay while working for Defendant during the last three years. *Id.* at *2. In support of their argument that there were other employees who desire to opt-in to the action, Plaintiffs submitted declarations in which they attested that they, "along with hundreds of other people, were terminated as part of a mass shutdown by Defendant." *Id.* at *3. As such, the Court found that Plaintiffs demonstrated a reasonable basis for crediting the assertion that other aggrieved employees existed in the proposed collective actions. Defendants contended that Plaintiffs were not similarly-situated to the members of the proposed collective actions because the definitions failed to exclude exempt employees and those working

at different facilities. *Id.* at *5-6. The Court opined that the seven declarations submitted by Plaintiffs each stated that during the last two weeks of their employment they received no compensation whatsoever, and that hundreds of other employees were terminated as part of Defendants' mass facility shutdowns. *Id.* at *6. The Court therefore held that Plaintiffs' proposed collective action definitions met the lenient notice stage standard that there were similarly-situated employees who desired to opt-in who were subjected to a common policy that allegedly violated the FLSA. However, the Court held that neither the complaint nor Plaintiffs' affidavits sufficiently demonstrated that the scope of the alleged FLSA violations extended beyond the two-week period of alleged non-pay. *Id.* at *7. Accordingly, the Court limited conditional certification to employees with minimum wage claims for work performed from February 29, 2016 to March 13, 2016. The Court thereby granted Plaintiffs' motion in part.

***Poggi, et al. v. Humana At Home 1, Inc.*, 2017 U.S. Dist. LEXIS 179252 (M.D. Fla. Oct. 30, 2017).** Plaintiff, a healthcare coordinator, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court denied. Plaintiff contended that: (i) Defendant imposed daily and weekly quotas that could not be met without working overtime; (ii) Defendant used the Verint software to track and increase productivity with respect to the quotas; (iii) the Verint software provided reports to Defendant that showed that employees were working in excess of 40 hours per work; (iv) the Verint data was not used to determine the number of hours that employees should be paid for working; and (i) Defendant had a policy of not paying overtime, despite its knowledge of the overtime hours being worked, as shown by the Verint reports. *Id.* at *6. In support of the motion for conditional certification, Plaintiff submitted declarations from several opt-in Plaintiffs to corroborate his allegations about Humana's practices. Several opt-in Plaintiffs described an environment wherein they regularly worked more than 40 hours each week and were threatened with termination if they did not meet her daily and weekly quotas. *Id.* at *7. Defendant argued that Plaintiff had failed to show that others similarly-situated wished to opt-in to the collective action. Defendant argued that Plaintiff's allegations and bare-bones, conclusory statements were not sufficient proof that other potential collective action members were interested in joining the case. The Court opined that even if Plaintiff had demonstrated that others wished to opt-in to the collective action, he failed to prove that the proposed collective action members were similar to him with respect to job responsibilities. *Id.* at *19. The Court found that the individualized nature of Plaintiff's claims would predominate, and although that standard is more typically used at the second stage of collective action certification, it determined that the issues would not change after discovery was concluded. *Id.* at *20. The Court opined that the individualized nature of the claims in the use of the Verint reports alone would require individual inquiries into whether an employee was logged-in to the system without actually working. *Id.* at *21. Additionally, the Court reasoned that healthcare coordinators' daily quotas all differed, and thus representative evidence would not be helpful if employees were not subject to the same quotas, because the necessary time it would take to complete their jobs would differ. *Id.* at *22. Furthermore, the Court noted that Defendant submitted evidence that the job duties varied based on the manager to whom that the healthcare coordinator reported. Accordingly, the Court denied Plaintiff's motion for conditional certification of a collective action.

***Roberson, et al. v. Restaurant Delivery Developers, LLC*, 2017 U.S. Dist. LEXIS 150591 (M.D. Fla. Sept. 18, 2017).** Plaintiff, a restaurant delivery driver, filed a collective action alleging that Defendant misclassified drivers as independent contractors and thereby denied them minimum wages and overtime compensation in violation of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff asserted that a similarly-situated group of drivers existed across the country and would be interested in joining the collective action. Plaintiff stated that three delivery drivers already opted-in to join the case and four submitted affidavits, attesting that they were subjected to a similar policy of being classified as an independent contractor for their delivery driver duties, not getting paid time-and-a-half for the hours that they work beyond 40 each week, and not receiving minimum wages for all workweeks. *Id.* at *5. Defendant did not challenge that a group of similarly-situated delivery drivers existed. However, Defendant asserted that Plaintiff could not show that similarly-situated delivery drivers employed by Defendant existed because Defendant never hired Plaintiff or any other delivery driver. *Id.* at *7. The Court stated that at this stage of the litigation, it would not review the merits of the case, including whether Defendant was Plaintiff's "employer" as defined by the FLSA. *Id.* Therefore, the Court confined its analysis to whether a group of similarly-situated drivers existed and whether those drivers would be interested in opting-in to the proposed FLSA

collective action. *Id.* at *7-8. The Court held that the evidence and affidavits provided by Plaintiff made the necessary showing as three delivery drivers opted-in, all of whom were classified as independent contractors, and various delivery drivers submitted affidavits averring that other delivery drivers would be interested in joining the action. *Id.* at *8. Accordingly, the Court granted Plaintiff's motion for conditional certification of a collective action.

***Rojas, et al. v. Uber Technologies,* 2017 U.S. Dist. LEXIS 98716 (S.D. Fla. June 27, 2017).** Plaintiff, a driver, brought a collective action alleging that Defendant violated the overtime and minimum wage provisions of the FLSA. Plaintiff alleged that Defendant – an entity which provides transportation services through a mobile phone application – failed to pay its drivers minimum wage for all hours worked as well as overtime premiums for work performed over 40 hours per week. Defendant argued that Plaintiff did not have standing to bring this suit and that he failed to carry his burden of demonstrating that there were other similarly-situated employees who desired to opt-in. *Id.* at *4. Defendant asserted that Plaintiff did not have standing to bring this suit because he had filed for bankruptcy. Therefore, Defendant argued that Plaintiff could not be a named Plaintiff in a collective action because the matter could only be prosecuted by the trustee of the bankruptcy estate. *Id.* at *5. Plaintiff asserted that he claimed this lawsuit as exempt from the bankruptcy estate on the schedules filed with the Bankruptcy Court, and that the trustee discharged him from bankruptcy. The Court explained that any property interests, including causes of action, that a debtor holds at the time he begins his bankruptcy action become a part of his bankruptcy estate. *Id.* at *6. If a cause of action is listed on a bankruptcy schedule, it is considered to be outside of the bankruptcy estate once the bankruptcy case is closed. *Id.* Therefore, the Court found that since the Plaintiff disclosed the lawsuit on a bankruptcy schedule and the bankruptcy had been discharged, Plaintiff had standing to bring this suit. *Id.* In support of his assertion that there were other employees who desired to opt-in, Plaintiff relied on the declaration of Michael Colman, an operations specialist, that was filed in another case. Colman's declaration stated that thousands of Defendant's transportation providers had opted-out of one or more "Arbitration Provisions contained in the various agreements in place between Uber and [its subsidiary] Rasier and the transportation providers who use the Uber App." *Id.* at *7. In addition, Plaintiff relied on the fact that there were two other cases pending in which Plaintiffs sought nationwide relief on behalf of drivers who opted-out of the arbitration provision contained in his or her applicable service agreement with Defendant or one of its subsidiaries. *Id.* Finally, Plaintiff relied on the fact that one other driver filed a notice of consent to join this lawsuit. The Court determined that beyond just demonstrating that similarly-situated employees existed, Plaintiff must show that there are similarly-situated employees who desired to opt-in. The Court noted that Plaintiff had not submitted a single affidavit from another driver who desired to opt-in, and he failed to prove that he was aware of other drivers who desired to opt-in. *Id.* at *8. The Court further determined that Plaintiff also failed to demonstrate that any potential opt-in Plaintiffs were similarly-situated. *Id.* at *10. Defendant provided evidence that during the relevant time period, Defendant and its subsidiaries used 17 different agreements with drivers. Further, Defendant asserted that each utilized entirely different operations, including the pricing structure for each of Defendant's products, differing options among cities due to market-specific factors, and each was managed "in an organizationally and operationally unique way." *Id.* at *11. The Court thereby found that Plaintiff made no effort to substantiate his allegations that there were other drivers who desired to opt-in or that drivers were similarly-situated to Plaintiff in terms of job requirements and pay provisions. Accordingly, the Court denied Plaintiff's motion for conditional certification.

***Schumann, et al. v. Collier Anaesthesia, P.A.,* 2017 U.S. Dist. LEXIS 57217 (M.D. Fla. April 14, 2017).** Plaintiffs, a group of former student registered nurse anesthetists ("SRNAs") of Defendant College, LLC ("Wolford"), brought an action seeking to recover minimum wages and overtime compensation under the FLSA. *Id.* at *4. As students, Plaintiffs participated as interns in a clinical training program supervised and subsidized by Defendant Collier Anesthesia, P.A. ("Collier"). Although it was undisputed that Plaintiffs knew that the internship was unpaid and that completing it was required to graduate, Plaintiffs claimed that they functioned as "employees" while at the clinical sites. *Id.* On February 21, 2013, the Court conditionally certified a collective action, and 23 additional Plaintiffs joined the two original Plaintiffs. Defendant subsequently moved to decertify the action, but the Court granted summary judgment in Defendant's favor prior to ruling on the motion. The Eleventh Circuit thereafter vacated the summary judgment order and remanded the case. Defendant again sought decertification of the collective action on the ground that the claims of the 25 Plaintiffs were not substantially similar, that Defendant had different defenses as to each, and that procedural and fairness

concerns were not present. Defendant requested that the Court conduct one trial with the two named Plaintiffs, and then 23 separate trials for opt-in Plaintiffs, in order to determine whether each individual's story compelled a finding that he or she was an "employee" during some or all of the SRNA internship program. *Id.* at *3. Plaintiffs responded that the student/employee inquiry before the Court focused on the internship program as a whole, not on each individual's experience, and that Plaintiffs' experiences were sufficiently similar to justify collective treatment. *Id.* at *4. The Court denied Defendant's motion for decertification. Defendant argued that it was not possible to collectively analyze the students' internships, since their experiences were not substantially similar as they were members of different classes; some graduated and others did not; they complained about and enjoyed different aspects of the program; they interned at different facilities; and they handled a different number of cases over a different number of total hours. *Id.* at *6. The Court stated that while true that Plaintiffs had their differences, they were not, on the whole, "legally significant differences." *Id.* at *8. To the contrary, the Court found that they are relatively *de minimis* matters when compared to the key factual threads that weaved consistently through the stories of Plaintiffs who were deposed. Plaintiffs claimed they often worked 50 or more hours per week and were scheduled on weekends and holidays. *Id.* at *8-9. Plaintiffs all asserted deficiencies in their clinical training, resulting from Defendant's alleged desire to save money on paid employees. *Id.* at *9. The Court held that while Plaintiffs' internship experiences that differed in some respects, few or none of the factual differences were "legally significant" to the question of whether Defendant's SRNA internship program violated the FLSA; they mattered – if at all – only when determining damages. *Id.* As to the issue of defenses, the Court opined the only defense that may affect certain Plaintiffs differently was the applicable statute of limitations, but that fact did not support decertification. *Id.* at *10. The Court noted that whether Defendant "willfully" violated the FLSA was a determination to be made on a group-wide basis, rather than individually as to each Plaintiff. *Id.* at *10-11. The Court stated that a group-wide defense can be "readily and fairly managed" in a collective action by providing the jury with "charts showing the amount of back pay owed for each Plaintiff for both a two-year and a three-year time period" and having the jury select the correct amount. *Id.* at *11. As to Defendant's claim that the collective action must be decertified based on fairness and procedural considerations, the Court found nothing unfair about collectively litigating the common question of whether the way in which Defendant ran the SRNA clinical internship program at issue turned Plaintiffs into "employees" under the FLSA. Accordingly, the Court denied Defendant's motion for decertification of Plaintiffs' collective action.

***Taylor, et al. v. White Oak Pastures, Inc.,* Case No. 15-CV-156 (M.D. Ga. April 20, 2017).** Plaintiff, a meat abattoir at Defendant's slaughterhouse, filed a collective action alleging that Defendant violated the overtime provisions of the FLSA. Plaintiff filed a motion for conditional certification of a collective action, which the Court granted. Plaintiff sought to certify a collective action of all current and former red meat abattoirs or employees supporting meat abattoirs. *Id.* at 2. The Court noted that 10 opt-in Plaintiffs filed consent to join the action, and several opt-in Plaintiffs submitted declarations in support of the motion for conditional certification. The Court thereby determined that a reasonable basis existed to believe that other non-named employees also desired to opt-in to the action. *Id.* at 4. Plaintiff defined the members of the collective action as red meat abattoirs who worked: (i) on the kill floor; (ii) in the cutting room; (iii) in the grinding room; (iv) in order fulfillment; or (v) on the loading docks. *Id.* at 5. Plaintiff argued that all red meat employees were similarly-situated because they: (i) were employed by Defendant; (ii) performed jobs relating to the processing of cattle and often did the same jobs in rotating positions; (iii) were paid a straight time hourly wage for all hours worked; (iv) were required to work more than 40 hours per week; and (v) were not properly compensation for overtime work. *Id.* Defendant argued that the scope of the proposed collective action was overly broad and contained employees whose jobs were outside of Plaintiff's job and were therefore substantially dissimilar to Plaintiff. *Id.* at 5-6. Plaintiff argued that regardless of assignment, all employees were cross-trained in all jobs and were required to help out on any of the jobs necessary to complete the work. *Id.* at 6. Additionally, Plaintiff stated that whether working in the abattoir or in support of the abattoir, all employees were paid hourly, regularly worked over 40 hours a week, and were denied overtime compensation. *Id.* at 6-7. The Court agreed with Plaintiff's arguments, and found that he submitted evidence to suggest that a pattern of FLSA overtime violations existed and that the employees were similarly-situated. Accordingly, the Court granted Plaintiff's motion.

(xii) District Of Columbia Circuit

***Galloway, et al. v. Chugach,* 2017 U.S. Dist. LEXIS 99681 (D.D.C. June 28, 2017).** Plaintiffs, a group of residential advisors, brought a collective action alleging that Defendant violated the overtime provisions of the

FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the Court granted in part. Plaintiffs alleged that residential advisors oversee and assist the individuals staying in Defendant's dormitories. Plaintiffs estimated that approximately 20 individuals worked in identical or similar positions, and that "35 to 40 people" may have held that job title since June 2012. *Id.* at *2. Plaintiffs asserted that Defendant: (i) required residential advisors to work through meal breaks but deducted one hour's pay per shift regardless of whether the employee actually received a break; (ii) required residential advisors to work 20 to 30 minutes beyond their scheduled shifts without pay while they waited for their replacement; and (iii) required residential advisors "regularly" to work more than five eight-hour shifts per week without paying overtime wages. *Id.* at *2-3. Plaintiffs sought to certify a collective action consisting of all persons employed by Defendant as residential advisors at any time since June 23, 2012, whom Defendant failed to pay overtime compensation for all hours worked in excess of 40. *Id.* at *8. The Court stated that of the three named Plaintiffs, only one submitted a declaration, and that declaration provided only very general information. The Court, however, found that although Plaintiffs' evidence was "minimally sufficient," it was enough to make a showing that similar-situated individuals existed who wished to opt-in to the action. *Id.* at *9. The Court opined that the declarations submitted might be short on detail, but they were based on personal knowledge, and thus meet the low bar of evidence "beyond pure speculation." *Id.* The Court determined that the declarations demonstrated that: (i) Defendant employed other residential advisors at the dormitories where Plaintiffs worked; (ii) those residential advisors had similar job responsibilities, by virtue of them having the same title; and (iii) that Defendant failed to pay overtime compensation to residential advisors in roughly the same manner that it allegedly failed to pay Plaintiffs. *Id.* Therefore, given the low bar Plaintiffs faced at the first stage of conditional certification, and given the relatively small and manageable size of their proposed collective action, the Court granted Plaintiffs' motion. The Court however, ruled that its order was subject to the caveats that: (i) the proposed group of persons to be notified include only employees who work or worked at the Potomac Job Corps dormitories; (ii) the notice needed to be sent only to those employed as residential advisors since July 12, 2014; and (iii) the notice must specify that the collective action will include only those employed as residential advisors within three years of the date the prospective member of the collective action files a written consent to join the action. Accordingly, the Court granted in part Plaintiffs' motion for conditional certification.

(xiii) Federal Court Of Claims

No reported decisions.

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

Throughout 2017, federal courts issued a wide variety of rulings on procedural and substantive matters in FLSA collective action litigation. Those rulings included All Writs Act issues in wage & hour class actions; amendments and counterclaims in FLSA collective actions; appeals in wage & hour class actions; application of *Twombly* pleading standards in FLSA collective actions; arbitration of wage & hour class claims; awards of attorneys' fees and costs in FLSA collective actions; communications with class members in FLSA collective actions; concurrent state law claims in wage & hour class actions; discovery in FLSA collective actions; DOL wage & hour enforcement actions; exemption issues in FLSA collective actions; FLSA collective actions for donning and doffing; foreign worker issues in wage & hour class actions; independent contractor issues in wage & hour class actions; individual executive liability in FLSA collective actions; issues with interns, volunteers, and students under the FLSA; issues with opt-in rights in wage & hour class actions; joint employer, employee status, and employer status issues in FLSA collective actions; liquidated damages in FLSA collective actions; mootness in FLSA collective actions; Motor Carrier Act issues in FLSA collective actions; pay policies and bonuses in FLSA collective actions; preemption and immunity issues in FLSA collective actions; procedural and notice issues in FLSA collective actions; public employee FLSA collective action litigation; record-keeping claims in wage & hour class actions; sanctions in wage & hour class actions; settlement approval issues in wage & hour class actions and collective actions; settlement bar and estoppel issues in wage & hour class actions; statute of limitations issues in wage & hour class action litigation; stays in wage & hour class actions; tip pooling and tip credit claims under the FLSA; tolling issues in wage & hour class actions; training time issues in wage & hour class actions; travel time issues in wage & hour class action litigation; trial and damages issues in FLSA collective actions; venue issues in FLSA collective actions; and willfulness in FLSA collective actions.

(i) All Writs Act Issues In Wage & Hour Class Actions

***Brunner, et al. v. Jimmy's Johns,* 2017 U.S. Dist. LEXIS 47241 (N.D. Ill. Mar. 27, 2017).** Plaintiffs, a group of assistant store managers, brought multiple class and collective actions alleging that Defendants misclassified them as exempt employees and denied them overtime compensation. In particular, Plaintiffs alleged that although they worked for franchise businesses, Jimmy John's, as the franchisor, was a joint employer of the assistant store managers and liable for the misclassification decisions of its franchisees. The lawsuits eventually were consolidated in the U.S. District Court for the Northern District of Illinois, and Plaintiffs filed a consolidated class and collective action. Following conditional certification of the collective action claims, the Court entered a series of case management orders that divided the case into three phases, and restricted discovery to joint employer issues. As a result, the Court limited the number of depositions that Plaintiffs' counsel could take relative to owners of franchisee businesses and of Jimmy John's personnel. Immediately before the close of discovery on joint employer issues, Plaintiffs filed 13 additional class and collective actions on behalf of various opt-in Plaintiffs in various federal districts throughout the United States. Jimmy John's sought to enjoin the prosecution of those lawsuits pursuant to the All Writs Act, 28 U.S.C. § 1651(a), which grants the Court power to issue all writs "necessary and appropriate" in aid of its jurisdiction that is "agreeable to the usages and principles of law." In this instance, Defendant contended that the Court should exercise its power to enjoin the parallel federal litigation in order to control and administer the litigation before it, and to protect its pre-trial rulings and discovery orders. Defendant further asserted that this power existed as a necessary component of the Court's inherent power to hear and decide cases, which was conferred on federal judges as one of the equitable powers conferred by the Judiciary Act of 1789. The Court agreed with Defendant and issued the anti-suit injunction. *Id.* It determined that the 13 lawsuits would frustrate its pre-trial orders and undermine the objectives they were intended to accomplish and that the anti-suit injunction was necessary to maintain the efficient resolution of these consolidated class actions. The Court opined that the 13 lawsuits would have undermined the Court's detailed discovery order because they would allow Plaintiffs to: (i) take discovery on the merits in those other cases before resolution of the joint-employer issue; and (ii) take discovery from franchisees and their employees outside of what was allowed per the discovery order.

Editor's Note: The ruling in *In Re Jimmy John's* is believed to be the first anti-suit injunction ever entered in the context of a wage & hour class action or FLSA collective action.

***In Re Jimmy John's Overtime Litigation,* 2017 U.S. App. LEXIS 25282 (7th Cir. Dec. 14, 2017).** Plaintiffs, a group of assistant store managers, brought multiple class and collective actions alleging that Defendants misclassified them as exempt employees and denied them overtime compensation. In particular, Plaintiffs alleged that although they worked for franchise businesses, Jimmy John's, as the franchisor, was a joint employer of the assistant store managers and liable for the misclassification decisions of its franchisees. Following conditional certification of the collective action claims, the U.S. District Court for the Northern District of Illinois entered a series of case management orders that divided the case into three phases, and restricted discovery to joint-employer issues. Immediately after the close of discovery on joint-employer issues, Plaintiffs filed 13 additional class and collective actions on behalf of various opt-in Plaintiffs in various federal districts throughout the United States. Jimmy John's sought to enjoin the prosecution of those lawsuits pursuant to the District Court's equitable powers and the All Writs Act, 28 U.S.C. § 1651(a), which grants the District Court the power to issue all writs "necessary and appropriate" in aid of its jurisdiction that is "agreeable to the usages and principles of law." *Id.* at *12. The District Court determined that the 13 lawsuits would frustrate its pre-trial orders and undermine the objectives they were intended to accomplish and that the anti-suit injunction was necessary to maintain the efficient resolution of these consolidated class actions. *Id.* at *8. On Plaintiffs' appeal, the Seventh Circuit reversed the District Court's decision. Although the Seventh Circuit held that a District Court could, in theory, enjoin parallel federal court litigation under either its inherent equitable powers or the All Writs Act, it determined that the circumstances of this case did not warrant such an injunction under either power. First, the Seventh Circuit ruled that because Jimmy John's was not a party to the lawsuits that were filed against its franchisees, neither those lawsuits, nor the parties, were identical, and it would not be possible to resolve all of the lawsuits in one forum. *Id.* at *19-21. Second, the Seventh Circuit found that the injunction was not necessary to prevent duplicative rulings because the potential effect of one suit on the other did not justify an injunction. *Id.* at *22. Third, the Seventh Circuit opined that the injunction was not necessary to protect the District Court's pre-trial orders regarding discovery and notice because the District Court had not mentioned

those reasons when it issued the injunction, and because Seventh Circuit precedent would not support the issuance of such an injunction for those reasons in any event. *Id.* at *23-24. Finally, the Seventh Circuit held that the District Court had abused its discretion when it issued the injunction by failing to consider the traditional injunction factors and failing to make findings of fact and conclusions of law as required by Rule 65. *Id.* at *29. The Seventh Circuit concluded that Rule 65 and the traditional injunction factors apply to injunctions issued under the All Writs Act, and that Rule 65 applies to anti-suit injunctions. *Id.* at *30-31. As a result, the Seventh Circuit reversed the District Court's judgment because it had not complied with those rules when it issued the anti-suit injunction. *Id.* at *32.

(ii) Amendments And Counterclaims In FLSA Collective Actions

***Avendano, et al. v. Averus, Inc.*, 2017 U.S. Dist. LEXIS 57528 (D. Colo. April 14, 2017).** Plaintiff, a former employee, filed an action alleging that Defendant violated the overtime requirements of the FLSA and Colorado state law. The Court conditionally certified a collective action of only Colorado employees. *Id.* at *2-3. Plaintiff then filed a motion to conditionally certify another collective action of employees at all other Defendant locations, including those in Illinois, Indiana, Minnesota, Missouri, and Tennessee. Plaintiff also moved to certify a Rule 23 class under Colorado law of employees in Colorado, Illinois, Indiana, Minnesota, Missouri, and Tennessee. *Id.* at *3. The Court granted Plaintiff's motion to conditionally certify a nationwide collective action and granted in part Plaintiff's motion to certify a Rule 23 class. The Court further certified a class of Colorado employees but declined to certify a Rule 23 class of employees in other states because Plaintiff never worked in those states, and therefore did not have standing to bring a class action on behalf of individuals in those states. *Id.* Plaintiff sought leave to amend his complaint pursuant to Rule 15(a) to add four Plaintiffs and state law claims under the laws of Missouri, Minnesota, Illinois, and Tennessee. Plaintiff filed his motion nearly four months after the deadline to amend pleadings. The Court explained that Rule 15 favors resolving disputes on their merits, which counseled in favor of allowing amendment and permitting Defendant to file appropriate motions to dismiss or for summary judgment. *Id.* at *4. The Court noted that, in addition to Rule 15, when the deadline for amendment of pleadings as set in the scheduling order has passed, Rule 16(b) applies. Rule 16(b) dictates that a scheduling order deadline "may be modified only for good cause and with the judge's consent." *Id.* Thus, the Court ruled that the requirements of both rules must be satisfied. Plaintiff argued that he met Rule 16's good cause standard because "new Plaintiffs were all absent class members who only now seek to become named Plaintiffs because, though they were members of the putative class, they are not members of the Colorado-only class certified by the Court." *Id.* at *5. Plaintiff further argued that "[t]he new Plaintiffs cannot be faulted for waiting for denial of class certification to intervene individually." *Id.* Defendant argued that amendment was untimely because "Plaintiff was aware of all the facts necessary to assert these state law claims for unpaid wages. He [failed to] identify any new facts or change in the law that demonstrates good cause to request leave to amend the complaint a second time long after the Court's deadline has passed." The Court agreed and found that good cause did not exist where Plaintiff knew of the underlying conduct, but failed to raise corresponding claims. *Id.* The Court, therefore, concluded that Plaintiff did not meet Rule 16's good cause standard. *Id.* at *6. The Court held that Plaintiff failed to sufficiently explain the delay in seeking leave to amend and, as a result, it concluded that he had not met the requirements of Rule 16. Because the Court held that Plaintiff did not meet Rule 16's requirements, the Court declined to address Rule 15's requirements and denied Plaintiff's motion.

***Conde, et al. v. Open Door Marketing, LLC,* 2017 U.S. Dist. LEXIS 95115 (N.D. Cal. June 20, 2017).** Plaintiffs, a group of sales representatives, filed suit against Defendants alleging that they were misclassified as independent contractors in violation of the FLSA and California labor laws. Plaintiffs also asserted a claim under the Private Attorneys General Act ("PAGA"). Plaintiffs filed a motion for leave to file a fourth amended complaint, seeking to add waiting time penalties, and to amend the proposed class and collective action definitions. The Court granted Plaintiffs' motion. The Court had previously granted Defendant 20/20's motion to deny class certification, holding that Plaintiffs could not satisfy Rule 23's typicality prerequisite as to a class that included individuals who signed the 20/20 arbitration agreement. *Id.* at *4. As to individuals who only signed the Open Door arbitration agreement, the Court denied Defendant's motion to deny class certification because 20/20 lacked an interest to enforce or rely on the Open Door agreement. *Id.* at *5. Second, with respect to Plaintiffs' motion to expand the collective action, the Court permitted notice of the collective action to go to individuals in California who signed arbitration agreements, but not to individuals in Nevada. Plaintiffs' fourth amended complaint modified the proposed class and collective action definitions to be consistent with the Courts' ruling

and add the waiting time penalty claims. The Court found that Plaintiffs unduly delayed in adding the waiting time penalty claim, which Plaintiffs acknowledged was "based on the same legal theories as all other claims brought under the California Labor Code, which were asserted in the Third Amended Complaint." *Id.* at *6. Further, Plaintiffs alleged since the initial pleading that they were not paid minimum wage or overtime under California law, and these claims formed the basis of the waiting time penalty claims. Thus, the Court reasoned that Plaintiffs could have brought their claims for waiting time penalties in their original complaint in September of 2015, yet waited for over a year to do so. *Id.* at *7. Although the Court held there was undue delay, it still allowed Plaintiffs to amend their complaint to add the waiting time penalties claim and to modify the class and collective action definitions. *Id.* at *8-9. The Court, therefore, concluded that the delay alone did not warrant denial of Plaintiffs' motion to add these claims because Defendant 20/20 had not identified any prejudice, bad faith, or futility. *Id.* at *10. Accordingly, the Court granted Plaintiffs' motion.

***Jama, et al. v. GCA Services Group*, 2017 U.S. Dist. LEXIS 178474 (W.D. Wash. Oct. 27, 2017).** Plaintiff, a bus driver, filed a class action alleging that Defendants failed to pay the minimum wage required by SeaTac Municipal Code § 7.45 (the "ordinance") and sought back pay. The Court found, however, that Defendant GCA Services did not fall within the definition of a "transportation employer" and was not subject to the ordinance. *Id.* at *2. Plaintiffs then requested and were granted leave to amend their complaint to add claims against Avis Budget Car Rental, LLC ("ABCR"), the entity with whom GCA Services contracted, on the theory that ABCR was also their employer under the economic realities test. Plaintiffs filed an amended complaint restating their claims against GCA Services and adding two different entities – Avis Budget Group, Inc., and Avis Rent a Car System, LLC (collectively, "Avis-Budget") – as Defendants. The claims against GCA Services were subsequently dismissed by stipulation of the parties. Plaintiffs subsequently filed a motion to amend their complaint, seeking permission to dismiss the claims against the Avis-Budget Defendants without prejudice, and to add ABCR as the sole Defendant. *Id.* at *3. The Court found that Plaintiffs unduly delayed in seeking amendment, causing prejudice to Defendants, and that the failure to name the correct Defendant in the prior amendment was unexplained and unjustified. *Id.* at *4. The original complaint was filed in February 2016. After the Court entered judgment against Plaintiffs, they moved for leave to file an amended complaint adding ABCR as a Defendant under a joint employer theory. The Court noted that Plaintiffs timely filed the amended complaint, but also added two Avis entities that had no contractual relationship with GCA Services, and did not add ABCR as a Defendant. *Id.* at *5. The Court held that the facts that ABCR was the contracting party and that Plaintiffs had no evidence that the Avis-Budget Defendants arguably employed Plaintiffs were known since the first amended complaint was filed 10 months prior. *Id.* The Court found that the delay in bringing the motion was significant and unexplained. *Id.* at *6. The Court further determined that the delay has also caused prejudice. With regards to named Defendants, it forced them to incur unnecessary costs defending a lawsuit and a class certification motion to which they should never have been parties. With regards to ABCR, the delay deprived it of an opportunity to defend the class certification motion. *Id.* Accordingly, the Court opined that the interests of justice would not be served by granting Plaintiffs' leave to amend. The Court thereby denied Plaintiffs' motion and dismissed the action.

(iii) Appeals In Wage & Hour Class Actions

***Ellersick, et al. v. Monro Muffler Brake, Inc.*, 2017 U.S. Dist. LEXIS 158063 (W.D.N.Y. Sept. 26, 2017).** Plaintiffs, a group of employees, filed a collective and class action alleging that Defendant improperly classified them as exempt from overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). The District Court previously granted Defendants' motions to decertify the collective action and to deny class certification. Plaintiffs subsequently moved the District Court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and moved for leave to appeal under Rule 23(f). *Id.* at *1. Plaintiffs sought permission to take an interlocutory appeal regarding the District Court's denial of class certification, while the certification motion pending before the District Court dealt with the decertification of the class. *Id.* at *1-2. Plaintiff requested appellate clarification of the standard for decertification of a collective action, and whether the assertion of the retail sales exemption categorically precluded collective adjudication. *Id.* at *2. The Second Circuit denied Plaintiff's Rule 23(f) motion, finding that "an immediate appeal is unwarranted." *Id.* Recognizing that the Second Circuit's decision to deny the Rule 23(f) application did not require the District Court to deny the pending § 1292(b) certification motion, the District Court nonetheless reached the same conclusion, and held that Plaintiffs had not satisfied the high standard for certification of an interlocutory appeal. *Id.* The District Court

determined that Plaintiffs had not satisfied the criteria of § 1292(b). First, the District Court stated that there was not a "substantial ground for difference of opinion" on the issue at hand, as case law authorities that have addressed similar situations and have reached the same conclusion. *Id.* at *3. Second, the District Court opined that the proposed interlocutory appeal would not advance the ultimate termination of the litigation because any decision on the merits would be delayed by an appeal, and piecemeal appeals that do not "materially advance the ultimate termination of the litigation," are strongly discouraged. *Id.* Further, because the Second Circuit denied Defendants' request for interlocutory appeal under Rule 23(f) regarding the denial of class certification, the District Court found it is highly unlikely that if it were to certify an interlocutory appeal under § 1292(b) that the Second Circuit would exercise its discretion to accept that interlocutory appeal. Accordingly, the District Court denied Plaintiffs' motion.

***Ferreras, et al. v. American Airlines,* Case No. 16-CV-2427 (D.N.J. May 1, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant violated various provisions of the FLSA and the New Jersey Wage & Hour Law ("NJWHL"). Specifically, Plaintiffs asserted that Defendants: (i) paid them straight hourly wages for hours worked in excess of 40 hours in a week as a result of voluntary shift trades with other employees ("shift trade claim"); (ii) required them to perform work before clocking-in and after clocking-out during meal breaks without compensation ("uncompensated time claim"); and (iii) configured time clocks to round down and reduce the amount of time employees were credited with performing work ("rounding down claim"). *Id.* at 2. The Court previously granted Defendant partial summary judgment pursuant to Rule 56 as to the shift trade claim, and denied summary judgment to Plaintiffs. Plaintiffs sought to take an immediate appeal from the Court's determination concerning the shift trade claim. The Court noted that in order to permit Plaintiffs to pursue an immediate appeal, the Court would need to exercise its discretion to find that the reasoning underlying the order contained a controlling question of law upon which there was a substantial ground for a difference of opinion and that the appeal would materially advance the ultimate termination of the litigation. *Id.* at 3. Plaintiffs argued that there was no cause to delay appeal of the issues related to the shift trade claims because there was no relationship between those claims and Plaintiffs' other claims. *Id.* at 4. Thus, Plaintiffs asserted that no future developments in the litigation would moot the possibility for review and an appeal of the issue would facilitate resolution of the litigation. *Id.* The Court found that there was no reason to exercise its discretion to deviate from the ordinary policy of avoiding the facilitation of an immediate appeal that would not materially advance the termination of the litigation. *Id.* at 5. The Court stated that Plaintiffs would have an opportunity to seek appellate review if they continued in prosecuting their other claims. Further, the Court was not convinced that there was a substantial ground for a difference of opinion regarding the relevant question of law. Accordingly, the Court denied Plaintiffs' motion.

***Johnson, et al. v. Serenity Transportation, Inc.,* 2017 U.S. Dist. LEXIS 117192 (N.D. Cal. July 26, 2017).** Plaintiff, a labor contractor, brought a class and collective action alleging that Defendant Serenity Transportation ("Serenity") misclassified him as an independent contractor rather than an employee and therefore denied him the benefits of the FLSA and California law. *Id.* at *1-2. Plaintiff also sued Defendants SCI and the County of Santa Clara under a joint employer theory, arguing that both entities were jointly and severally liable for Serenity's wage & hour violations. The Court granted summary judgment to SCI and the County on the joint employer common law claims and deferred its decision as to whether, as a matter of law, SCI was subject to liability under § 2810 of the California Labor Code. *Id.* at *2. The Court requested further briefing regarding the exemption for "five or fewer workers supplied by a labor contractor or labor contractors to the client employer at any given time" under § 2810.3. The Court also denied SCI's motion for summary judgment on Plaintiff's § 2810.3 claim. SCI filed a motion to certify for interlocutory appeal the Court's order denying Defendants' motion for summary judgment as to Plaintiff's § 2810.3 claim and to stay further proceedings. *Id.* Defendants argued that the Court's order met the three requirements for an interlocutory appeal under 28 U.S.C. § 1292(b), including: (i) the order involved a controlling question of law; (ii) there was substantial ground for differences of opinion; and (iii) an immediate appeal would materially advance the litigation. The Court found that there was no controlling question of law because the questions that SCI sought to have reviewed were mixed questions of law and fact. *Id.* at *4. The proposed appellate review would require statutory analysis regarding the definitions of "supplied" and "any given time" and application of the statute's words to the actual facts. In such circumstances, the Court stated that it was preferable to review the question on the basis of established trial facts. *Id.* As to the second factor, the Court determined that SCI also failed to demonstrate that substantial ground for a difference

of opinion existed. While Defendants argued that the controlling law had not been addressed by another U.S. District Court in California, the Ninth Circuit specifically had held that such circumstances do not create a substantial ground for a difference of opinion. *Id.* at *5. Moreover, the Court found that Defendants had not "provided a single case that conflicts" with the Court's construction or application of § 2810.3. *Id.* at *6. Finally, the Court held that an appeal would not materially advance the litigation because it would do nothing about the claims against Serenity, and therefore would certainly delay the litigation, especially because Defendants were asking the entire case to be stayed in the interim. *Id.* at *6-7. Accordingly, the Court denied SCI's motion to certify for interlocutory appeal the Court's order denying Defendants' motion for summary judgment as to Plaintiff's § 2810.3 claim and to stay further proceedings.

Scott, et al. v. Chipotle Mexican Grill, Inc., **2017 U.S. Dist. LEXIS 156640 (S.D.N.Y. Sept. 25, 2017).** 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 in violation of the FLSA and New York Labor Law ("NYLL"). *Id.* at *22. The Court had previously denied Plaintiffs' motion for Rule 23 class certification and also decertified Plaintiffs' FLSA collective action *Id.* Plaintiffs sought leave for interlocutory review of the Court's decision pursuant to 28 U.S.C. § 1292(b). Plaintiffs also requested review from the Second Circuit pursuant to Rule 23(f). *Id.* at *23. The Second Circuit granted Plaintiffs' request for interlocutory review because "an immediate appeal is warranted." *Id.* Thereafter, the parties stipulated to stay the action until after the Second Circuit's review of the grant of Plaintiffs' § 1292(b) motion. The Court explained that it could certify a matter for interlocutory appeal when: (i) the order appealed from presents a controlling question of law; (ii) as to which there is a substantial ground for difference of opinion; and (iii) an immediate appeal from the order may materially advance the ultimate termination of litigation. *Id.* The Court found that Plaintiffs met their burden in demonstrating the § 1292(b) factors. The Court noted that Plaintiffs' § 1292(b) motion centered on whether a conflict existed in the Second Circuit between Rule 23 standards for class certification and § 216(b) standards for certification of a collective action under the FLSA. *Id.* at *24. Plaintiffs contended that the Court's order reflected the uncertainty in differences between the two standards. The Court disagreed with Plaintiffs' argument that there was a "rift" between the Rule 23 and § 216(b) standards, but it found that Plaintiffs' assertions pointed to controlling questions of law that may have substantial grounds for a difference of opinion. *Id.* The Court stated that although the Second Circuit will review its Rule 23 class certification decision pursuant to Rule 23(f), the review would not likely encompass the portion of the Court's decision decertifying the § 216(b) collective action. *Id.* Given that Plaintiffs argued that the Court erred in applying the standards, the Court held that it was proper to grant § 1292(b) relief in order for the Second Circuit to review the entire order. *Id.* The Court held that review of the entire order would avoid the possibility of conflicting decisions on Plaintiffs' class motions, promote judicial efficiency, and avoid piecemeal appellate litigation. *Id.* at *24-25. Accordingly, the Court granted Plaintiffs' motion for interlocutory appeal.

Senne, et al. v. Kansas City Royals Baseball, **2017 U.S. Dist. LEXIS 69337 (N.D. Cal. May 5, 2017).** Plaintiffs, a group of baseball players, brought an action alleging wage & hour violations pursuant to the FLSA. Plaintiffs sought conditional certification of a collective action. The Court granted Plaintiffs' motion. Subsequently, on Defendants' motion, the Court decertified the collective action and granted Defendant's motion to exclude Plaintiffs' expert. *Id.* at *66. Upon Plaintiffs' renewed motion, the Court reversed itself and certified a narrower collective action under the FLSA including those related to Plaintiffs' expert's survey. *Id.* at *67. The Court granted Defendant's motions to certify the order for appeal pursuant to 28 U.S.C. § 1292(b) on two issues and stayed all matters pending appeal. *Id.* at *76. The Court concluded that two issues satisfied the requirements of 28 U.S.C. 1292(b) and certified those issues for interlocutory appeal. *Id.* at *69. The first issue was the Court's reliance on the "continuous workday" rule in support of its conclusion that Plaintiffs' claims could be addressed on collective basis. *Id.* The second issue was the Court's conclusion that the survey of Plaintiffs' expert was admissible. *Id.* In concluding that Plaintiffs' FLSA claims could be handled collectively, the Court acknowledged that variations in Plaintiffs' arrival and departure times, work routines, and activities raised difficult questions about whether Plaintiffs could prove the amount and extent of their work on a collective basis. The Court ruled that Plaintiffs would be able to do so, because Plaintiffs' narrowed the proposed collective action to exclude winter work and relied upon the "continuous workday" rule with the survey its expert produced. *Id.* at *70. The Court found little case law to guide it in deciding whether it could allow Plaintiffs in an FLSA collective action to rely on a survey such as the one that Plaintiffs offered to establish the type and amount of work

performed by the collective action. *Id.* at *71. The Court further found that reasonable minds could differ as to whether Plaintiffs' reliance on the "continuous workday" doctrine and the survey results in support was permissible where players' arrival and departure times varied significantly, and where their arrival and departure times did not necessarily coincide with the time they devoted to team activities. *Id.* at *70. Further, Defendant asserted a *Daubert* challenge to the admissibility of the expert's survey. *Id.* at *72. The Court ruled that many of the problems with the expert's survey went to the weight of the evidence and not its admissibility. *Id.* However, the Court noted a split in the Ninth Circuit as to the degree of rigor that should be applied in evaluating the admissibility of survey evidence in the class certification context. Under a more rigorous standard, the expert's survey might have been excluded on the basis that it was not sufficiently probative of collective-wide liability and then the FLSA collective action might not have been certified. The Court concluded that these questions involve controlling questions of law as to which there is substantial ground for difference of opinion. *Id.* at *72. Because the questions had crucial implications for whether a collective action may be certified, the Court reasoned that an immediate appeal from its order would materially advance the ultimate termination of the litigation. *Id.* The Court also ruled that a stay was warranted because there were serious questions on to the merits and the potential harm to the parties in entering a stay, as opposed to allowing the case to move forward, favored a stay. *Id.* at *74-75. Accordingly, the Court granted Defendant's motions.

***Taylor, et al. v. Pilot Corp.,* 2017 U.S. App. LEXIS 11036 (6th Cir. June 19, 2017).** Plaintiffs, a group of hourly employees, filed a collective action alleging that Defendant routinely altered time records to avoid paying overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action, which the District Court granted. The District Court also denied Defendant's motion for a stay. Defendant appealed both decisions and, on appeal, the Sixth Circuit affirmed the District Court's ruling denying Defendant's motion for a stay and declined to consider the District Court's ruling granting Plaintiffs' motion for conditional certification because it lacked jurisdiction. The Sixth Circuit stated that it lacked authority to review a conditional certification decision on interlocutory appeal because the statute providing general appellate jurisdiction allows appeals only from a District Court's "final decisions." *Id.* at *7. The Sixth Circuit noted that a District Court's decision to approve notice to members of a conditionally-certified FLSA collective action is not a final judgment on the merits, and, therefore, the Sixth Circuit cannot hear immediate appeals from conditional certification decisions. *Id.* Defendant argued that the Federal Arbitration Act ("FAA") allows immediate appeal over certain interlocutory orders. The FAA allows for an immediate appeal from "[a]n order . . . refusing to stay any action under section 3" of the FAA. *Id.* The Sixth Circuit concluded that the District Court did not err in denying Defendant's motion for a stay of the proceeding. *Id.* at *8. Defendant requested a stay "until all arbitrations have been had" as alternative relief to its request that the District Court remove employees with arbitration agreements from the parameters of the conditional certification order. *Id.* However, the Sixth Circuit determined that no Plaintiff in the litigation had a claim referable to arbitration. Although some opt-in Plaintiffs could have a claim, because they had yet to opt-in to the action, Defendant lacked any entitlement to a stay under the FAA. *Id.* at *9. Defendant further argued that the denial of its motion to dismiss employees with arbitration agreements from the conditionally certified collective action constituted an appealable order under § 4 of the FAA. Defendant challenged the District Court's conditional certification determination that employees met the FLSA's similarly-situated requirement and thus should receive notice about the action. *Id.* at *12. The Sixth Circuit found that simply because Defendant called its motion a "motion to dismiss" did not mean that the District Court's rejection of the motion rendered it an appealable order. *Id.* at *13. Therefore, the Sixth Circuit determined that it had jurisdiction over Defendant's appeal only as to the District Court's denial of the request for a stay. Further, the Sixth Circuit concluded that the District Court did not err in denying Defendant's request for a stay and affirmed the ruling.

***Yu, et al. v. Hasaki Restaurant Inc.*, 2017 U.S. Dist. LEXIS 54597 (S.D.N.Y. April 10, 2017)**. Plaintiffs, a group of restaurant employees, filed a collective action against Defendant alleging violations of the FLSA. The parties entered into a settlement agreement pursuant to Rule 68. The parties asserted that the settlement did not require judicial approval because the language of Rule 68 provides that "the clerk must…enter judgement." *Id.* at *5. The Court disagreed, noting a split in the Second Circuit on the issue of whether settlement of an FLSA claim pursuant to Rule 68 requires judicial approval. *Id.* The Court held that FLSA claims fall within the narrow class of claims that cannot be settled under Rule 68 without approval of the Court or the U.S. Department of Labor ("DOL"), in light of the Second Circuit's decision in *Cheeks v. Freeport Pancakes House, Inc.,* F.3d 199

(2d Cir. 2015). *Cheeks* held that judicial or DOL approval of a FLSA settlement is necessary pursuant to Rule 41, because of the potential for abuse and to promote the purposes of the FLSA. *Id.* at *4. As to this issue, the Court certified an interlocutory appeal, finding that the order involved a controlling question of law for which there was a substantial ground for difference of opinion. *Id.* at *16.

(iv) Application Of *Twombly* Pleading Standards In FLSA Collective Actions

***Cooley, et al. v. HRM Of Alabama,* 2017 U.S. Dist. LEXIS 54840 (N.D. Ala. April 11, 2017).** Plaintiffs, a group of healthcare workers, filed a collective action alleging that Defendant violated the FLSA and state labor law by failing to pay Plaintiffs overtime for time that they were required to perform work duties during lunch. *Id.* at *2. Pursuant to 12(b)(6), Defendant moved to dismiss Plaintiffs' three-count complaint based on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The Court granted the motion in part and denied it in part. The Court dismissed count one without prejudice, ruling that Plaintiffs were required to plead factual allegations that they worked more than 40 hours of compensable work in at least one week and the type of compensable work that they were required to perform during lunch. *Id.* at *15, 19. Count two alleged a breach of an implied contract based upon the employee handbook. The Court dismissed it with prejudice, as Plaintiffs conceded that the signed disclaimers to the handbook precluded an implied contract claim. *Id.* at *8. The Court denied Defendant's motion to dismiss as to count three of the complaint seeking equitable relief under a *quantum meruit* theory. The Court rejected Defendant's arguments that count three was based upon the same implied contract theory as count two, and therefore should be dismissed as duplicative. *Id.* at *9. The Court ruled that count three was based upon an implied contract arising out of the parties' dealings and not the employee handbook. *Id.* The Court also rejected Defendant's argument that the *quantum meruit* claim was preempted by the FLSA, because equitable relief is only available when there is no other remedy at law. *Id.* at *9. In rejecting Defendant's argument that the FLSA preempted the *quantum meruit* claim, the Court ruled that the FLSA does not cover "gap time." *Id.* at *10. Accordingly, the Court granted Defendant's motion in part and denied it in part.

***Roth, et al. v. Lifetime Fitness, Inc.,* 2017 U.S. Dist. LEXIS 66083 (D. Minn. May 1, 2017).** Plaintiff, a fitness instructor, brought unjust enrichment claims on an individual and class-wide basis against Defendant. Plaintiff sought to represent a class of spinning, aerobics, and yoga instructors seeking relief from Defendant for time spent preparing for and cleaning up after fitness classes. Defendant moved to dismiss, arguing that Plaintiff failed to plead facts supporting an unjust enrichment claim and that her claim was barred because she had an adequate remedy at law. The Court denied Defendant's motion. Plaintiff alleged that she and the other instructors were required to perform work that preceded and followed each of her fitness classes. *Id.* at *2. Plaintiff further alleged that Defendant only paid group instructors for actual class time, and that it under-paid class members for actual time worked. Plaintiff asserted that she had properly pled the elements of an unjust enrichment claim under Minnesota law, including that she "conferred a benefit upon [Life Time] in the form of uncompensated labor;" and that Defendant "appreciated, knew, and accepted this benefit" in a manner "that it is inequitable for them to retain it without paying class members the full amount of wages due and owing to them for that benefit of uncompensated labor." *Id.* at *4. Defendant contended that Plaintiff failed to sufficiently plead facts to support an unjust enrichment claim. Defendant asserted that Plaintiff alleged only that she "performed labor for Defendants in exchange for hourly wages." *Id.* at *6-7. Plaintiff also stated that her pre-class and post-class work was "unpaid." *Id.* at *7. Defendant contended that these allegations of "hourly" wages and "unpaid" work were conclusory, and the Court should not accept them as true under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Id.* However, the Court noted that at this stage of proceedings, it must accept Plaintiff's factual allegations as true, and she alleged she earned "hourly wages." *Id.* Therefore, in accepting Plaintiff's allegations that she was paid hourly and that she was not compensated for performing some of her job duties, the Court opined Plaintiff had advanced sufficient facts for an inference that she conferred the benefit of performing unpaid work duties and structuring the employment relationship in this way could be considered unjust, *i.e.*, meaning fraudulent, illegal, or a moral wrongdoing similar in nature to fraud. *Id.* at *7-8. Defendant further argued that Plaintiff's unjust enrichment claim failed because she had an adequate legal remedy, which barred her claim. The Court opined that Minnesota case law authority did not state that a Plaintiff must establish the lack of an adequate remedy at law at the pleadings stage. *Id.* at *8. Defendant also argued that the facts as pleaded by Plaintiff established that she had an adequate remedy at law under the Ohio Prompt Pay Act ("OPPA"), which requires a corporation doing business in Ohio to "pay all its employees the wages earned by them" by the first and fifteenth of each month. *Id.* at *9. Plaintiff disputed that the OPPA provided a stand-alone remedy. The

Court determined that it was not entirely clear that Plaintiff would have an adequate remedy at law under the OPPA. The Court therefore denied Defendant's motion to dismiss Plaintiff's unjust enrichment claim.

***Walden, et al. v. State Of Nevada Department Of Corrections,* 2017 U.S. Dist. LEXIS 39657 (D. Nev. Mar. 20, 2017).** 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 compensation allegedly in violation of the FLSA. *Id.* at *10-11. Plaintiffs further alleged that they were not paid minimum wage or overtime when accounting for these additional hours worked. *Id.* at *11. Defendant filed a motion to dismiss, which the Court granted in part. Invoking *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Defendant argued that Plaintiffs failed to state viable FLSA claims because they did not allege that they were paid below the minimum wage for each pay period and that they worked more than 40 hours in any workweek without compensation. *Id.* at *12. Plaintiffs asserted that they were not compensated for performing the pre-shift and post-shift activities alleged in the complaint. *Id.* Plaintiffs alleged they were required to work but were not compensated for working "upwards to 30-minutes of compensable work" before, and after, "their regularly scheduled shifts." *Id.* at *13. Plaintiffs also sought overtime compensation for hours worked in excess of 40 hours in a workweek pursuant to the FLSA. *Id.* The Court held that Plaintiffs' claims as alleged were insufficient under *Twombly* to draw the reasonable inference that Defendant failed to comply with the FLSA's minimum wage and overtime requirements. *Id.* at *14. The Court found that Plaintiffs failed to allege sufficient facts – such as the length of their workweek, the hours they purportedly worked for any given workweek, their regular rate of pay or average rate of pay, and the amount of overtime wages they believe are owed – to assert plausible claims. *Id.* For example, the Court explained that if Plaintiffs worked a 30-hour workweek, then Defendant's failure to compensate them for an additional hour per workday at the overtime rate would not violate the FLSA because they worked no more than 37 hours, assuming a 7-day workweek. *Id.* Similarly, if Plaintiffs' hourly rate was significantly above the minimum wage, their hourly rate of pay might still be above the minimum wage when their compensation for the workweek was averaged across their total time worked for the workweek. Absent such additional allegations, the Court stated that Plaintiff failed to state a plausible claim for relief for failure to pay the minimum wage and overtime as required under the FLSA. *Id.* Accordingly, the Court dismissed Plaintiffs' FLSA overtime and minimum wage claims. *Id.* at *14-15. Because the Court dismissed the FLSA claims, it declined to exercise supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1367(c). The Court therefore granted Defendant's motion to dismiss in part.

(v) Arbitration Of Wage & Hour Class Claims

***Armenta, et al. v. Staffworks,* 2017 U.S. Dist. LEXIS 114266 (S.D. Cal. July 21, 2017).** Plaintiff, a temporary employee, filed a class action alleging that Defendant failed to pay all wages due in violation of the FLSA and California labor law. Defendant moved to compel arbitration of Plaintiff's claims based on an arbitration agreement she signed as part of her pre-employment paperwork. Defendant also moved to strike Plaintiff's class claims, and stay the action pending the outcome of arbitration. The Court noted that given that employees have the right to pursue employment claims collectively, an agreement violates the National Labor Relations Act ("NLRA") when employees are: (i) limited to pursuing claims in only one forum; and (ii) prevented from acting in concert in that forum. *Id.* at *7. The Court stated that in this case, the arbitration agreement at issue limited Plaintiff to pursuing employment claims in only one forum (*i.e.*, arbitration). *Id.* The Court therefore determined whether the agreement also prevented Plaintiff from acting in concert with other employees in that forum, *i.e.*, participating in class arbitration. *Id.* Before analyzing whether the agreement allowed employees to act in concert in arbitration, the Court stated that it must consider whether the parties had delegated this determination to the arbitrator. *Id.* at *8. Although federal policy favors arbitration agreements, the Court noted that the U.S. Supreme Court has made clear that there is an exception to this policy – "the question [of] whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* Here, the Court found that there was no evidence that the parties had "clearly and unmistakably" delegated to the arbitrator the question of arbitrability of class claims, as the agreement contained "no specific language delegating any threshold question of arbitrability to the arbitrator, nor does it contain a reference to any arbitration rules which do so." *Id.* Therefore, the Court found no clear and unmistakable evidence that the parties intended the arbitrator to decide whether

the agreement permitted class arbitration. *Id.* The Court held that the arbitration agreement Plaintiff signed made no reference to class proceedings. Additionally, neither party submitted evidence that the parties expected or intended class arbitration to be authorized. *Id.* at *9. Accordingly, the Court determined that class arbitration was not available because there was no contractual basis for concluding the parties agreed to authorize it. Further, the Court found that by moving to compel individual arbitration and strike Plaintiff's class claims, Defendant was seeking to enforce a construction of the agreement that violated § 8 of the NLRA, because denying Plaintiff the opportunity to pursue class claims would implicate the antithesis of § 7's substantive right to pursue concerted work-related legal claims. *Id.* at *14. The Court explained that § 7 of the NLRA provided Plaintiff the right to engage in concerted activity, and § 8 forbid Defendant from interfering with this right. *Id.* at *17. The Court determined that Defendant's attempt to compel arbitration and strike class claims was an attempt to limit Plaintiff to arbitration and prevent her from acting in concert in arbitration. *Id.* at *18. Accordingly, the Court found the arbitration agreement unenforceable, and denied Defendant's motion to compel arbitration.

Bey, et al. v. XPO Logistics*, 2017 U.S. Dist. LEXIS 144797 (M.D. Fla. Sept. 7, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant failed to pay overtime wages in violation of the FLSA. Defendant filed a motion to compel arbitration, contending that Plaintiffs submitted to arbitration by signing employment agreements with arbitration agreements. Plaintiffs argued that: (i) Defendant waived its right to arbitrate; and (ii) notwithstanding waiver, the arbitration provision was unenforceable because it was unconscionable under North Carolina law. *Id.* at *4. The Court began its analysis with Plaintiffs' waiver argument. Plaintiffs contended that Defendant acted inconsistently with the right to arbitrate, as Defendant: (i) filed an answer that failed to raise arbitration as an affirmative defense; (ii) participated in the preparation and filing of a case management report, which indicated that the parties did not agree to arbitration; and (iii) complied with its disclosure obligations under the FLSA and Rule 26. According to Plaintiffs, such conduct prejudiced them by raising their litigation costs, and Defendant thereby waived its right to compel arbitration. *Id.* at *6-7. The Court noted that not all litigation activities resulted in a waiver, and the Eleventh Circuit has found waiver only in cases with long delays and extensive use of discovery or motion practice prior to a Defendant's assertion of its arbitration right. *Id.* at *7. Further, any delay must be "coupled with other substantial conduct inconsistent with an intent to arbitrate." ***Id. at *8. The Court held that Plaintiffs pointed to no other substantial conduct inconsistent with Defendant's intent to arbitrate, and the weight of authority thereby counseled against a finding of substantial participation on this record. *Id.* at *9. Even if the Court concluded that Defendant's conduct amounted to substantial participation, it stated that Plaintiffs failed to demonstrate prejudice. Plaintiffs argue that Defendant's delay in seeking to compel arbitration has raised their litigation costs, but failed to identify what litigation expenses they incurred or the amount. *Id.* The Court stated that given the limited nature of the proceedings, Plaintiffs could not have expended more than minimal time and resources in prosecuting the action. The Court next turned to whether it could decide the merits of Plaintiffs' unconscionability argument. It determined that it could not. The Court found that when, as here, "an arbitration agreement contains a delegation provision and Plaintiff raises a challenge to the contract as a whole, "the Court may not review his claim" because it has been committed to the power of the arbitrator." *Id.* at *10. Thus, the Court would have jurisdiction to review a challenge only to the delegation provision specifically. *Id.* Thus, for the Court to examine the merits of Plaintiffs' unconscionability argument, Plaintiffs must have alleged that the delegation provision specifically – and not just the arbitration provision as a whole – is unconscionable. The Court determined that neither party even mentioned the delegation provision. As Plaintiffs failed to challenge the delegation provision specifically, the Court ruled that it must treat it as valid under § 2 of the Federal Arbitration Act and leave any challenge to the enforceability of the arbitration provision as a whole for the arbitrator. The Court therefore granted Defendant's motion to compel.

***CFL Pizza, LLC v. Hammack, et al.*, 2017 U.S. Dist. LEXIS 14081 (M.D. Fla. Feb. 1, 2017).** Defendant, a delivery driver, alleged that Plaintiff failed to pay minimum wages in violation of the FLSA. In connection with his employment, Defendant signed an arbitration agreement providing for confidential binding arbitration for any claims that arose between Plaintiff and Defendant including, without limitation, any claims "concerning compensation, employment, . . . or termination of employment." *Id.* at *2. The arbitration agreement further provided that the prevailing employment dispute resolution rules of the American Arbitration Association applied, and that claims subject to arbitration would be brought only in an individual capacity, and not as a representative Plaintiff on behalf of any purported class, collective or consolidated action. *Id.* Defendant filed a claim with the

AAA, individually and on behalf of all other similarly-situated persons, seeking unpaid minimum wages under the FLSA. Plaintiff then filed a lawsuit and asserted that Defendant intended to pursue a collective action with the arbitrator, which effectively amounted to an effort to deprive Plaintiff of its contractual rights under the arbitration agreement. Plaintiff sought an order compelling Defendant to submit his claims to individual arbitration in accordance with the terms provided for in arbitration agreement. *Id.* at *3. Defendant moved to dismiss Plaintiff's petition for failure to state a claim on which relief can be granted. Plaintiff argued that the Court, not the arbitrator, should decide whether the class/collective action waiver in the arbitration agreement was enforceable. *Id.* at *5. Plaintiff further asserted that that whether the class waiver was enforceable was an arbitrability issue for the Court rather than a procedural issue for the arbitrator. The Court found that the issue was for the arbitrator to decide regardless of whether it is a procedural issue or an arbitrability issue. *Id.* at *6. The Court opined that if it was a procedural question, the decision was for the arbitrator under the long-established default rule. The Court further remarked that even if the issue was a question of arbitrability, it was also for the arbitrator to decide because the parties clearly and unmistakably provided in their arbitration agreement that issues of arbitrability were for the arbitrator. *Id.* The Court concluded that the parties bargained for the arbitrator's construction of their contract, including the arbitrator's rulings on procedural and arbitrability issues, and therefore the issue of whether Defendant may pursue his claims through class or collective arbitration was for the arbitrator to decide. The Court therefore denied Plaintiff's motion to order Defendant to submit his claims to individual arbitration.

***Chen, et al. v. Kyoto Sushi, Inc*., 2017 U.S. Dist. LEXIS 155853 (E.D.N.Y. Sept. 22, 2017).** Plaintiffs, a group of restaurant workers, filed a collective action alleging that Defendants violated certain provisions of the FLSA and the New York Labor Law ("NYLL"). Defendants filed a motion to compel arbitration pursuant to an employment agreement that purportedly contained a binding arbitration clause. The Court granted the motion. Defendants argued that the language in the agreement required Plaintiffs to arbitrate their FLSA and NYLL claims on an individual basis. *Id.* at *4-5. In response, Plaintiffs argued that: (i) the arbitration agreement was unenforceable because it violated federal law; (ii) the arbitration agreement was unconscionable under New York State law; (iii) Plaintiffs signed the arbitration agreement as a result of economic duress; and (iv) the FLSA claims should be collectively certified under 29 U.S.C. § 216(b). *Id.* at *5. The Court determined that Plaintiffs signed the arbitration agreement and thereby bound themselves to its terms. *Id.* at *7. The Court found that Plaintiffs' claims were within the scope of the arbitration clause because the agreement covered "any claim or cause of action alleging Employee is an employee of employer and/or was improperly or insufficiently paid wages under the Fair Labor Standards Act ('FLSA') or state or local wage & hour law" and subjected any such claims to binding arbitration. *Id.* at *8. Plaintiffs argued that the arbitration agreement was unenforceable because it barred collective actions in violation of the National Labor Relations Act ("NLRA") and because their rights to pursue a collective action under the FLSA were non-waivable. *Id.* at *9. The Court disagreed. The Court explained that the Second Circuit has held that the FLSA does not include a "contrary congressional command" that prevents the underlying arbitration agreement from being enforced by its terms. *Id.* at *11. Plaintiffs also contended that the circumstances surrounding the execution of the agreement made it unconscionable under New York state law. *Id.* at *11-12. The Court stated that, to establish unconscionability under New York law, there must be a showing that the contract is both procedurally and substantively unconscionable. *Id.* at *12. As such, the Court ruled that, even if the Court were to assume that Plaintiffs established procedural unconscionability, they did not contend that any part of the agreement was substantively unconscionable, and therefore the agreement could not be unconscionable. *Id.* at *13. Plaintiffs also claimed that the agreement was unenforceable as the product of economic duress because Defendants threatened to unlawfully withhold pay and terminate Plaintiffs' employment if they did not sign the agreement. *Id.* The Court opined that the alleged threats to withhold pay or terminate did not rise to the level of economic duress and, while Plaintiffs may have been faced with a difficult choice, "difficult choices do not constitute duress." *Id.* at *14. Finally, the Court held that Plaintiffs signed the binding valid agreement, and thereby agreed to arbitrate their FLSA claims on an individual basis, so conditional certification of a collective action was not warranted. Accordingly, the Court granted Defendants' motion to compel arbitration.

***Cicero, et al. v. Quality Dining, Inc.,* 2017 U.S. Dist. LEXIS 50257 (D.N.J. April 3, 2017).** Plaintiff, a server, brought a collective and class action asserted that Defendants' tip pooling and tip credit policies violated the FLSA and the New Jersey Wage & Hour Law ("NJWHL"). Defendants filed a motion to dismiss and sought to

enforce the mandatory arbitration agreement and class action waiver Plaintiff signed. *Id.* at *1. Plaintiff signed an arbitration agreement that stated that "Employee and the Company mutually agree that any and all claims or disputes. . . shall be heard and decided by a neutral arbitrator . . . ." *Id.* at *2. The agreement also contained a class action waiver limiting the claims to that of the employee. *Id.* at *3. Plaintiff asserted that the arbitration agreement violated the National Labor Relations Act ("NLRA"), and was therefore unenforceable. The Court stated that this same issue was presently before both the Third Circuit and the U.S. Supreme Court, and the federal circuits that had ruled on the issue were split. *Id.* The Court reasoned that in a related action brought by former employees of Defendants' restaurants in Pennsylvania, the Court considered the identical arbitration agreement and held that it did not violate the NLRA. *Id.* at *3-4. The Court had declined to follow recent out-of-circuit decisions holding such a waiver void under the NLRA and instead considered the holdings of the Fifth Circuit and other case law authorities that enforced class arbitration waivers under the Federal Arbitration Act ("FAA"). *Id.* at *4. The Court therefore adopted the reasoning of the Second, Fifth, and Eight Circuits that there is no "inherent conflict" between the FAA and NLRA, particularly in light of the strong public policy considerations underlying the FAA and the general understanding that the NLRA permits and requires arbitration in labor disputes. *Id.* at *5. Accordingly, the Court granted Defendants' motion to dismiss and to compel arbitration.

***Doe, et al. v. Swift Transportation Co., Inc.,* 2017 U.S. Dist. LEXIS 2410 (D. Ariz. Jan. 5, 2017).** Plaintiffs, a group of truck drivers, filed suit against Defendant alleging various labor law claims in terms of their alleged misclassification as independent contractors. Defendant moved to compel arbitration based upon the terms of the employment contract between the parties, which included an arbitration clause. Plaintiffs opposed the motion on the basis that they were employees and not independent contractors, and that they were exempt from arbitration pursuant to the Federal Arbitration Act ("FAA"). *Id.* at *3. The FAA exempts "contracts of employment of . . . workers engaged in foreign or interstate commerce." *Id.* at *3. Initially, the Court concluded that the issue of whether Plaintiffs were employees and exempt from arbitration was a question for the arbitrator. On appeal, that order was reversed on the grounds that the Court must first determine whether the agreement was exempt from the FAA before ruling on a motion to compel arbitration*. Id.* At *5. On remand, the Court found that the contract was a contract of employment and Plaintiffs were exempt from arbitration. In making its determination, the Court declined to rule whether it merely had to look at the four corners of the contract or if it should also look to facts outside of the contract as to how the contract operated, because under either scenario the contract operated as an employment contract. *Id.* at *9. In making its determination the Court considered that the agreed upon work in the contract was at the very core of Defendant's business of delivering freight. The Court also focused the permanent nature of the agreement, as it was automatically extended every year, thereby indicating that the contract was not for a specific project for a limited time. The Court further analyzed the degree of control that Defendant exercised over Plaintiffs in that Defendant had the right to terminate unilaterally without notice and controlled the delivery schedule. Further, per the contract, Plaintiffs were required to "comply with any company policy." *Id.* at *14. The Court also found that it was significant that under the agreement that Plaintiffs had to use equipment that was compatible with the company equipment and that Plaintiffs all obtained the trucks through a rental agreement/ leasing contract, which was incorporated into their employment agreement. The contract offered cost-advancing equipment leasing agreements whereby Defendant would pay for the equipment by deducting from Plaintiffs' earnings. Defendant asserted that Plaintiffs were independent contractors and relied upon the language in the contract stating that Plaintiffs were independent contractors who were not entitled to workers' compensation and that Plaintiffs would have control over the method of means of work daily. The Court rejected the Defendant's assertion that Plaintiffs were not required to work a set number of hours because in practice the drivers needed to drive the same number of hours as Defendant's employee-drivers to satisfy the leasing agreements. The Court found that the lease agreement curtailed any provisions allowing Plaintiffs to operate as a distinct business. Evidence outside of the agreement also suggested that it was not practical for Plaintiffs to work for other carriers because the contract required drivers to return all the materials under Defendant's authority and its licenses before driving for another company. Moreover, Defendant chose Plaintiffs from its employee pool of drivers before entering into the agreements and Plaintiffs never held themselves out as independent contractors. Accordingly, the Court held that Plaintiffs had contracts of employment and were exempt from arbitration.

***Echevarria, et al. v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 1047 (N.D. Cal. Jan. 3, 2017).** Plaintiff brought a putative class action against Defendant, a temporary staffing company, alleging violation of the California Labor

Code, Private Attorney General Act ("PAGA"), and Unfair Competition Law based upon Defendant's failure to pay temporary employees for time spent attending mandatory meetings. Defendant hired Plaintiff for a temporary position and sent him a welcome email with directions to complete their "on-line onboarding paperwork" and a link to complete the new-hire paperwork on-line. *Id.* at *1. Among the documents Plaintiff completed as part of the process was a "Mutual Arbitration Agreement." *Id.* at *2. The agreement provided that all claims between the parties would be resolved in arbitration, and all claims must be brought in a party's individual capacity and may not be brought as a class action. The agreement also provided that Plaintiff's signature and acknowledgment of the agreement was not required for the agreement to be enforced and that once Plaintiff began working he was deemed to have consented and accepted the agreement. Plaintiff electronically signed the "Mutual Arbitration Agreement" and Defendant electronically counter-signed it. Plaintiff worked for one week and then resigned. Subsequently, Plaintiff filed his lawsuit, and Defendant moved to dismiss Plaintiff's class claim, compel arbitration of his individual claim, and stay his claim under the PAGA. The Court denied Defendant's motion. The Court denied the motion to dismiss Plaintiff's class claim on the basis that the class action waiver in the "Mutual Arbitration Agreement" was unenforceable because Plaintiff was not given a meaningful opportunity to opt- out of the agreement. The Court noted that the application failed to inform Plaintiff that he could opt-out of the agreement and the agreement stated that it would be enforced whether or not Plaintiff signed the Mutual Arbitration Agreement. The Court also denied the motion to compel arbitration of Plaintiff's individual claim, reasoning that compelling him to arbitrate his individual claim would effectively preclude him from pursuing his class claim. Accordingly, the Court ruled that the motion to stay the PAGA claim was moot.

***Essex, et al. v. Children's Place, Inc*., 2017 U.S. Dist. LEXIS 198595 (D.N.J. Dec. 4, 2017).** Plaintiff, a store manager, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. The Court had previously entered an order that conditionally certified a collective action consisting of store managers. The Court did not address any potential arbitration agreement at the conditional certification stage. Over 200 of the 377 opt-in Plaintiffs signed arbitration agreements with Defendant. Defendant subsequently moved to compel arbitration as to the opt-in Plaintiffs who signed an arbitration agreement. The Court agreed that that the parties entered into a valid arbitration agreement and that the dispute at issue fell within the scope of the arbitration agreement. *Id.* at *12-13. The agreement applied to "any dispute arising out of or related to Associate's application for employment, employment, or separation of employment with The Children's Place regardless of its date of accrual and survives after the employment relationship terminates." *Id.* at *13. The Court held that the current suit fell within the scope of this language as it concerned appropriate pay during the time that the relevant opt-in Plaintiffs were employed by Defendant. The opt-in Plaintiffs asserted that they had a right to engage in concerted legal action and that the "class, collective, and representation action waiver" (the "waiver") in the arbitration agreement violated that right. *Id.* at *14. Plaintiffs further argued that the "opt out right" in the arbitration agreement made the agreement legal. The Court disagreed, and determined that the relevant opt-on Plaintiffs were not required to participate in Defendant's arbitration program as a condition of employment. Defendant's "arbitration agreement announcement" and the arbitration agreement itself expressly stated that signing the agreement not a mandatory condition of employment, and the agreement had a clear "opt out" provision. *Id.* The Court noted that several Plaintiffs who had opted-in to the lawsuit had opted-out of the arbitration agreement. Accordingly, the Court held that opt-in Plaintiffs who signed the arbitration agreement entered into a valid and enforceable arbitration agreement and that this dispute fell within the scope of the agreement. *Id.* at *15. Thus, the Court granted Defendant's motion to compel arbitration as to the relevant opt-in Plaintiffs who did not previously opt-out of arbitration.

***Fozard, et al. v. C.R. England, Inc.,* 2017 U.S. Dist. LEXIS 38537 (N.D. Tex. Mar. 17, 2017).** Plaintiffs, a group of truck drivers, alleged that Defendant failed to pay overtime in violation of the FLSA and pay for off-the-clock work in violation of Texas' wage statute. *Id.* at *1-2. Plaintiffs enrolled in Defendant's truck driving school to gain the training and experience necessary to obtain a commercial driver's license before becoming an employee. Before beginning classes, Plaintiffs signed an arbitration agreement. Plaintiffs subsequently became employed as employee-driver trainees. Defendant filed a motion to compel arbitration. Plaintiffs contended that Defendant's motion should be denied because Defendant waived its right to enforce an agreement to arbitrate because it substantially invoked litigation as a means of adjudicating the present dispute. *Id.* The Court noted that the Fifth Circuit follows a two-step procedure in deciding whether to compel arbitration, including: (i)

determine whether the parties agreed to arbitrate the dispute in question; and (ii) determine whether any external legal constraints foreclosed arbitration of the dispute. *Id.* at *3-4. The Court stated that the question of whether an arbitration agreement covered the claims at issue was ordinarily a question for the Court, but where the arbitration agreement contained a delegation clause giving the arbitrator the primary power to rule on the arbitrability of a specific claim, the analysis changed. *Id.* at *8. The Court explained that here the parties disputed over the presence of a valid delegation clause. Plaintiffs argued that the issue of arbitrability of certain claims was a question for the Court because Defendant had not sufficiently asserted the supremacy of any delegation clause. Defendant responded by pointing to the agreement and its express delegation of authority to the arbitrator to decide questions of arbitrability. *Id.* at *9. The Court noted that the language of the agreement provided that: “covered claims shall include any and all procedural, substantive and gateway issues, including, without limitation, any dispute between the parties relating to the scope of the arbitrator's powers, the interpretation or enforceability of this agreement or any part thereof, or the arbitrability of any dispute.” *Id.* at *9-10. The Court therefore found that the parties’ arbitration agreement provided that the arbitrator had authority to resolve disputes regarding the interpretation, scope, and enforceability of the arbitration agreement. *Id.* at *10. Further, the agreement expressly stated that the arbitrator had the authority to determine the arbitrability of any dispute. *Id.* The Court held that the clause was a valid and enforceable delegation clause. Defendant further argued that the agreement’s provision entitled "Class Action/Collective Action/And Other Group Proceeding Waivers" waived Plaintiffs' ability to bring their claims as a class or collective action. *Id.* at *14. The agreement stated that that "parties expressly waive any right to submit, initiate, or participate in any class, collective, consolidated, representative or joint action." *Id.* The Court reasoned that since the Supreme Court has enforced class and collective action waivers, and because Plaintiffs did not dispute the clause's enforceability, it found that Plaintiffs were barred from bringing their claims as a class or collective action. *Id.* at *15. Accordingly, the Court granted Defendant’s motion to compel arbitration.

***Freeman, et al. v. Progress Residential Property Manager, LLC*, 2017 U.S. Dist. LEXIS 106158 (S.D. Tex. July 10, 2017).** Plaintiff, an employee, filed a collective action asserting that Defendant violated the overtime provisions of the FLSA. Defendant filed a motion to compel arbitration and a motion to stay the action pending resolution of the motion to compel arbitration. The Court denied Defendant’s motion to compel arbitration and denied the motion to stay as moot. *Id.* at *1. At the commencement of her employment, Plaintiff signed an agreement to arbitration claims containing the following provision: “This Agreement to arbitrate shall survive the termination of my employment and the expiration of any benefit plan. It can only be revoked by a writing signed by the Company's President/CEO (or, if none, its highest-ranking official), specifically stating an intent to revoke this Agreement.” *Id.* at *2. Plaintiff argued that the agreement was illusory because Defendant retained the unilateral power to terminate the agreement. *Id.* Plaintiff further argued that because the provision was illusory, the agreement was unenforceable. *Id.* Defendant argued that it was up to the arbitrator, and not the Court, to decide whether to enforce the agreement. *Id.* at *2-3. The Court stated that the entire contract involved the duty to arbitrate, and therefore Plaintiff challenged the agreement as a whole "on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.” *Id.* at *3-4. The Court determined that it was therefore its duty to decide whether the enforcement provision rendered the agreement unenforceable. The Court concluded that it did because while a mutual agreement to arbitrate provided sufficient consideration, "the agreement is illusory where one party has the unrestrained unilateral authority to terminate its obligation to arbitrate." *Id.* at *4. The Court found that Defendant alone retained the power to revoke the agreement, and therefore the agreement’s enforcement provision was not supported by consideration and must be considered illusory. The Court therefore denied Defendant’s motion to compel arbitration.

***Galvan, et al. v. Michael Kors USA Holdings, Inc.*, 2017 U.S. Dist. LEXIS 9059 (C.D. Cal. Jan. 19, 2017).** Plaintiff, a wholesale inventory clerk, filed a class action alleging that Defendant violated various state wage & hour laws. Defendants filed a motion to compel arbitration pursuant to an agreement Plaintiff signed with Defendant Adecco, at the commencement of her employment. Plaintiff claimed that Defendants failed to meet their burden of proof of establishing that a valid arbitration agreement existed between the parties because Defendants could not prove that Plaintiff signed the arbitration agreement. Adecco delivered its Dispute Resolution Agreement to associates through a secure system called US Verify whereby new associates may electronically sign the arbitration agreement. To access the onboarding documents in US Verify, an associate clicks an individualized web link, enters his/her registered email address, and submits personal information such

as name, social security number, date of birth and zip code in mandatory fields. Defendants offer the "E-Signature Agreement," which reflects that Plaintiff agreed that "her electronic signature holds the same value as [her] signature." *Id.* at *10. Plaintiff also signed an "acknowledgement of company form," reflecting that Plaintiff "acknowledged receipt of, and has agreed to read, and hereby accepted" the "Employment Arbitration Rules." *Id.* at *11. The Court found that Defendants had shown, by a preponderance of the evidence, that Plaintiff signed the arbitration agreement. The Court stated that Defendants offered a detailed explanation of the US Verify system and its inherent security mechanisms to ensure the identity and knowledgeable assent of its new associates, *i.e.*, associates are required to enter personal identifying information, proceed through various agreements one-by-one, confirm that their electronic signature will have the same effect as their signature, and finally, receive a confirmation of the various agreements they have viewed and/or accepted. *Id.* at *11-12. Plaintiff contended that the arbitration agreement was unconscionable. Plaintiff argued that the arbitration agreement was a contract of adhesion because the agreement's language indicated that it was presented to obtain or continue employment, such that the agreement "surely indicates that Adecco intends to require its employees to sign the agreement." *Id.* at *15. Defendants contended that Plaintiff had the opportunity to opt-out of the arbitration agreement containing the class action waiver, but chose not to do so. *Id.* at *16. Plaintiff argued that the opt-out procedure did not effectively provide employees with a meaningful manner to opt-out, and required the employee to "jump though a number of unnecessary hoops to actually opt-out." *Id.* Defendants explained that the arbitration agreement permitted employees to opt-out by requesting a form through an email link and electronically completing and submitting the form. The Court therefore found no ground to determine that this particular opt-out procedure was burdensome. *Id.* The Court recognized that Plaintiff, as an employee, was likely in a weaker bargaining position than Adecco and it appeared that Plaintiff had no opportunity to negotiate the terms of the arbitration agreement. Thus, the Court found some degree of procedural unconscionability. However, the record did not show any additional evidence of procedural unconscionability. As to substantive unconscionability, the Court found: (i) that Plaintiff's employment was not contingent upon agreeing to the arbitration agreement; (ii) that the agreement's AAA Rule 9 discovery provision did not overly limit Plaintiff's rights; (iii) that an agreement permitting one party to modify contract terms did not, standing alone, render a contract illusory because the party with that authority may not change the agreement in such a manner as to frustrate the purpose of the contract; (iv) that Plaintiff was not subjected to overly burdensome costs; and (v) Plaintiff was not required to waive class and representative actions because she was given an opportunity to opt-out. Accordingly, the Court concluded that there was insufficient evidence of substantive unconscionability to warrant a finding of invalidity. *Id.* at *25. Accordingly, the Court granted Defendant's motion to compel. *Id.* at *29.

***Garcia, et al. v. Golden Abacus Group,* 2017 U.S. Dist. LEXIS 90975 (S.D.N.Y. June 13, 2017).** Plaintiffs, a group of former employees, alleged that Defendant violated various provisions of the FLSA and the New York Labor Law ("NYLL"). Defendant moved to compel arbitration and requested that the Court dismiss Plaintiff's complaint. The Court denied Defendants' motion. On or about their respective dates of hire, Plaintiffs signed documents including an arbitration agreement (the "agreement"). The agreement provided, in pertinent part, that the following types of disputes would be submitted to arbitration: "[c]laims of unlawful harassment or discrimination," "[c]laims of unfair demotion or reduction in pay," and "[a]ny claims of breach of contract or tort claims arising out of [an employee's] employment or termination with the Company, including, but not limited to, defamation, intentional infliction of emotional distress, intentional interference with contract, or right to privacy." *Id.* at *2-3. Defendants moved to compel arbitration of Plaintiffs' claims pursuant to the agreement. Plaintiffs argued that the agreement was unenforceable on the grounds of unconscionability, and also that the dispute was outside the scope of the agreement. Defendant asserted that Plaintiffs' action was within the scope of the agreement because Plaintiffs' claims could be characterized as sounding in tort, or, in the alternative, as contract claims or claims regarding an unfair reduction in pay. The Court held that Defendant offered no legal authority supporting their tort characterization argument, and that applicable case law authorities routinely declined to apply tort principles to FLSA and NYLL claims. Accordingly, the Court stated that Plaintiffs' action could not properly be characterized as asserting "tort claims" within the meaning of the arbitration provision. *Id.* at *5. The Court further opined that Defendant's characterization of Plaintiffs' action as a claim for breach of contract was similarly unpersuasive. Plaintiffs asserted violations of statutory obligations. Accordingly, such claims were not "claims of breach of contract" that were within the scope of the agreement. *Id.* at *6. Finally, the Court found that Plaintiffs' claims could not be characterized as asserting a "reduction in pay." *Id.* Defendant argued that because Plaintiffs were provided with a pay rate notice stating a rate in compliance with the FLSA

and the NYLL, any payment below the statutory requirements would constitute a "reduction." *Id.* The Court disagreed and held that because the FLSA and the NYLL claims were not contemplated on the face of the parties' agreement, and were not implied in the agreement, the action was outside the scope of the agreement's arbitration clause. *Id.* at *7-8. The Court therefore concluded that it need not address Plaintiffs' argument that the clause was unenforceable. Accordingly, the Court denied Defendant's motion to compel arbitration.

***Jones, et al. v. Silver Care Operations, LLC*, 857 F.3d 508 (3d Cir. 2017).** Plaintiffs, a group of nursing assistants, brought a collective action alleging that Defendant failed to properly pay them overtime compensation in violation of the FLSA and New Jersey law. Defendant moved to dismiss or to stay the proceedings pending arbitration, citing the arbitration clause in the workers' governing collective bargaining agreement ("CBA"). *Id.* at 509. The District Court denied the motion to dismiss or to stay pending arbitration. On appeal, Defendant contended that both overtime claims first must be submitted to arbitration for interpretation of the CBA, including the definition of the wage differentials and policies concerning meal breaks. The Third Circuit disagreed and affirmed the District Court's decision. Under the CBA, nursing assistants who were scheduled for eight-hour shifts were entitled to two paid 15-minute breaks and one unpaid 30-minute meal break per shift. Plaintiffs alleged that nursing assistants who worked during the night shifts "rarely, if ever" took an uninterrupted meal break because those shifts were chronically under-staffed. *Id.* at 511. Defendant argued that Plaintiffs' FLSA claim alleging miscalculation of the overtime rate rested upon a dispute over an implicit term of the CBA regarding whether the wage differentials already included a payment for overtime. The Third Circuit held that Plaintiffs' overtime claim was governed by the FLSA, and the statute required it to bypass how the CBA broke down the pay differentials and look only at whether the pay differentials fit into the statutory definition of remuneration that must be included in the calculation of an employee's regular hourly rate of pay. *Id.* at 514. The Third Circuit further explained that whether the wage differentials should be included in the regular rate of pay depended not on any labels assigned to them by the CBA, but on whether they fit into one of the statutory exclusions. *Id.* Accordingly, the Third Circuit stated that Plaintiffs' miscalculation of overtime rate claim did not depend on any disputed term of the CBA, and therefore it need not be sent to arbitration. Defendant further contended that Plaintiffs' claim that their meal breaks should have been credited toward hours worked also depended on disputed practices under the CBA, which first had to be resolved by an arbitrator. The Third Circuit concluded that the alleged disputed practices were simply factual disputes, and, therefore arbitration of this claim was also unnecessary. The Third Circuit noted that the FLSA does not define what are compensable work hours. Instead, the U.S. Department of Labor issued a number of regulations providing guidance to employers and employees alike on how it would implement and enforce the law. One such regulation provides that employers need not compensate employees for *bona fide* meal periods because those are not considered compensable worktime. The Third Circuit stated that Defendant's contentions of the disputed "interpretations" of the CBA were merely factual questions, such as the length of meal breaks, types of interruptions, how they were handled, and whether Plaintiffs ever received compensation due to these interruptions. *Id.* at 516. The Third Circuit held that, to characterize an essentially factual inquiry as a dispute of practices or custom under the CBA such that arbitration was necessary, would circumvent U.S. Supreme Court precedent that Plaintiffs cannot be compelled to arbitrate their federal statutory claims without a clear and unmistakable waiver. *Id.* at 516-17. Accordingly, the Third Circuit found that neither of Plaintiffs' FLSA claims depended on disputed interpretations of CBA provisions. Therefore, it affirmed the District Court's ruling denying Defendant's motion to compel arbitration.

***Joseph, et al. v. Quality Dining, Inc.*, 2017 U.S. Dist. LEXIS 40604 (E.D. Pa. Mar. 21, 2017).** Plaintiffs, a group of restaurant servers, brought a suit challenging a particular tip-pooling practice violated the FLSA and the Pennsylvania Minimum Wage Act ("PMWA"). Defendants moved to dismiss on the basis of arbitration agreements signed by Plaintiffs. The Court considered several questions, including which agreement documents actually applied to each lead Plaintiff; whether the Court or the arbitrator should determine the availability of class-based arbitration; if the answer was the Court, whether class arbitration was available; and what to do about numerous opt-in Plaintiffs if the lead Plaintiffs' claims were dismissed in favor of individual arbitration. *Id.* at *1-2. Defendants filed a motion to dismiss on the basis of signed arbitration agreements. Plaintiffs then filed forms signed by 15 additional individuals consenting to become party Plaintiffs. *Id.* at *3. The Court stated that it was clear and agreed that the two lead Plaintiffs had valid arbitration agreements, so their claims must be dismissed in favor of arbitration. *Id.* The Court explained that the presumption that the Court would decide the

question of arbitrability could only be overcome if "the parties clearly and unmistakably provide otherwise." *Id.* at *6-7. The Court found that the language in the arbitration agreement did not clearly and unmistakably delegate the issue of class availability to the arbitrator; therefore, the Court considered the issue itself. *Id.* at *8. The Court held that the rules incorporated with the arbitration agreement waived the right to proceed as a class. *Id.* at *9. Specifically, § C4 of rules provided: "Only one Employee may be a party to any particular arbitration unless otherwise agreed by the parties. Each arbitration is limited to the claims of the Employee who is a party to that arbitration and shall not include claims pertaining to any other Employee unless otherwise agreed by the parties." *Id.* at *10. The Court determined that the rules provided fairly wide power over arbitrability to the arbitrator, but did not clearly and unmistakably give the arbitrator authority to decide the availability of class procedures; therefore, the Court determined that it had the duty to make that determination. The Court held that the agreements and incorporated rules plainly purported to waive class procedures in arbitration. *Id.* at *19. The Court found that Plaintiffs had to proceed in an individual arbitration. Accordingly, the Court granted Defendant's motion to compel arbitration.

***Judge, et al. v. UniGroup, Inc.*, 2017 U.S. Dist. LEXIS 145576 (M.D. Fla. Sept. 8, 2017).** Plaintiffs, a group of independent contractor drivers, filed a collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA. Defendants filed a motion to compel arbitration, and the Court granted the motion in part. Defendants argued that the Federal Arbitration Act ("FAA") required arbitration of Plaintiffs' claims, that Plaintiffs were not exempt from either the FAA or the Missouri Uniform Arbitration Act, that the arbitration agreements precluded arbitration on a class or collective basis, that Defendants could enforce the arbitration agreements, and that Defendants acted consistently with their purported right to compel arbitration. First, Plaintiffs argued that Defendants could not compel arbitration because § 1 of the FAA exempted transportation employees from compelled arbitration. *Id.* at *4. Defendants argued that Plaintiffs were independent contractors, and therefore the transportation-worker exemption was inapplicable. The Court found that the independent contractor agreements that Plaintiffs signed stated that Plaintiffs: (i) could determine the method, means, and manner in which they performed their work; (ii) could refuse shipments and refuse to accept loads tendered by an agent; (iii) could vacation at will and self-schedule; (iv) could supply necessary equipment and labor, including hiring employees to assist in satisfying contractual obligations; (v) could cover their own operating and maintenance expenses; and (vi) could retain the option of hauling for competitors provided that they removed agent identifying information from the trucks. *Id.* at *8. The Court concluded that, because federal law strongly favors arbitration and because the agreements reserved to Plaintiffs the discretion that is characteristic of independent contractors, Plaintiffs failed to meet their burden of establishing that they were exempt employees under § 1 of the FAA. *Id.* Second, Plaintiffs argued that Defendants could not compel arbitration because Defendants were not parties to the arbitration agreements. The Court explained that a non-party could compel arbitration if the relevant state contract law allowed him to enforce the agreement. *Id.* at *9. Florida law governed the agreements of the named Plaintiffs Judge and Oliveira; Ohio law governed the agreements of the named Plaintiffs Oliveira and Coffman; Virginia law governed Plaintiff Coffman's agreement; and New Jersey law governed Plaintiff Lesperance's agreement. *Id.* The Court noted that to compel arbitration under Florida law, the non-party must show both that the signatory relied on the agreement to assert its claims against the non-party and that the scope of the arbitration clause covered the dispute. *Id.* at *10. The Court determined that the arbitration clause signed by the parties covered any and all disputes arising out of the agreements and that the allegations asserted by Judge and Oliveira that they were employees entitled to relief under the FLSA were intimately founded in and intertwined with the agreements. *Id.* at *11. The Court, therefore, held that Defendants could compel arbitration under the agreements governed by Florida law. With respect to Ohio, Virginia, and New Jersey, however, the Court found little guidance as to whether non-signatories could compel arbitration, and therefore denied the motion with respect to the remaining named Plaintiffs. Accordingly, the Court granted in part Defendants' motion to compel arbitration.

***Lamour, et al. v. Uber Technologies,* 2017 U.S. Dist. LEXIS 29706 (S.D. Fla. Mar. 1, 2017).** Plaintiff brought an FLSA collective action against Defendant, a ride sharing company, alleging wage & hour violations. Plaintiff alleged that Defendant misclassified the drivers as independent contractors as opposed to employees. Defendant moved to compel arbitration and strike Plaintiff's collective action pursuant to the parties' arbitration agreement. The agreement required Plaintiff to arbitrate all disputes arising out of the employment relationship unless he had opted-out of the agreement. The agreement further provided that all claims in arbitration be

brought individually and not as on a class or collective basis. Plaintiff asserted that the arbitration agreement was unenforceable because it violated the National Labor Relations Act ("NLRA"). The Magistrate Judge disagreed and recommended that the Court grant Defendant's motions to compel arbitration and strike Plaintiff's collective action claims. At the outset, the Magistrate Judge stated that the Federal Arbitration Act ("FAA") was enacted to "reverse judicial hostility toward arbitration" and reflected a" liberal policy favoring arbitration". *Id.* at *2. The arbitration agreement was enforceable because it contained an opt-out clause and Plaintiff reviewed the agreement twice before consenting to the on-line agreement. The Magistrate Judge noted that even in the absence of an opt-out clause, the arbitration provision might still be valid. The Magistrate Judge rejected the view that the right to maintain a collective action was a substantive right, citing binding precedent and the majority of case law authorities that have held that it was a procedural right that may be waived in an arbitration agreement. Further, even if the NLRA did bar mandatory class and collective actions, the opt-out provision rendered the arbitration agreement voluntary. The Magistrate Judge also determined that the arbitration agreement contained a clear and unmistakable delegation clause in which the parties agreed to delegate threshold issues of arbitrability; therefore, the decisions of whether Plaintiff was an employee subject to NLRA and whether the agreement was unconscionable, should be decided by the arbitrator. However, the Magistrate Judge noted that even if he were to decide the unconscionability issue, he would find that the agreement was neither procedurally nor substantively unconscionable. Accordingly, the Magistrate Judge recommended that the Court grant Defendant's motion to compel arbitration and strike the collective action allegations.

***Levy, et al. v. Lytx, Inc.*, 2017 U.S. Dist. LEXIS 100529 (S.D. Cal. June 28, 2017).** Plaintiff, a former employee, filed a class and collective action alleging that Defendant violated various provisions of the FLSA and the California Labor Code. Defendant filed a motion to compel arbitration pursuant to an agreement Plaintiff signed the day he commenced his employment. The Court granted the motion in part and denied it in part. Plaintiff argued that the agreement was illegal and invalid because Defendant's interpretation of the agreement as precluding class claims violated the National Labor Relations Act ("NLRA"). Defendant asserted that the agreement neither intended nor authorized class arbitration, on the grounds that the agreement mentioned only two parties to the agreement (the "company" and the "employee") and specifically covered claims that arose from the "employee's employment with the Company." *Id.* at *8. Plaintiff argued that the agreement incorporated class arbitration by reference to the AAA rules and references to "all parties" and "all claims." *Id.* The Court examined whether California law or AAA rules governed the determination. *Id.* at *9-10. The Court noted that the state law provision in the agreement appeared to allocate the question of class availability to the Court; however, the general clause in the agreement did not expressly incorporate the state procedural rules that governed allocation of the arbitrability question between the Court and arbitrators. *Id.* at *11. The Court found that the agreement neither referenced the California Arbitration Act nor incorporated § 1281.2(b). *Id.* at *12. Consequently, the Court stated that it would not apply state statutes in determining the allocation of the class availability question, and therefore turned to whether the AAA rules resolved the issue. *Id.* at *13-14. The Court held that the agreement, entered into in April 2008, incorporated by reference the AAA rules, and further, by agreeing to resolve disputes according to the AAA rules, Plaintiff and Defendant also agreed to follow the AAA Supplementary Rules, which became effective on October 8, 2003. *Id.* at *14. The Court noted that the AAA Supplementary Rules "shall 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 when "a Court refers a matter pleaded as a class action to the AAA for administration." *Id.* at *15. The AAA Supplementary Rules further instruct that "the arbitrator shall determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." *Id.* Consequently, the Court concluded that references to the AAA rules, even without specific reference to the AAA Supplementary Rules, "clearly and unmistakably evidence" the parties' intention to delegate the question of availability of class proceedings to the arbitrator. *Id.* at *16. Absent further, binding guidance, the Court found that the incorporation of the AAA Supplementary Rules constituted clear and unmistakable evidence that the parties intended to allow the arbitrator, rather than the Court, to determine whether the agreement permits class arbitration. *Id.* Consequently, the Court granted in part Defendant's motion to compel arbitration on the basis that the parties agreed to arbitrate disputes regarding the availability of class proceedings. *Id.* at *17. However, the Court denied in part Defendant's motion to compel individual arbitration and further denied Defendant's motion to dismiss Plaintiff's class claims because the Court ruled that the arbitrator, not the Court, must determine whether class arbitration is permitted. *Id.* at *17-18.

***Lockard, et al. v. EMY King Of Kansas*, 2017 U.S. Dist. LEXIS 146944 (D. Kan. Sept. 12, 2017).** Plaintiff, a former employee, brought an action alleging that Defendants violated various provisions of the FLSA. Defendants filed a motion to compel arbitration pursuant to an agreement Plaintiff allegedly signed as a condition of his employment. The Court granted Defendants' motion to compel. On Plaintiff's first day of employment, he signed an arbitration agreement. At the outset, the Court noted that under the Federal Arbitration Act ("FAA"), a Court should compel arbitration if it finds that: (i) a valid arbitration agreement exists between the parties; and (ii) the dispute before it falls within the scope of the agreement. *Id.* at *8-9. Plaintiff argued that the arbitration agreement was invalid because: (i) the agreement is one part of the employee handbook, which contained a conflicting revocation and modification clause, rendering the agreement illusory; (ii) there was no meeting of the minds as to the arbitration procedures that would apply; and (iii) the arbitration agreement was unenforceable for lack of consideration. *Id.* at *9-10. Plaintiff asserted that the agreement was illusory based on the provision in the acknowledgement and receipt section of the handbook that any part of the handbook could be modified or revoked by Defendants at any time with or without notice. *Id.* at *10. Defendants contended that the arbitration agreement was a separate, stand-alone agreement that required a writing signed by both parties in order to modify or revoke. *Id.* at *10-11. Moreover, Defendant pointed to the acknowledgement of receipt, which included a list of the policies and procedures the employee had read and understood, including the arbitration agreement, and the various subparts of that agreement, including the revocation and modification section. *Id.* at *11. The Court agreed with Defendant that the arbitration agreement was separate and distinct from the handbook. The Court noted that when Plaintiff signed the handbook's receipt, Plaintiff acknowledged reading and agreed to not only the arbitration agreement, but also the provision within that agreement on revocation and modification. The Court therefore found that the arbitration agreement controlled that question and Defendants could not unilaterally modify or revoke the arbitration agreement, and therefore it was not illusory. *Id.* The Court stated that under Kansas law, there must be a meeting of the minds on all essential elements of a contract, including a fair understanding between the parties that normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract. *Id.* at *12. Plaintiff argued that there could be no meeting of the minds because the arbitration agreement did not set forth any arbitral procedures. Defendants replied that the lack of arbitral procedures in the arbitration agreement did not invalidate the agreement. The Court agreed and found that Plaintiff cited no authority for the proposition that arbitration procedures are essential terms of a contract to arbitrate, for which there must be a meeting of the minds. *Id.* at *13. The Court held that the arbitration procedures in this case were not essential terms of the contract about which the parties were required to have a meeting of the minds. Finally, Plaintiff argued that the arbitration agreement was invalid for lack of consideration. The Court stated that the arbitration agreement provided that Plaintiff was giving up a right to a jury trial on all claims covered by the agreement and that Defendants agreed to submit any claims against Plaintiff to arbitration. The Court thereby concluded that a valid arbitration agreement existed between the parties. *Id.* at *15-16. As Plaintiff did not dispute that his FLSA claims were within the scope of the arbitration agreement, the Court granted Defendants' motion to compel arbitration.

***Maynard, et al. v. Valley Christian Academy, Inc.*, 2017 U.S. Dist. LEXIS 133268 (N.D. Ohio Aug. 21, 2017).** Plaintiff, a facilities manager, filed a collective action asserting that Defendant failed to pay for all hours worked and failed to pay overtime compensation in violation of the FLSA, the Ohio Minimum Fair Wage Standards Act, and the Ohio Prompt Pay Act. Defendant moved to compel arbitration pursuant to an agreement Plaintiff signed at the commencement of her employment, which the Court granted. Plaintiff argued that the agreement was unenforceable because: (i) the agreement denied her access to remedies under federal and state law; (ii) the agreement denied her access to legal representation; (iii) the agreement was unconscionable; (iv) Defendant waived its right to arbitration; and (v) Plaintiff did not agree to arbitrate her claims nor did she knowingly agree to waive her right to a trial by jury. *Id.* at *4-5. First, Plaintiff asserted that the arbitration provision required her to submit to Biblical scripture –"following the Biblical pattern of Matthew 18: 15-17…" – and therefore made the Bible the supreme authority governing every aspect of the conciliation process, which would require her to forfeit her federal rights. *Id.* at *8. The Court found that the agreement required arbitrators to take into consideration applicable law and Plaintiff failed to explained how Biblical law might conflict with the FLSA. *Id.* at *9. Plaintiff also sought to invalidate the arbitration clause by arguing that the agreement had the potential to deny her representation by counsel. The Court determined that the agreement clearly stated that the parties were afforded full access to representation during the arbitration phase of conciliation where any legally binding

decision would be made. *Id.* at *15. Plaintiff further argued that the arbitration provision was procedurally unconscionable because Defendant did not explain the terms of the arbitration clause, and Plaintiff pointed to her limited education and lack of computer skills to support this argument. The Court rejected this argument, explaining that Plaintiff had a high-school degree and the entire employment agreement was a mere two-page document. *Id.* at *18. Further, the Court reasoned that if Plaintiff did not understand the terms after reading the agreement, the onus was on her, not Defendant, to ensure that she did. *Id.* at *19. Plaintiff also asserted that the employment agreement was a contract of adhesion. *Id.* at *20. The Court disagreed, finding that while it may be true that Plaintiff had little opportunity to negotiate, there was not "an absence of meaningful choice." *Id.* at *21. For these reasons, the Court held that the arbitration clause was not procedurally unconscionable. Plaintiff's next argument was that Defendant waived its right to arbitration because by terminating her without first "attempting to resolve differences . . . by following the biblical pattern of Matthew 18:15-17," Defendant acted inconsistently with the requirements of the arbitration clause. *Id.* at *24. However, the Court noted that Defendant's termination of Plaintiff was not indicative of the existence of any "difference" between the parties. In filing the present lawsuit, the Court opined that it was Plaintiff who acted in a manner inconsistent with the arbitration clause. *Id.* at *25. Plaintiff's final argument was that she did not agree to arbitrate her claims, and that her waiver of a right to a trial by jury was not knowing or voluntary. *Id.* The Court reasoned that this argument was largely a rehashing of the unconscionability points, and therefore the Court rejected it as well. Accordingly, the Court granted Defendant's motion to compel arbitration.

***Mcadoo, et al. v. New Line Transportation,* 2017 U.S. Dist. LEXIS 34086 (M.D. Fla. Mar. 9, 2017).** Plaintiffs, a group of owner-operators, asserted that Defendants failed to pay wages in violation of the FLSA and Florida state law. Defendants moved to dismiss and to compel arbitration of all claims pursuant to the arbitration provision in each Plaintiffs' owner-operator agreement. Defendant New Line offered to each Plaintiff an owner-operator agreement, which included an arbitration clause. All Plaintiffs signed them. Nonetheless, Plaintiffs asserted that the arbitration agreement was unconscionable. Plaintiffs also claimed that the owner-operator and sales agreements were sham agreements that purported to sell trucking equipment to Plaintiffs so that Defendants could change their status from employees to independent contractors. The Court found that Plaintiffs' allegations focused on disputed facts relating to an issue in the case, rather than the circumstances surrounding the execution of the agreements. *Id.* at *6. The Court stated that Plaintiffs' allegations of fraud, therefore, were not a basis for finding procedural or substantive unconscionability in regards to the arbitration agreement. Plaintiffs also did not claim that they could not or did not understand the agreement to arbitrate or that they were denied an opportunity to review the agreements before signing them. *Id.* at *6-7. The Court therefore determined that the agreements were not procedurally unconscionable. Plaintiffs also pointed to two provisions they contended were substantively unconscionable. First, they focused on the provision requiring that "[t]he parties shall share the cost of arbitration equally," which they asserted was unconscionable because of the disparate impact the cost of arbitration had on them. *Id.* at *8. The Court held that Plaintiffs' bare claim that the "cost of arbitration would limit or eliminate their ability to redress their rights," was insufficient to establish that an equal cost-splitting provision of an arbitration agreement was substantively unconscionable. Plaintiffs also pointed to the provision allowing Defendants to "forgo arbitration and pursue litigation." *Id.* Plaintiffs interpreted this clause as "textbook lack of mutuality of obligation" by "[r]equiring the drivers to proceed only in arbitration while allowing New Line to choose." *Id.* at *9. The Court found that the provision was inapplicable to this case, since Plaintiffs initiated the litigation. *Id.* The Court opined that the provision allowing Defendant to forgo arbitration, like the cost-splitting provision, did not conclusively demonstrate unfairness. Accordingly, the Court held that Plaintiffs did not met their burden of establishing that the terms of the arbitration agreement were so unfair or unjust as to be unconscionable. The Court therefore granted Defendants' motion to compel arbitration.

***McFaddin, et al. v. E.A. Renfroe & Co.*, 2017 U.S. App. LEXIS 20306 (9th Cir. Oct. 17, 2017).** Plaintiff, an employee, filed a wage & hour class action asserting violations of the California Labor Law and California's Private Attorneys General Act ("PAGA"). Defendant filed a motion to compel arbitration pursuant to an arbitration agreement that Plaintiff had signed. The District Court denied Defendant's motion, finding that the arbitration agreement was unenforceable. On appeal, the Ninth Circuit vacated the District Court's ruling. The Ninth Circuit stated that California law governs the determination of whether the parties' arbitration agreement is unconscionable. Further, the Ninth Circuit found that under California law, "the strong preference is to sever unless the agreement is permeated by unconscionability." *Id.* at *1. The Ninth Circuit agreed with the District

Court that the choice-of-forum provision, the prevailing party provision, and the cost provision portions of the arbitration agreement were unconscionable. *Id.* at *2. The Ninth Circuit noted that Defendant had stipulated it would not enforce the choice-of-forum provision. The Ninth Circuit held that the prevailing party and cost provisions were severable. *Id.* Accordingly, the Ninth Circuit vacated the District Court's ruling that the entirety of the arbitration agreement was unenforceable. *Id.* The Ninth Circuit also determined that the District Court did not address whether the arbitration agreement's waiver of class action claims was enforceable and applied to Plaintiff's PAGA claim. The Ninth Circuit therefore also directed the District Court on remand to address that issue before reconsidering whether the agreement remained enforceable.

***Moon, et al. v. Breathless Inc.,* 868 F.3d 209 (3d. Cir. 2017).** Plaintiff, an exotic dancer, brought a putative class and collective action alleging that Defendant misclassified its exotic dancers as independent contractors, and failed to pay minimum and overtime wages, unemployment, disability, and social security taxes as well as workers' compensation premiums and other mandatory insurance benefits in violation of the FLSA and New Jersey state laws. *Id.* at 212. Previously, the District Court had denied Defendant's motion to dismiss and ordered the parties to engage in limited discovery on the issue of whether Plaintiff's claims were subject to a valid arbitration agreement. *Id.* Plaintiff claimed that the purported arbitration agreement was invalid and Plaintiff's claims were outside its scope. *Id.* The District Court rejected Plaintiff's argument and granted Defendant's motion for summary judgment. The District Court found that Plaintiff failed to establish a genuine issue as the validity or scope of the arbitration provision. On appeal, the Third Circuit reversed and remanded for further proceedings. The Third Circuit stated that it must decide two questions under New Jersey law, including: (i) should a District Court decide whether the parties should submit this issue to arbitration; and (ii) if the parties have contracted to allow a District Court to decide arbitrability, have the parties agreed to arbitrate the claims at issue. *Id.* at 213. The Third Circuit answered the first question in the affirmative and the second question in the negative. The Third Circuit stated that the arbitration clause failed to mention arbitrability, let alone the venue for deciding it. Further, the Third Circuit determined that Defendant had conceded in District Court that it should determine arbitrability. The Third Circuit explained that under New Jersey law, an arbitration clause must: (i) identify the general substantive area that the arbitration clause covers; (ii) reference the types of claims waived by the provision; and (iii) explain the difference between arbitration and litigation. *Id.* at 214. The Third Circuit noted that the Supreme Court of New Jersey had interpreted three arbitration clauses to determine whether they covered a particular type of statutory claim. In two of these cases, *Garfinkel* and *Atalese*, which resembled the present case, the Supreme Court of New Jersey found that the arbitration clause did not cover Plaintiff's statutory claims. Accordingly, because the arbitration clause here resembled the arbitration clauses in *Garfinkel* and *Atalese,* and because the Supreme Court of New Jersey found that the arbitration clauses in *Garfinkel* and *Atalese* only applied to contract disputes, the Third Circuit held that the arbitration clause did not cover Plaintiff's statutory claims. Defendant contested the factual similarities and argued that *Garfinkel* could not govern the instant case because it involved employees, whereas this matter involved an independent contractor. Defendant also asserted that deciding the arbitration question would force the District Court to determine the case's merits. *Id.* at 217. The Third Circuit determined that Defendant's first argument lacked merit because the Supreme Court of New Jersey has applied *Garfinkel* to cases outside of the employment context. Defendant's second argument also failed because the District Court found that the arbitration clause did not cover Plaintiff's wage & hour claims without deciding the claims' merits. *Id.* at 217-18. To answer the arbitrability question, the Third Circuit opined, the District Court must only decide what the arbitration provision says. Accordingly, the Third Circuit reversed the District Court's ruling and found that the arbitration provision did not cover Plaintiff's wage & hour claims. The Third Circuit therefore remanded for further proceedings.

***Mumin, et al. v. Uber Technologies*, U.S. Dist. LEXIS 34008 (E.D.N.Y. Mar. 8, 2017).** Plaintiffs brought two related putative class actions against Defendant, a ride sharing company, alleging wage & hour violations under state law as well as other statutory and common law claims. Defendant moved to compel arbitration pursuant to the parties' agreement and sought enforcement of the class action waiver. The Court held that the arbitration provision provided clear and unmistakable evidence that the parties intended to delegate the issue of arbitrability to an arbitrator and that the provision was not unconscionable. Plaintiffs challenged the provision delegating the issue of arbitrability on the grounds that it was unconscionable. The Court rejected the argument because Plaintiffs had 30 days to opt-out of the arbitration provision, yet failed to do so. Therefore, the Court concluded that the agreement to arbitrate the question of arbitrability was not procedurally unconscionable. As such, the

Court did not address whether it was substantively unconscionable. The Court also held that the class action waiver was valid and enforceable. Plaintiff asserted that the class action waiver was unenforceable pursuant to the Norris-La Guardia Act, which protects an individual employee's right to engage in "concerted activities for the purpose of . . . mutual aid or protection." *Id.* at *32. The Court ruled that the Second Circuit had consistently rejected such arguments and had found that class action waivers are enforceable and do not infringe upon employees' substantive rights. *Id.* at *31. Defendant also moved to dismiss the claims of two Plaintiffs – Plaintiffs Mumin and Ortega – who opted-out of the arbitration agreement. The Court found that both Plaintiffs sufficiently pled claims that Defendant unlawfully retained gratuities and failed to pay minimum wage. The Court rejected Defendant's assertion that the Rule 12(b)(6) heightened standard applied to these claims. It ruled that, because fraud was not an integral part of these claims, a heightened standard did not apply. However, the Court dismissed Mumin's claims of tortious interference with business relations, breach of contract, conversion, promissory estoppel, unjust enrichment, fraud, and intentional misrepresentation. Similarly, Defendant's motion to dismiss Ortega's claims was granted as to tortious interference with business, breach of contract, and conversion. The Court also dismissed Ortega's claims of minimum wage violations based upon incurred expenses, as Ortega's claim based upon incurred expenses was not specific and did not supply facts such that "a simple arithmetical calculation" could be used to determine if there was a violation. *Id.* at 46. Ortega merely alleged that he paid "hundreds of dollars" each week in expenses. *Id.* at 46. As such, the Court granted Defendant's motion to dismiss Ortega's minimum wage claim based upon incurred expenses. Defendant's motion to dismiss Ortega's claims for false advertising was denied because the Court rejected the argument that Plaintiff must allege that he personally relied upon the advertisement. Accordingly, Defendant's motion to compel arbitration and to enforce the class action waiver was granted. Defendant's motion to dismiss was granted in part and denied in part as to the claims of Plaintiffs Mumin and Ortega.

***Nadeau, et al. v. Equity Residential Properties Management*, 2017 U.S. Dist. LEXIS 68937 (S.D.N.Y. May 4, 2017).** Plaintiff, a customer-support assistant, filed a class action alleging violations of the FLSA and state law. Plaintiff alleged that Defendant regularly required her to respond to text messages and phone calls after work without compensation. *Id.* at *3. Plaintiff received a text message from her supervisor instructing her to attend a company event outside of work hours and Plaintiff sent a vulgar text in response. *Id.* Plaintiff received a formal write up, alleging that she violated company policy by communicating with her supervisor by text and using inappropriate language. *Id.* at *4. Plaintiff filed an arbitration demand pursuant to the parties' arbitration agreement. *Id.* Defendant terminated Plaintiff and failed to arbitrate the matter. *Id.* at *5-6. Plaintiff filed a lawsuit and Defendant moved to compel arbitration and stay the matter. *Id.* at *6. Plaintiff objected to the motion, asserting that Defendant could not compel arbitration as it breached the arbitration agreement by refusing to arbitrate. *Id.* at *8. Defendant asserted that it did not breach the arbitration agreement because: (i) Plaintiff's demand for arbitration was deficient, as Plaintiff failed to date and sign the demand; and (ii) Plaintiff's demand addressed a claim that was not covered by the agreement. *Id.* at *9. The Court rejected both arguments. First, the Court noted that Defendant provided no authority that required technical conditions be met to initiate arbitration. The Court ruled that Plaintiff's demand triggered Defendant's obligation to arbitrate. *Id.* at *10. Second, the Court rejected Defendant's assertion that Plaintiff's demand for arbitration regarding her formal write up was not arbitrable. *Id.* at *11. The Court rejected this argument on the grounds that the proper forum to challenge the arbitrability of Plaintiff's issues was in arbitration and not in Court. *Id.* Furthermore, the Court ruled that the claim was arbitrable, as arbitration clauses should be construed as "broadly as possible" and there is a strong federal policy favoring arbitration. *Id.* at *12. Accordingly, the Court held that Defendant's refusal to arbitrate constituted a material breach of the agreement and it denied Defendant's motion to compel arbitration and stay the matter.

***Olivares, et al. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 109348 (N.D. Ill. July 14, 2017).** Plaintiff filed a five-count amended class action complaint against Uber Technologies, Inc. for violation of the Illinois Wage Payment and Collection Act ("IWPCA"), the Illinois Minimum Wage Law ("IMWL"), and the FLSA. Defendant filed a motion to compel arbitration and dismiss the case pursuant to the Federal Arbitration Act ("FAA"). Plaintiff asserted that Defendant violated both federal and state laws by not providing drivers with salaries that met minimum wage requirements or overtime pay. Plaintiff voluntarily entered into a valid and enforceable arbitration agreement with Rasier, LLC, Defendant's wholly-owned subsidiary. At the time Plaintiff signed up to use Defendant's app to generate leads for potential riders, the applicable agreement was the

November 10, 2014 Rasier Software License & Online Services Agreement ("November 2014 Agreement"). In December 2015, Defendant introduced a revised agreement ("December 2015 Agreement"), containing an arbitration provision, delegation provision, and opt-out provision. *Id.* at *4. Plaintiff voluntarily entered into the November 2014 and December 2015 Agreements and did not opt-out of the arbitration provision. *Id.* at *5-6. Plaintiff asserted that the arbitration provision was unenforceable because the class action waiver it contained violated § 7 of the National Labor Relations Act ("NLRA"). Defendant argued that a valid, enforceable arbitration agreement existed and that the NLRA did not apply since Plaintiff was an independent contractor, not an employee. *Id.* at *7. Plaintiff also challenged Defendant's classification of him as an independent contractor and argued that the Court must decide this "threshold question" before it could rule on Defendant's motion. *Id.* at *7-8. Defendant contended that whether Plaintiff was properly classified as an employee or an independent contractor was for the arbitrator, not the Court, to decide. *Id.* at *8. The Court explained that a delegation clause can only be enforced if there is clear and unmistakable evidence that the parties have agreed to arbitrate threshold issues. The Court found that here Defendant's delegation clause was clear and unmistakable evidence that when Plaintiff accepted the December 2015 Agreement, he agreed to arbitrate threshold issues. *Id.* The Court found that the operative delegation clause provided that the arbitration provision applied to all disputes between Plaintiff and Defendant, including any disputes arising out of or related to Plaintiff's relationship with Defendant. *Id.* at *8-9. Pursuant to that arbitration agreement, from which Plaintiff did not opt-out, the Court held that the arbitrator was responsible for determining the threshold issue of whether Plaintiff was an employee or independent contractor. *Id.* at *9. The Court noted that it would be essential to first resolve whether Plaintiff was an independent contractor or an employee, as the NLRA only applied to employees. Because the Court held that question was for the arbitrator to decide, it declined to decide at this stage whether the class action waiver violated the NLRA. The Court thereby granted in part and denied in part Defendant's motion to compel arbitration.

***Oliveira, et al. v. New Prime, Inc.,* 857 F.3d 7 (1st Cir. 2017).** Plaintiff, a driver, filed a collective action alleging that Defendant violated the FLSA by misclassifying drivers as independent contractors and thereby failing to pay minimum wage. *Id.* at 8. Defendant moved to compel arbitration under the Federal Arbitration Act ("FAA") and stay the proceedings, asserting that Plaintiff entered into an independent contractor operating agreement with Defendant. Plaintiff contended that the motion to compel arbitration should be denied because it was exempted from the FAA under § 1. Plaintiff further argued that the question of the applicability of the § 1 exemption was one for the District Court, and not an arbitrator, to decide. *Id.* at 11. Defendant argued that the § 1 exemption did not include independent-contractor agreements and, in any event, the question of whether the § 1 exemption applied was a question of arbitrability that the parties had delegated to the arbitrator. The District Court concluded that the question of the applicability of the § 1 exemption was for it, and not an arbitrator, to decide. The District Court further determined that it could not yet answer that question because: (i) the "contracts of employment" language of the § 1 exemption does not extend to independent contractors; and (ii) discovery was needed on the issue of whether Plaintiff was an employee or an independent contractor before the District Court could decide whether the contract was a contract of employment under the § 1 exemption. *Id.* at 11-12. The District Court therefore denied Defendant's motion to compel arbitration without prejudice and permitted the parties to conduct discovery on Plaintiff's employment status. On appeal, the First Circuit affirmed the District Court's ruling. The First Circuit noted that the appeal raised two questions of first impression in the First Circuit. First, when a District Court is confronted with a motion to compel arbitration under the FAA in a case where the parties have delegated questions of arbitrability to the arbitrator, must the District Court first determine whether the FAA applies or must it grant the motion and let the arbitrator determine the applicability of the Act. Second, whether a provision of the FAA that exempts contracts of employment of transportation workers from the Act's coverage applies to a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship. *Id.* at 8. As to the first question, the First Circuit was persuaded by Ninth Circuit precedent holding that the issue of whether the § 1 exemption applies presents a question of "whether the FAA confers authority on the District Court to compel arbitration" and not a question of arbitrability. *Id.* at 12. After concluding that it must decide for itself whether the § 1 exemption applies, the District Court ordered the parties to conduct factual discovery to determine whether Plaintiff was an independent contractor or an employee during the time that the contract was in place. On appeal, both parties challenged this aspect of the District Court's order. Defendant agreed that § 1 does not extend to independent contractors, but argued that discovery on the relationship between the parties was inappropriate because Plaintiff's status as an employee or

independent contractor should be decided by the arbitrator. *Id.* at 18. Plaintiff argued that the phrase "contracts of employment" contained in § 1 means simply "agreements to do work." *Id.* at 20. The First Circuit agreed and determined that this interpretation was consistent with the ordinary meaning of the phrase at the time Congress enacted the FAA. *Id.* at 22. The First Circuit found that the combination of the ordinary meaning of the phrase "contracts of employment" and Defendant's concession that Plaintiff is a transportation worker compelled the conclusion that the contract in this case was excluded from the FAA's reach. *Id.* at 25. Accordingly, the First Circuit held that a transportation-worker agreement that establishes or purports to establish an independent-contractor relationship is a contract of employment under § 1. *Id.* at 30.

***Ortega, et al. v. Uber Technologies,* 2017 U.S. Dist. LEXIS 66658 (E.D.N.Y. May 1, 2017).** Plaintiffs, a group of drivers, brought an action alleging that Defendant induced them through false advertisements and breached its contracts with Plaintiffs by, among other things, inflating the "service fee" charged to drivers. *Id.* at *2. Defendant moved to dismiss all of Plaintiffs' claims for failure to state a claim upon which relief may be granted. Defendant separately moved to compel individual arbitration as to all of Plaintiff Martinez's claims on the basis of an arbitration provision contained within the operative service agreement. The Court had previously ordered that Martinez agreed not only to arbitrate his claims against Defendant, but also to "submit to an arbitrator any disputes relating to the interpretation or application of the arbitral clause." *Id.* at *2-3. The Court also concluded that Plaintiff Ortega had not made out a sufficient claim for breach of contract and dismissed Ortega's breach of contract claim. Plaintiffs filed a motion for reconsideration, which the Court denied. Plaintiffs requested that the Court reconsider its determinations that: (i) Martinez's false advertising claim was subject to arbitration under his contract with Defendant; and (ii) Ortega failed to state a claim for breach of contract. Martinez argued that a contract's arbitration provisions could not be extended to cover disputes that arose prior to contracting. However, in the Court's previous opinion, it concluded not only that Martinez agreed to arbitrate his claims against Defendant, but also that he agreed to delegate the question of arbitrability itself to the arbitrator. *Id.* at *4. Therefore, whether Martinez's false advertising claims fell inside the scope of the claims covered by the arbitration clause was squarely within the realm of decisions that Martinez delegated to the arbitrator. *Id.* at *5-6. The Court noted that Martinez presented no new challenge to the validity of this delegation and provided no grounds to revisit the Court's previous order. Accordingly, the Court denied Plaintiffs' motion for reconsideration as to Martinez' false advertising claim. Seeking reinstatement of his breach of contract claim, Ortega further argued that the Court overlooked other, potentially relevant iterations of the service agreements, pointing specifically to the April 2015 and December 2015 service agreements. Ortega also argued that the Court's prior order was "based on an incomplete [version of the relevant agreement] submitted by Defendants herein, which lacked the 'City Addendum.'" *Id.* at *6. The Court opined that, although Ortega correctly noted that the Court's decision did not address two later-in-time iterations of the service agreements, those agreements did not address the underlying issue with Ortega's claim. *Id.* at *7. Plaintiffs' complaint never identified the agreement that Defendant allegedly breached, an essential allegation in the present case where, as discussed, the alleged "breach" was expressly valid under at least one of the relevant agreements. *Id.* at *8. The Court stated that Plaintiffs' failure to identify the agreement and terms alleged to have been breached necessitated dismissal of the claim. *Id.* The Court concluded that Plaintiffs' pointing to the two agreements again without specifying that Defendant had breached those particular agreements did not remedy the pleading failure, and therefore the Court was not persuaded to reconsider its prior decision. Accordingly, the Court denied Plaintiffs' motion for reconsideration.

***Ortiz, et al. v. Volt Management Corp.,* 2017 U.S. Dist. LEXIS 72403 (N.D. Cal. May 11, 2017).** Plaintiff, an employee, filed a putative class action against Defendants for alleged violations of California's wage & labor laws. Defendants filed a motion to compel arbitration and dismiss Plaintiff's claims or, in the alternative, to stay the entire case during the pendency of arbitration proceedings. *Id.* at *2. Defendant Genco provided Defendant Volt with logistics support for its operations. Plaintiff alleged that Defendants failed to provide all necessary compensation related to shift differentials, non-discretionary bonuses, premium wages for meal and rest periods, overtime wages, time spent clocking-in and clocking-out, and final wages following separation from employment. *Id.* Additionally, Plaintiff alleged that Defendants failed to provide accurate written wage statements. *Id.* at *2-3. Plaintiff signed a one-page "employment agreement" with Volt, which contained an arbitration agreement stating that any employment and/or employment termination-related disputes and/or disputes would be settled by final and binding arbitration, pursuant to the Federal Arbitration Act, in accordance with the employment rules of the

American Arbitration Association ("AAA"). *Id.* at *3-4. Plaintiff argued that the arbitration agreement was unconscionable and therefore unenforceable. *Id.* at *7. With respect to the first prong of procedural unconscionability, Plaintiff asserted the contract was adhesive because it was a condition of employment. The Court found that Plaintiff offered no further argument with regard to the adhesive nature of the delegation provision specifically, or the contract generally, nor did he raise any suggestion of "oppression" or "surprise" as to the agreement. *Id.* at *8. Thus, while the Court acknowledged that some measure of procedural unconscionability existed as a result of the adhesive nature of the employment contract, the degree of such procedural unconscionability was low. *Id.* at *9. With respect to the second prong, *i.e.*, analyzing whether the agreement was substantively unconscionable, Plaintiff raised three arguments, including: (i) the provision gave Volt the unilateral right to modify the agreement; (ii) the arbitration policy allowed Volt to recover attorneys' fees if it was the prevailing party; and (iii) ambiguity existed as to which rules apply. *Id.* at *9-10. The Court found that Plaintiff's argument with respect to Volt's right to modify stemmed from the following language: "Volt has the right to change, interpret or cancel any of its rules, policies, benefits, procedures or practices at Volt's discretion, upon reasonable notice where practicable." *Id.* at *10. The Court determined that the relied-upon language was not contained in the employment agreement but rather in the employee guide. Thus, the Court opined that the arbitration provision itself could not be interpreted to contain a provision allowing Volt to amend, modify, or abrogate any of Plaintiff's rights unilaterally. *Id.* Similarly, the Court stated that Plaintiff's argument with respect to the right of the arbitrator to award attorneys' fees was also contained in the employee handbook and not in the actual arbitration provision or employment agreement. With respect to the final argument regarding ambiguity, Plaintiff compared the language in the employment agreement, which required the arbitration to be conducted "in accordance with the employment rules of the [AAA]" with the arbitration policy included in the employee handbook, which provided that the arbitration be conducted in accordance with "the applicable rules of the [AAA]." *Id.* at *11. The Court ruled the distinction did not create a meaningful ambiguity, let alone support a finding of substantive unconscionability. The Court therefore held that Plaintiff failed to make any showing of substantive unconscionability with regard to the arbitration provision generally or the delegation clause specifically. Accordingly, the Court granted Defendants' motion to compel arbitration.

***Ouadani, et al. v. TF Final Mile LLC*, 2017 U.S. App. LEXIS 23493 (1st Cir. Nov. 21, 2017).** Plaintiff filed a collective action alleging that Defendant incorrectly classified him as an independent contractor and thereby denied him overtime and minimum wages in violation of the FLSA and state wage & hour laws. Defendant filed a motion to compel arbitration, which the District Court denied. On appeal, the First Circuit affirmed the Districts Court's ruling. Plaintiff delivered products for Dynamex Operations East, LLC ("Dynamex") and was required to associate with a vendor affiliated with Dynamex, Selwyn, and Birtha Shipping LLC ("SBS"). *Id.* at *1-2. Plaintiff received his compensation from SBS, which had a written contract with Dynamex. Plaintiff did not have a written contract either with Dynamex or with SBS. Unbeknownst to Plaintiff, Dynamex and SBS entered into an "Independent Contractor Agreement for Transportation Services" (the "Agreement"), which included an arbitration provision. *Id.* at *3. The agreement required SBS to provide Dynamex with a written agreement from any sub-contractor that SBS utilized attesting that the sub-contractor had agreed to comply with the terms of the Agreement. *Id.* at *4. SBS did not have Plaintiff execute the written agreement. After commencing his employment, Plaintiff complained to Dynamex that he lacked the independence of a contractor, and that he should be paid as an employee if Dynamex continued to exert the same degree of control over his work. Plaintiff was terminated shortly after he complained. After Plaintiff filed his collective action, Defendant moved to compel arbitration based on the agreement between Dynamex and SBS that contained a mandatory arbitration clause. *Id.* at *2. In denying Defendant's motion, the District Court reasoned that Plaintiff had never signed the agreement containing the arbitration clause and had no idea that the agreement even existed. On appeal, Dynamex argued that Plaintiff nonetheless should be compelled to arbitrate under federal common law principles of contract and agency. Dynamex asserted that Plaintiff should be bound to arbitrate because he was an "agent" of SBS. *Id.* at *5. The First Circuit disagreed, finding that, in this context, Plaintiff was not bringing his wage & hour claims as an "agent acting on behalf" of SBS, but rather was bringing his claims against Dynamex on his own behalf and purportedly on behalf of other similarly-situated drivers. *Id.* at *9. Accordingly, the First Circuit held that the alleged agency relationship between Plaintiff and SBS was irrelevant to the "legal obligation in dispute." *Id.* at *10. Defendant also asserted that the doctrine of equitable estoppel applied to Plaintiff's claims. The First Circuit explained that equitable estoppel "precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations." *Id.* at *11. The First Circuit found

that Dynamex's rationales were inapposite because Plaintiff was a non-signatory Plaintiff who was trying to avoid arbitration, not a non-signatory Defendant seeking to compel it. Dynamex also argued that Plaintiff knowingly sought and obtained benefits from the Agreement because he performed the "Contracted Services" pursuant to the Agreement for compensation. *Id.* The First Circuit disagreed, finding that the benefits of the arbitration clause of the Agreement accrued to the contracting signatories, Dynamex and SBS, not to Plaintiff. Further, Plaintiff could hardly be said to have "embraced" the Agreement when he was unaware of its existence. *Id.* at *14. The First Circuit reasoned that Plaintiff's claims did not depend on the existence of a right guaranteed in the Agreement between Dynamex and SBS; rather, they were grounded in Plaintiff's relationship with Dynamex. The Court concluded that Dynamex failed to show that the parties to the Agreement intended to provide any legal rights to Plaintiff. *Id.* at *17. Accordingly, the First Circuit affirmed the District Court's ruling denying Defendant's motion to compel arbitration.

***Patel, et al. v. Jack In The Box,* 2017 U.S. Dist. LEXIS 76581 (S.D. Cal. Jan. 27, 2017).** Plaintiff, a restaurant manager, filed a collective action alleging that Defendant violated various state and federal wage & hour laws. Defendant filed a motion to compel arbitration based on an dispute resolution agreement that Plaintiff signed (the "agreement"), and the Court granted the motion. Plaintiff asserted various defenses, including that: (i) the agreement's collective action waiver was unenforceable under the National Labor Relations Act ("NLRA") because it interfered with employees' collective action rights; (ii) the agreement's waiver of representative claims was invalid because it prevented the filing of California Private Attorneys General Act ("PAGA") claims; and (iii) the agreement was unconscionable. *Id.* at *5-6. The Court found that Plaintiff's arguments failed. First, the Court determined that under the NLRA, Plaintiff was a supervisor and, thus, was able to waive his collective action rights. The Court noted that Defendant provided declarations from other managers explaining specific managerial duties that independently established that Plaintiff was a supervisor. *Id.* at *11. At a minimum, the Court stated that Plaintiff hired employees, managed the staffing of his restaurants, and recommended employees for promotion. *Id.* at *15. The Court found that these activities each involved independent judgment and the weighing of various factors. *Id.* at *16. Thus, the Court held that the agreement was not rendered illegal by the NLRA. Because Plaintiff's complaint did not include any PAGA claims, the Court stated that it need not address whether they had been waived. *Id.* at *6. Finally, the Court held that the agreement was not unconscionable. The Court explained that by signing the agreement's receipt and acknowledgment, Plaintiff acknowledged receiving the agreement and having the opportunity to read it. *Id.* at *18. Plaintiff also acknowledged that the agreement required "all employment-related disputes involving my legally protected rights to be submitted to an arbitrator rather than a judge and jury in court. *Id.* The Court further found that the document was short, concise, in plain English, and not deceptive. Moreover, the Court noted that Plaintiff had the option to opt-out of the agreement. Accordingly, the Court granted Defendant's motion to compel arbitration.

***Poublon, et al. v. C.H. Robinson Co.,* 2017 U.S. App. LEXIS 1969 (9th Cir. Feb. 3, 2017).** Plaintiff, an account manager, brought an action in state court on behalf of herself and other similarly-situated employees, alleging wage & hour violations based upon misclassification of employment status as well as a claim under California's Private Attorneys General Act ("PAGA"). Defendant removed Plaintiff's claims to federal court. Defendant moved to compel arbitration, stay the proceedings, and dismiss the class and representative claims pursuant to the dispute resolution provision contained in the parties' incentive bonus agreement. The District Court denied Defendant's motion, holding that the agreement between the parties was both procedurally and substantively unconscionable under California law. On Defendant's appeal, the Ninth Circuit reversed. Plaintiff asserted that the agreement was procedurally unconscionable to a high degree and contained eight substantively unconscionable provisions. The Ninth Circuit disagreed and concluded that even though the agreement was an adhesion contract, there was a low degree of procedural unconscionability. The Ninth Circuit rejected Plaintiff's argument that the dispute resolution provision was oppressive because Defendant failed to provide her with a copy of the American Arbitration Association's rules and Defendant's arbitration procedure, which were incorporated by reference in the dispute resolution provision. Further, there was no evidence that Defendant indicated that Plaintiff would be fired for failing to sign the agreement, but only that Plaintiff would not get a bonus if she failed to sign the agreement. As to substantive unconscionability, the Ninth Circuit agreed with the District Court that the judicial carve-out provision allowing only Defendant to seek out judicial resolution of specific claims was substantively unconscionable. Defendant did not contest the District Court's decision as to the judicial carve-out provision. However, the Ninth Circuit ruled that while the provision was substantively

unconscionable, it could be extirpated without affecting the intent of the agreement; therefore, it did not invalidate the agreement. The Ninth Circuit also held that a waiver of representative claims was not substantively unconscionable even though the waiver of Plaintiff's claim under California's Private Attorneys General Act ("PAGA") was not enforceable under California law. The Ninth Circuit further ruled that the agreement's venue provision, confidentiality provision, sanctions provision, unilateral modification provision, and limitations on discovery did not render the agreement substantively unconscionable. The Ninth Circuit concluded that severance was appropriate and the agreement was valid and enforceable once the judicial carve-out was extirpated and the waiver of representative claims was limited to non-PAGA claims. Accordingly, the Ninth Circuit reversed and remanded.

***Price, et al. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 83754 (S.D. Ind. June 1, 2017).** Plaintiff, a driver, brought an action alleging that Defendant misclassified drivers as independent contractors in violation of the FLSA. Defendant filed a motion to compel arbitration with opt-in Plaintiff Ogbonna Anih and to dismiss him from the action. The Court granted the motion in part. Defendant is a technology company that offers a smartphone application to connect riders looking for transportation to drivers. Prior to using Defendant's software to generate leads for riders, potential drivers must enter into a technology services agreement (the "agreement"). *Id.* at *2. To enter into the agreement, Anih had to sign into Defendant's app and click the appropriate hyperlink. After confirming his acceptance of the agreement, the app automatically transmitted it to Plaintiff's driver portal, where Anih could review it or print it at any time. *Id.* at *3. The agreement contained an arbitration provision, which provided, in relevant part: "[E]xcept as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration, with the exception of proceedings that must be exhausted under applicable law before pursuing a claim in a court of law or in any forum other than arbitration. Except as it otherwise provides, this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action." *Id.* Additionally, once a driver accepts the agreement, he still could opt-out of the arbitration provision within 30 days. Anih did not opt-out of the arbitration provision. Anih admitted that he accepted the agreement and did not opt-out of the arbitration provision, but argued that the class action waiver included in the arbitration provision violated the National Labor Relations Act ("NLRA") and therefore rendered the arbitration provision unenforceable. The Court found that the Seventh Circuit had expressly declined to address the effect of a clear opt-out provision on the validity of a class action waiver. The Court therefore held that the optional waiver in this case was lawful. *Id.* at *8. The Court stated that Anih had the opportunity to choose to resolve disputes by arbitration or litigation and, by not acting upon the clear, bold-faced language in the arbitration provision, Anih was bound to arbitrate his claims. *Id.* at *9. Accordingly, the Court granted Defendant's motion to compel arbitration and stayed the matter as to Anih pending resolution of the arbitration proceeding. *Id.* However, the Court denied the motion to dismiss Anih from the action because the Seventh Circuit has held repeatedly, "the proper course of action when a party seeks to invoke an arbitration clause is to stay the proceedings rather than to dismiss outright." *Id.* at *10.

***Pyle, et al. v. VXI Global Solutions, Inc.*, 2017 U.S. Dist. LEXIS 183471 (N.D. Ohio Nov. 6, 2017).** Plaintiff, a phone operator at a call center, brought a collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA. Defendants filed a motion to compel arbitration, arguing that Plaintiff signed an arbitration agreement during the course of his employment, in which he agreed to submit any employment claims he might have against Defendants to arbitration. Plaintiff argued that the Sixth Circuit's recent decision in *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017), rendered the parties' arbitration agreement unenforceable. *Id.* at *1-2. Plaintiff and Defendants mutually agreed to submit any claim related to Plaintiff's employment with Defendants to binding arbitration. *Id.* at *3. Plaintiff did not dispute that his FLSA claim was covered by the arbitration agreement, nor did he disagree that the arbitration agreement was silent as to the availability of class-wide arbitration. However, Plaintiff maintained that requiring him to proceed to arbitration on an individual basis would be illegal. *Id.* at *4. The Court noted that the Sixth Circuit applies a four-pronged test to determine whether an unwilling party can be compelled to arbitrate, and there was no question that the facts of this case satisfied the four-prong test. *Id.* at *5-6. Relying exclusively on *Alternative Entertainment*, Plaintiff argued that the ruling made compelling individual arbitration illegal. *Id.* at *7. In *Alternative Entertainment,* the National Labor Relations Board ("NLRB") sought enforcement of its administrative

decision that Alternative Entertainment had violated the National Labor Relations Act ("NLRA") by requiring employees to agree to arbitrate all claims concerning or arising out of their employment individually. *Id.* at *8. The Court explained that this action gave the Sixth Circuit the opportunity to weigh in on a circuit split over the question of "whether federal law permits employers to require individual arbitration of employees' employment-related claims." *Id.* The Sixth Circuit adopted the view that arbitration agreements containing express class waivers violate the NLRA. Defendants argued that the Sixth Circuit's decision was distinguishable because, whereas the agreement in *Alternative Entertainment* contained an explicit waiver of the right to pursue collective arbitration, the agreement here was silent as to the availability of class arbitration. *Id.* at *10. The Court agreed with Defendants. The Court noted that *Alternative Entertainment* did not address the issue of arbitration agreements that are silent on the subject of class-wide waivers. *Id.* Under these circumstances, the Court concluded that the decision in *Alternative Entertainment* was not intended to apply to arbitration agreements that were silent on the issue of class-wide arbitration, and therefore did not contain an illegal term, such as an express waiver of the right to class-wide arbitration. The Court found that it was undisputed that the arbitration agreement in question made no reference whatsoever to class-wide arbitration, and thus the Court could not infer the availability of such a vehicle based on mere silence. *Id.* at *11. As a result, the Court concluded that the parties' arbitration clause did not authorize class-wide arbitration and it held that Plaintiff must proceed to arbitration on an individual basis.

***Ranieri, et al. v. Banco Santander, S.A.,* 2016 U.S. Dist. LEXIS 45113 (D.N.J. Jan. 25, 2016).** Plaintiffs, two former mortgage loan officers, brought a putative class action and collective action alleging that Defendants failed to pay the required minimum wage and overtime compensation under the FLSA and the New Jersey Wage & Hour Law. *Id.* at *1. Defendants moved to compel arbitration, arguing that Plaintiffs were obligated to arbitrate all disputes pursuant to provisions in a series of employment agreements. At the start of their employment, Plaintiffs received an offer of employment that mandated that Plaintiffs execute "the enclosed Mortgage Retail Development Officer Agreement" ("MDO") and all attached exhibits, on or before the first day of work. *Id.* at *3. The offer letter also attached a copy of the mortgage sales commission plan. The MDO included an arbitration clause that prohibited class, collective, and representative actions against Defendant. *Id.* Both Plaintiffs signed the MDO on the bottom of the final page under a bolded sentence that read: "I certify, by my signature below, that I have received a copy of the mortgage sales commission plan, which has been provided to me." *Id.* at *5. Defendants maintained that Plaintiffs agreed to arbitrate pursuant to the MDO that contained the arbitration clause. The Court previously had held that it would not compel arbitration because the agreement was too ambiguously drafted, and ordered further discovery on the question of arbitrability. Defendant subsequently deposed Plaintiffs and they asserted that they did not intend to be bound to the terms of the arbitration clause because they did not read the offer letter or MDO in full. *Id.* at *7. After discovery, Defendant filed its renewed motion to compel arbitration with supporting documentation and Plaintiffs' deposition testimony, which the Court granted. The Court found that the express, unequivocal language of the MDO, extrinsic evidence that undermined Plaintiffs' claim of ambiguity in the MDO, and Plaintiffs' objective manifestations of intent to contract required grating the motion to compel arbitration. *Id.* at *8. The Court held that reasonable people reading the MDO would believe that, by signing it, they were agreeing to the terms in the document, including the arbitration clause. The Court opined that Plaintiffs also received and signed the offer letter, which told them they had to "execute" the MDO "on or before your first day of work." *Id.* at *15. One Plaintiff also received an addendum that again informed her that her that she was bound to all of the MDO's terms. *Id.* The Court determined that these documents put Plaintiffs on notice that, by signing the MDO agreement, their signatures would bind them to the entire document, not just acknowledge receipt of the commission plan. The Court held that Plaintiffs agreed to arbitrate based on the MDO's express terms and corroborative extrinsic evidence. *Id.* at *16. The Court further ruled that Plaintiff's FLSA and NJWHL overtime claims fell within the scope of the agreement. Accordingly, the Court granted Defendant's motion to compel arbitration.

***Rimel, et al. v. Uber Technologies, Inc.,* 2017 U.S. Dist. LEXIS 48527 (M.D. Fla. Mar. 31, 2017).** Plaintiff, a driver, brought an action alleging that Defendants misclassified drivers as independent contractors, and asserted various violations of Florida state and common law. To access the UberX platform to book passengers, a driver must enter into a "Raiser Software Sublicense & Online Services Agreement" (the "services agreement"). *Id.* The services agreement contained an arbitration provision and waiver of the right to bring collective or class actions. The services agreement also contained a provision permitting a signor to opt-out of

the arbitration provision within 30 days. Based on the services agreement, Defendants filed a motion to compel arbitration and dismiss the case requiring that Plaintiff litigate his individual claims in arbitration. The Magistrate Judge had previously concluded that Plaintiff had accepted the services agreement and failed to opt-out of the arbitration provision within 30 days. The Magistrate Judge further held that: (i) Florida law, not California law, applied to the arbitration provision; (ii) the arbitration provision and the delegation clause were not unconscionable; (iii) the terms of the delegation clause were clear and unmistakable; and (iv) the class action waiver in the arbitration provision should be enforced. As such, the Magistrate Judge recommended that the Court grant Defendants' motion to compel arbitration. The Magistrate Judge found that, under the rules of severability, Florida law applied to the arbitration provision because the arbitration provision was a separate and distinct contract, isolated from other terms in the services agreement, including the California choice-of-law clause. On Rule 72 review, the Court concluded that the Magistrate Judge correctly determined that Florida law applied to the arbitration provision. *Id.* at *9. The Court found that the arbitration provision was severable from the services agreement, and therefore concluded that the services agreement's California choice-of-law provision had no effect on the Court's determination of the conscionability of the arbitration provision. *Id.* at *10. Plaintiff argued that the delegation clause was not clear and unmistakable because it conflicted with the services agreement's forum-selection clause. The Court ruled that the delegation clause clearly and unmistakably delegated questions of arbitrability to the arbitrator. Plaintiff also asserted that the delegation clause was substantively unconscionable because it would subject him to hefty fees. The Court opined that Plaintiff offered no evidence to buttress his conclusory assertion that arbitration would subject him to hefty fees because the arbitration provision provided that "[e]ach party will pay the fees for his … own attorneys," but that "[Defendants] will pay the Arbitrator's and arbitration fees." *Id.* at *14-15. The Court determined that Plaintiff's argument that the delegation clause was substantively unconscionable lacked merit because Plaintiff may not have to bear any fees or expenses beyond what he would have had to pay to pursue this action in a judicial forum. Plaintiff also contended that the delegation clause was procedurally unconscionable because it was hidden in the services agreement. The Court stated that the opt-out clause was prominently displayed in bold typeface in the services agreement, and the mechanism for opting-out was straightforward and simple to accomplish. *Id.* at *16. Accordingly, the Court found that the services agreement was not adhesive or procedurally unconscionable as a matter of law. Plaintiff also argued that the arbitration provision was unconscionable because it ran afoul of the National Labor Relations Act ("NLRA") and Federal Arbitration Act by requiring drivers to resolve all disputes in arbitration "on an individual basis" only and not by way of "class, collective, or representative action." *Id.* at *16-17. As Plaintiff was not required to arbitrate his claims as a condition of employment, the Court held that Plaintiff had an absolute right to opt-out of the arbitration provision within 30 days from entering into the services agreement. Therefore, the Court noted that the Magistrate Judge correctly found that the arbitration provision was not substantively unconscionable based on the class action waiver. Finally, Plaintiff asserted that because the arbitration provision contained a waiver of claims under the Private Attorneys General Act ("PAGA") it was unenforceable on public policy grounds. The Court explained that under the delegation clause, the parties clearly and unmistakably agreed that an arbitrator must resolve all "disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision." *Id.* Accordingly, if California law applied, which it did not, all of Plaintiff's challenges to the terms of the arbitration provision, including the PAGA waivers, would have to be "adjudicated in the first instance by an arbitrator and not in [a judicial forum]." *Id.* at *18. The Court therefore adopted the Magistrate Judge's report and recommendation and granted Defendants' motion to compel arbitration.

***Riveria, et al. v. Saul Chevrolet, Inc.*, 2017 U.S. Dist. LEXIS 70960 (N.D. Cal. May 9, 2017).** Plaintiff, a service counter salesperson, filed a class and collective action alleging that Defendant failed to provide meal and rest breaks, and failed to provide minimum wages and overtime compensation in violation of the FLSA and the California Labor Code. Defendant filed a motion to compel arbitration based on an arbitration agreement that Plaintiff signed when he commenced his employment. Plaintiff argued that arbitration should not be compelled because: (i) it was not a valid contract, (ii) the agreement was unenforceable because it interfered with Plaintiff's right to engage in concerted protected activity under the National Labor Relations Act ("NLRA"); and (iii) the agreement was both procedurally and substantively unconscionable. *Id.* at *8-9. The Court found that the agreement was unenforceable because it interfered with Plaintiff's right to engage in concerted protected activity under the NLRA, and therefore the Court denied Defendant's motion. The Court noted that the Ninth Circuit had

previously held that a waiver of the right to bring concerted legal claims, *i.e.*, collective or class action claims, in any forum – such as in arbitration agreement – are unenforceable because they violate the right to engage in concerted activity under the NLRA. *Id.* at *10. The Court noted that the arbitration agreement at issue contained the following language: “an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding. Thus, the company has the right to defeat any attempt by me to file or join other employees in a class, collective or joint action lawsuit or arbitration.” *Id.* at *11. The Court held that the agreement thus contained an unenforceable concerted action waiver. The terms of the agreement made arbitration the exclusive forum for resolving disputes, and eliminated the right to proceed in arbitration as "a class or collective action or to award relief to a group of employees in one proceeding.” *Id.* at *12. Accordingly, the Court denied Defendant’s motion to compel arbitration.

***Scroggins, et al. v. Uber Technologies, Inc.,* 2017 U.S. Dist. LEXIS 10815 (S.D. Ind. Jan. 26, 2017).** Plaintiff, a driver, brought a putative class action alleging that Defendants, a gig economy company and its subsidiary, misclassified its drivers as independent contractors rather than employees resulting in the violation of wage payment laws. Prior to using Defendant’s software to generate leads for riders, potential drivers must enter into a Technology Services Agreement (the "Agreement"). To enter the Agreement, drivers had to sign into the Uber app and click the appropriate hyperlink. The Agreement is then presented on the screen and can be reviewed in its entirety by scrolling. There is no time limitation to review the Agreement. To advance past the "Agreement" screen, the driver must first click "YES, I AGREE" and then click "CONFIRM.” *Id.* at *4. After confirming his acceptance of the Agreement, Plaintiff could review it or print it at any time. The Agreement also contained an arbitration provision. Although the arbitration provision began on page 14 of the Agreement, potential drivers were advised of the provision and their ability to opt-out at the bottom of page one in a paragraph printed in bold caps. *Id.* The arbitration provision also stated that it was not a mandatory condition of a driver’s contractual relationship with Defendant and provided the option to opt-out within 30 days of signing. Plaintiff did not opt-out of the arbitration provision. Defendant moved to compel arbitration of Plaintiff’s claims. Plaintiff did not dispute that he accepted the Agreement and did not opt-out of the arbitration provision. Rather, Plaintiff argued that the class action waiver included in the arbitration provision violated the National Labor Relations Act ("NLRA") and the Norris-LaGuardia Act ("NLGA"), and therefore rendered the arbitration provision unenforceable. The Court opined that Plaintiff was able to opt-out of the Arbitration Provision – including the class action waiver – even after he began driving for Uber, and yet he failed to do so. *Id.* at *7. Plaintiff argued that the NLGA prohibits the enforcement of class action waivers. The Act prohibits two types of agreements, including: (i) one in which a person promises not to join a labor union; and (ii) one in which a person promises to withdraw from a labor union. *See* 29 U.S.C. § 103. The Court held that an agreement to arbitrate is not covered by the NLGA and therefore it cannot render the class action waiver, or the arbitration provision, unenforceable. *Id.* at *8. The Court therefore granted Defendant’s motion to compel arbitration and stayed the matter as to Plaintiff’s claims pending the resolution of the arbitration proceeding.

***Singh, et al. v. Uber Technologies*, 235 F. Supp. 3d 656 (D.N.J. 2017).** Plaintiffs, a group of Uber drivers, brought a class action against Defendant claiming that Defendant violated various labor laws. Defendant moved to dismiss the complaint and compel arbitration on the basis that Plaintiffs were bound by an arbitration agreement that the parties executed on-line. Plaintiffs argued that the arbitration agreement was invalid and unenforceable on several grounds. First, Plaintiffs argued that it was invalid because they never received a hard copy of the agreement. The Court rejected this argument outright as having “no basis in law” noting that in the “internet-era,” agreements are often maintained and delivered in electronic format. *Id.* at 664. In determining that the parties’ hyperlink agreement was valid, the Court found that Plaintiffs were provided reasonably conspicuous notice of the terms of the agreement and they unambiguously assented to these terms. The agreement was written in large, bold, capital text, and stated clearly that it was a voluntary arbitration agreement. The agreement also indicated that Plaintiffs should review the agreement with an attorney before agreeing to its terms and conditions and would suffer no adverse consequences if they chose not to agree. After Plaintiffs first “clicked” to accept the agreement on-line, they were prompted again to confirm that they accepted the agreement. Accordingly, the Court concluded that there was a valid agreement. Plaintiffs further argued that even if there was a valid arbitration agreement, it was unenforceable because the agreement was exempt from the Federal Arbitration Act ("FAA"). Plaintiffs argued that the Court lacked the authority to compel arbitration

because the FAA excludes contracts involving transportation employees from arbitration agreements. Plaintiffs contended that their jobs required them to transport passengers across state lines, and therefore the agreement was unenforceable. The Court rejected this argument, noting that Plaintiffs' argument assumed that Plaintiffs were employees and not independent contractors. However, regardless of Plaintiffs' employment status, the Court ruled that the FAA would govern the parties' arbitration agreement because the FAA's arbitration exclusion only applies to those employees who are engaged in the movement of goods, as opposed to people, in interstate commerce. Accordingly, the FAA exclusion did not apply to this agreement. The Court also rejected Plaintiffs' argument that the agreement violated the National Labor Relations Act ("NLRA"). The Court noted that the NLRA would only apply if Plaintiffs were deemed to be employees. Regardless, the Court did not need to determine that issue because the Court noted that the arbitration agreement was optional and stated clearly that Plaintiffs would suffer no adverse consequences for not agreeing to it. Accordingly, the Court held that agreement did not violate the NLRA. Finally, Plaintiffs argued that the agreement was unconscionable and unenforceable because of the parties' unequal bargaining power and the cost-sharing provision. The Court rejected both these arguments as being without merit as well. The Court ruled that because of the conspicuous notice and the 30 day opt-out period of the provision, the contract between the parties could not be construed as a contract of adhesion. Plaintiff also argued that the cost-sharing provision, which requires Plaintiffs to share half the cost of arbitrating all claims, rendered the agreement unconscionable because it prevented Plaintiffs from vindicating their statutory rights. The Court also found this argument to be meritless and conclusory as there was nothing to suggest the cost-sharing provision was cost-prohibitive for Plaintiffs. Accordingly, the Court dismissed the case and compelled arbitration.

***Smith, et al. v. RGIS LLC,* 2017 U.S. Dist. LEXIS 166608 (W.D. Pa. Oct. 6, 2017).** Plaintiff filed a class and collective action against Defendant alleging overtime violations pursuant to the FLSA and the Pennsylvania Minimum Wage Act ("PMWA"). *Id.* at *1. Defendant moved to compel arbitration pursuant to the parties' agreement, to strike Plaintiff's class and collective action allegations, and to stay the action pending resolution of the arbitration. *Id.* The Magistrate Judge recommended that Defendant's motions be granted. *Id.* at *42. Defendant argued that Plaintiff was bound by the mandatory arbitration agreement set forth in its dispute resolution program ("DRP"). *Id.* at *17. Plaintiff argued that the collective/class action waiver in the DRP was unlawful under the National Labor Relations Act ("NLRA") and the Norris-LaGuardia Act ("NLA") and, therefore, unenforceable. *Id.* at *19. Plaintiff argued that the class/collection action waiver violated the NLRA provision granting employees a substantive right to engage in "concerted activity," which included the right to bring a collective action under the FLSA. *Id.* at *21. Defendant responded that the class/collective action waiver was enforceable because Plaintiff could opt-out without consequences. *Id.* at *20. The Magistrate Judge agreed, noting that the evidence established that Defendant did not require Plaintiff to accept the collective/class action waiver as a condition of employment or coerce her to accept it in any way. *Id.* at *26. Plaintiff received an electronic and hard copy of the DRP booklet and a letter on the date of hire informing her that she could submit an opt-out form within 60 days of her hire date. *Id.* Plaintiff electronically signed an acknowledgement that she understood that she was bound by the DRP unless she opted-out and that the DRP required all employment related claims to be submitted to arbitration on an individual basis. *Id.* Plaintiff did not submit an exclusion form. *Id.* at *26. The Magistrate Judge, therefore, determined that Plaintiff was fully informed about the **c**onsequences of failing to submit the exclusion form and that she chose not to opt-out. *Id.* at *27. Further, the Magistrate Judge found no evidence in the record to suggest that Defendant threatened, either expressly or impliedly, to terminate or to retaliate against Plaintiff if she chose to opt-out of the DRP. *Id.* at *27. To the contrary, Defendant's manager of human resources stated that participation in the DRP was completely voluntary, that an employee's election to participate in or opt-out of the DRP had no negative effect on his or her employment, and that safeguards were in place to ensure the confidentiality of any exclusion forms. *Id.* The Magistrate Judge concluded that the weight of the relevant authority supported a finding that an arbitration agreement that requires individual arbitration of all employment-related disputes and includes an opt-out provision does not violate the NLRA or the NLA where there is no evidence that Defendant coerced Plaintiff's decision not to opt-out. *Id.* at *42. Because the opt-out provision was dispositive of the issues presented in the case, the Magistrate Judge did not address whether the phrase "concerted activity" in the NLRA could be interpreted to include FLSA collective actions or whether the right to engage in concerted activities is a substantive or procedural right. *Id.* at *33. The Magistrate Judge, therefore, recommended that the Court rule that the collective/class action waiver

was valid and enforceable, grant Defendant's motion to compel arbitration, and strike Plaintiff's class and collective action allegations. *Id.* at *43.

***Spano, et al. v. v. &J National Enterprises,* 2017 U.S. Dist. LEXIS 139922 (W.D.N.Y. Aug. 30, 2017).** Plaintiff brought a putative class action alleging violations of the FLSA and the New York Labor Law ("NYLL"). Plaintiff was an employee of v. & J Employment Services, Inc. ("V&J Employment"), a non-party to this action, where he worked as a pizza delivery driver for a restaurant that Defendants operated. Plaintiff executed an arbitration agreement containing a collective/class action waiver with v. & J Employment. *Id.* at *4. Defendants filed a counterclaim and sought to compel arbitration of Plaintiff's claims pursuant to the agreement. Plaintiff then filed a charge with the National Labor Relations Board ("NLRB") claiming that Defendants had interfered with Plaintiff's rights under § 7 of the National Labor Relations Act ("NLRA"), by including a class/collective action waiver in the agreement and attempting to enforce it. The NLRB began an investigation into the basis of the charge, but stayed the investigation pending a forthcoming decision by the U. S. Supreme Court on the validity of class/collective action waivers in arbitration agreements under the NLRA. Plaintiffs moved to dismiss Defendants' counterclaim for lack of subject-matter jurisdiction and stay the action pending an investigation by the NLRB. Defendants then moved to compel individual arbitration, stay this action, and strike all class/collective actions from the complaint. Specifically, Defendants contended that Plaintiff's FLSA, NYLL, and common law claims must be arbitrated or litigated through arbitration pursuant to the terms of the agreement and that Plaintiff's class allegations should be struck from the complaint due to the waiver in the agreement. Plaintiff then filed a class action arbitration demand and sought to initiate arbitration proceedings before the American Arbitration Association ("AAA"). Plaintiff named Defendants and V&J Employment as the arbitration respondents and the AAA sent correspondence to Defendants, indicating that the demand had been filed and requesting submission of the agreement. Subsequently, Defendants failed to respond to the AAA. The Court determined that Defendants were bound by the arbitration agreement as non-signatories and agreed with Plaintiff's contention that Defendants were estopped from avoiding the agreement because Defendant received a direct benefit from the agreement and had sought to enforce it. However, the Court denied Defendant's motion to compel arbitration on the basis that Defendants waived the right to arbitrate. Defendants sought to strike all class/collective actions from the complaint based upon the agreement's class/collective action waiver. The Court opined that the application of existing Second Circuit precedent indicated that the waiver was valid and enforceable, and that Defendants' motion to strike the class/collective allegations from the complaint should be granted. However, the Court deferred entering judgment upon the validity and enforceability of the class/collective action waiver and granted a stay *sua sponte* because the U. S. Supreme Court had granted *certiorari* on three consolidated cases to address whether class action waivers in arbitration agreements violated the NLRA. Accordingly, the Court denied Plaintiff's motion to stay pending the resolution of the NLRB's investigation. It opined that the Second Circuit had rejected the NLRB's position that class/collective action waivers were unenforceable, and thus, absent a new ruling by the U.S. Supreme Court, the Court would follow Second Circuit precedent and enforce the waiver. Accordingly, the Court stayed the action along with Defendants' motion to strike Plaintiff's collective and class claims pending the resolution of the Supreme Court's decision in the consolidated cases of *Ernst & Young, LLP v. Morris*, 137 S. Ct. 809 (2017), *Epic Systems Corp. v. Lewis*, 137 S. Ct. 809 (2017), and *NLRB v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (2017). *Id.* at *45.

***Sutherland, et al. v. AmeriFirst Financial, Inc.*, 2017 U.S. Dist. LEXIS 156835 (S.D. Cal. Sept. 25, 2017).** Plaintiff, an executive assistant, filed a lawsuit in California state court alleging various violations of the California Labor Code and seeking statutory penalties pursuant to the California Private Attorneys General Act ("PAGA"). Defendant removed the action on the basis of diversity jurisdiction and then filed a motion to transfer venue and compel arbitration. Defendant contended that Plaintiff signed an arbitration agreement at the commencement of her employment that required "all disputes, claims, questions, or differences" arising from Plaintiff's employment or separation to be resolved by binding arbitration. Defendant argued that all of Plaintiff's causes of action related to, derived from, and arose in connection with her employment relationship with Defendant, and therefore fell squarely within the scope of the arbitration agreement. Plaintiff argued that the arbitration agreement was unenforceable because it was unconscionable and lacked mutuality. The Court held that the arbitration agreement was valid, covered the dispute at issue, and should be enforced. *Id.* at *11. Defendant contended that the arbitration agreement was valid and enforceable because Plaintiff knowingly and voluntarily agreed to the terms and conditions contained in the employee handbook, which included the arbitration

agreement. Plaintiff asserted that the agreement she signed was invalid because: (i) the arbitration clause was adhesive by nature; and (ii) the placement of the arbitration clause within the larger employee handbook led to unfair surprise that rose to the level of unconscionability. *Id.* at *12. Drawing all reasonable inferences in the light most favorable to Plaintiff, the Court found Plaintiff's unconscionability arguments unavailing. The Court determined that Plaintiff signed and acknowledged her receipt, understanding of, and agreement to be bound by the employee handbook containing the arbitration agreement and the document entitled "Dispute Resolution Policy Acknowledgement." *Id.* at *15. Further, looking to the language of the subject documents, the Court found no term that shocked the conscience, contravened public policy, or otherwise impermissibly altered the fundamental duties imposed by law. Accordingly, the Court held that the arbitration agreement was valid*. Id.* at *16-17. The Court further opined that the allegations and factual details left little doubt that the matter was covered by the arbitration agreement. Indeed, Plaintiff brought claims alleging wage & hour violations arising from her employment. *Id.* at *17. The Court noted that, in the arbitration agreement, the parties agreed upon venue in Maricopa County, Arizona. Because § 4 of the Federal Arbitration Act did not permit the Court to compel arbitration outside of the Southern District of California, however, the Court concluded that the appropriate remedy would be to transfer this case to the U.S. District Court for the District of Arizona. *Id.* at *18. Accordingly, the Court granted Defendant's motion to transfer venue.

***Torgerson, et al. v. LLC, International, Inc.*, 277 F. Supp. 3d 1224 (D. Kan. 2017).** Plaintiff, a migration analyst, brought a putative collective action alleging that Defendant incorrectly classified all migration analysts as exempt and therefore failed to pay proper overtime compensation in violation of the FLSA. The Court had previously concluded that Plaintiff signed an employment agreement that required him to arbitrate any FLSA claims, and granted Defendant's request to stay the case and compel the parties to proceed to arbitration. The Court also previously declined to rule on Plaintiff's motion for conditional certification of a collective action without prejudice to his right to present the request to an arbitrator. *Id.* at 1221. Plaintiff subsequently filed a motion for reconsideration of the Court's previous order, asserting: (i) that a recent Tenth Circuit decision presented a change in the controlling law that rendered the parties' arbitration agreement unenforceable; and (ii) that even if the Court declined to reconsider its decision to compel arbitration, Plaintiff requested that the Court grant conditional certification of a collective action because the Court must decide the issue and not the arbitrator. *Id.* The Court denied Plaintiff's motion for reconsideration. Plaintiff had signed an employee agreement as a condition of his employment, which contained an arbitration agreement stating that: (i) employees would submit to arbitration any controversy or claim arising out of or relating to the agreement; (ii) that all arbitration costs would be paid by the losing party, unless the arbitrators decide such costs should be allocated between the parties in particular proportions; and (iii) that the prevailing party was entitled to reasonable attorneys' fees and costs. Plaintiff argued that the Tenth Circuit had recently held that the effective vindication exception could apply if the filing and administrative fees attached to arbitration were so high as to make access to the forum impracticable. *Id.* at 1228. Plaintiff asserted that the employment agreement's fee-shifting and cost-shifting provisions exposed him to a substantial risk that he would have to bear the costs and fees of arbitration if his claims failed. *Id.* The Court, however, found that even if the exception applied, Plaintiff provided no evidence regarding his inability to pay the costs and fees associated with arbitration. *Id.* at 1230. Without this information, the Court could not decide whether arbitration was prohibitively expensive. *Id.* Further, the Court opined that the employment agreement was clear that Plaintiff was able to recover attorneys' fees if he was the prevailing party, and that this provision was consistent with the fee-shifting provisions of the FLSA. *Id.* at 1232. The Court also disagreed that its previous order declining to rule on Plaintiff's motion for conditional certification of a collective action produced manifest injustice. Plaintiff contended that the putative Plaintiffs would lose their right to assert FLSA claims if they did not receive notice and an opportunity to join the lawsuit before the statute of limitations ran on their claims. The Court held that the putative Plaintiffs could stop the statute of limitations from running by filing individual claims, and that opting-in to this lawsuit was not the only mechanism for preserving those claims. *Id.* at 1234. The Court found that it was inefficient to grant conditional certification before the arbitrator decided that Plaintiffs could proceed on a collective basis, as granting conditional certification and facilitating the notice and setting an opt-in period would impose additional delays. The Court thereby denied Plaintiff's motion for reconsideration.

***Valenzuela, et al. v. Crest-Mex Corp*., 2017 U.S. Dist. LEXIS 122012 (N.D. Tex. Aug. 3, 2017).** Plaintiffs, a group of maintenance employees, brought a collective action alleging that Defendants failed to pay overtime

compensation in violation of the FLSA. Defendants filed a motion to compel arbitration, and the Court granted the motion. Defendant Townsend contended that he provided Plaintiffs with agreements that contained arbitration provisions, both in person and by mail. *Id.* at *3. Townsend asserted that he told Plaintiffs they would be bound by the agreements if they continued to work and receive pay, that Plaintiffs orally agreed to their terms, and that Plaintiffs continued to work and receive pay. Townsend further contended that he subsequently provided Plaintiffs with updated agreements, to which they again orally agreed, and that Plaintiffs continued to work and receive pay. *Id.* at *3-4. Plaintiffs stated that that they did not recall receiving the first agreement, and two Plaintiffs stated that they did not remember seeing the second agreement. *Id.* at *4. Plaintiffs contended that Townsend failed to prove notice of either agreement by mail because he failed to provide evidence of letters that were properly addressed, stamped, and mailed. Plaintiffs further asserted that they did not receive effective notice of either agreement because, although both agreements contained a written Spanish translation, both stated that the English version controlled, and Townsend did not orally translate the English version into Spanish or submit a certified translation. *Id.* at *6-7. The Court concluded that Plaintiffs had formed a valid agreement to arbitrate. Under Texas law, an at-will employee who receives notice of an employer's arbitration policy and continues working has accepted that policy as a matter of law. *Id.* at *7. The Court also considered whether Plaintiffs' claims were within the scope of the agreements. Defendants contended that Plaintiffs' claims were within the scope of both agreements because the first contained a delegation of arbitrability clause, which permitted the arbitrator to decide whether Plaintiffs' claims were within the scope of the agreement, and the second encompassed "all issues at any time including all state and federal laws regarding work, employment, pay, and overtime." *Id.* at *8. The Court determined that the dispute was within the scope of the agreements. The Court also held that the language of the agreements did not make them procedurally unconscionable because Plaintiffs were provided with Spanish translations, and Plaintiffs did not contend that the translations were inaccurate. *Id.* at *10-11. Finally, the Court concluded that Plaintiffs' claims against all of Defendants must be arbitrated because, by alleging that all Defendants were their employers during the same period of time, and that all Defendants violated the FLSA by withholding overtime pay, Plaintiffs advanced allegations of "substantially interdependent and concerted misconduct by both the non-signatories and one or more of the signatories" to the agreements. *Id.* at *12-13. Accordingly, the Court granted Defendant's motion to compel arbitration.

***Wulfe, et al. v. Valero Refining Co.*, 2017 U.S. App. LEXIS 6764 (9th Cir. April 19, 2017).** Plaintiff, a refinery operator, filed a suit alleging several employment-related claims under the California Private Attorneys General Act ("PAGA"). The District Court entered an order compelling arbitration. The arbitrator then entered a partial award, ordering Plaintiff to proceed with his PAGA claim on an individual basis. The District Court subsequently confirmed the partial arbitration award. *Id.* at *2. On appeal, the Ninth Circuit upheld the District Court's ruling. While this case was pending on appeal, the California Supreme Court and the Ninth Circuit issued opinions holding that pre-dispute agreements to waive the right to bring a representative PAGA claim are unenforceable notwithstanding the Federal Arbitration Act ("FAA"). *Id.* The Ninth Circuit explained that when this case was first before it, it affirmed the District Court's order compelling arbitration and also affirmed, in part, the order confirming the arbitration award, but remanded to the District Court to consider the intervening case law concerning the PAGA claim. *Id.* at *3. The Ninth Circuit directed the District Court to consider in the first instance Plaintiff's argument that, in light of those subsequent decisions, the arbitrator's award should be vacated because she "exceeded [her] powers," or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. *Id.* On remand, the District Court analyzed the issue and declined to vacate the award. The District Court concluded that intervening law could not provide a basis for vacatur. Section 10 of the FAA permits vacatur "where the arbitrators exceeded their powers." *Id.* at *3. Plaintiff argued that succeeding judicial decisions rendered the arbitrator's decision in excess of her powers. *Id.* at *3-4. The Ninth Circuit explained that the issue was not whether, with perfect hindsight, it could conclude that the arbitrator erred; instead, the issue was whether the arbitrator recognized the applicable law and then ignored it, and there was no contention that the arbitrator did so here. *Id.* at *4. The Ninth Circuit stated that at the time the arbitrator rendered the partial award, the law was unsettled as to whether Plaintiff's PAGA claim should be arbitrated on an individual basis. Further, Plaintiff did not argue or cite any authority to the arbitrator that the agreement requiring individual arbitration of his PAGA claim was unenforceable. *Id.* The Ninth Circuit determined that failing to correctly predict future judicial decisions did not mean the arbitrator acted in "manifest disregard" of existing law. *Id.* at *5. Accordingly, the Ninth Circuit affirmed the District Court's decision.

(vi) Awards Of Attorneys' Fees And Costs In FLSA Collective Actions

***Dobson, et al. v. Timeless Restaurants Inc.,* 2017 U.S. Dist. LEXIS 54912 (N.D. Tex. April 11, 2017).** Plaintiffs, a group of former employees, filed an action alleging that Defendant violated various provisions of the FLSA. At trial, after seven Plaintiffs were dismissed, a jury awarded the remaining Plaintiffs unpaid wages and the Court awarded an equal amount in liquidated damages for a total award of $87,753.96. *Id.* at *2. Plaintiffs had two sets of lawyers, the Tran Law Firm and the Glenn Law Firm. Plaintiffs filed a motion for attorneys' fees and costs, which the Court granted in part. The Tran Law Firm requested total fees and expenses of $398,326.90. *Id.* at *3. The fees were calculated at an hourly rate for partners of $350 to $400 per hour and $125 per hour for legal assistants and paralegals. The Glenn Law Firm requested 199.25 hours at $400 per hour for an amount of $79,700, plus $4,807.11 in litigation costs for a total of $84,507.11. *Id.* Plaintiffs voluntarily reduced their fees by 25% due to the seven Plaintiffs that were dismissed from the action. Accordingly, Plaintiffs sought $298,745.17 in fees on behalf of the Tran Law Firm and $63,380.33 for the Glenn Law Firm. Plaintiffs contended that the amounts requested on behalf of both law firms were reasonably and necessarily expended for the successful prosecution of their claims. *Id.* at *5. Defendant asserted the amount of attorneys' fees and costs requested was unreasonable and excessive. The Court noted that while this case had numerous Plaintiffs and several issues under the FLSA, it was not a particularly difficult case in terms of the issues presented, it was over-litigated, and became protracted because of the issue of attorneys' fees and the parties' unwillingness to take reasonable steps to resolve the fee issue. The Court found that Plaintiffs provided affidavits of other attorneys in the area that confirmed that the requested fees were within the normal and customary range based on the experience of Plaintiffs' counsel. *Id.* at *11. The Court therefore found the rates reasonable. However, the Court noted that the jury's award of $43,876.98 was only 38% of the amount in actual damages Plaintiffs sought at trial. *Id.* at *12. Had Plaintiffs prevailed on the amount of actual damages sought, they would have been awarded $116,308.37 by the jury, and the Court would have awarded an equal amount in liquidated damages for a total judgment of $232,616.74. *Id.* at *13. The Court stated that although there is no *per se* rule of proportionality between the amount of recovery and the amount of attorneys' fees awarded, it believed a further reduction was warranted. *Id.* at *14-15. Additionally, as Plaintiffs did not file a bill of costs as required under § 1920, the Court declined to permit recovery of any items that were defined as taxable costs. Therefore, the Court did not allow recovery of the $350 filing fee or the $555 sought by both the Tran Law Firm and the Glenn Law Firm for deposition expenses. *Id.* at *18. Accordingly, the Court granted in part and denied in part Plaintiffs' motion for attorneys' fees.

***In Re FedEx Ground Package System, Inc. Employment Practices Litigation*, 2017 U.S. Dist. LEXIS 91155 (N.D. Ind. June 12, 2017).** Plaintiffs brought a multi-district wage & hour class action litigation alleging numerous state and federal claims. Co-lead counsel for Plaintiffs and FedEx signed onto a settlement agreement purportedly resolving all claims in the New Jersey class action, but only one of the six class representatives signed the agreement. The Court granted settlement approval. Less than a week later, all seven class representatives objected to final approval of the settlement. At the fairness hearing, the Court ruled that none of the class representatives' arguments were sufficient to invalidate the settlement even before reaching the issue of fairness. *Id.* at *79. However, the Court noted that, at the hearing, the class representatives found an error in the notice to class members as to the average amount of recovery under the settlement agreement and as to whether the class representatives approved the settlement. The class representatives asked that new notice be issued showing the corrected average recovery amount and explaining that the class representatives did not approve of the settlement. *Id.* at *79-80. The parties stipulated to re-notice the class, the Court approved the new notice form, and the revised notice was sent to class members. Class representatives then requested attorneys' fees and costs for their work on the objection and at the fairness hearing. *Id.* at *80. Class counsel argued that the class representatives should not be credited for the re-notice. Class counsel stated that they stipulated to re-noticing the class without the Court's order and that they were not obligated to re-notice because the estimated recovery for each class member was correct in the original notice. *Id.* at *87. The Court ruled that whether the updated notice was required or only done out of "an abundance of caution," the new notice helped provide class members with information that could assist them in deciding whether or how to object. *Id.* at *88. However, the Court held that class representatives' argument that the settlement agreement was facially invalid because all class representatives opposed it had little basis in law and simply reiterated arguments that came out in assessing the settlement's fairness. *Id.* The Court concluded that when, as here, the objectors' benefits to the class are meager and their litigation tactics are misleading or needlessly accusatory, a fee award was not

appropriate. *Id.* at *93. The Court found that the new notice did not change the settlement agreement or class counsel's fee award. Accordingly, the Court denied the class representatives' request for fees.

***Makaneole, et al. v. SolarWorld Industries America, Inc.*, 2017 U.S. Dist. LEXIS 83954 (D. Ore. May 11, 2017).** 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"). Plaintiff alleged that during all three successive periods of employment, SolarWorld engaged in a practice of programming an electronic time-keeping system to deduct minutes from his hours worked prior to reporting them to payroll for purposes of computing his compensation, and that Kelly and Randstad – who were staffing agencies for SolarWorld – used the hours reported to them by SolarWorld following such deductions in calculating Plaintiff's compensation during the periods when he worked for those employers. *Id.* at *2-3. The Magistrate Judge previously recommended granting summary judgment in Randstad's favor as to Plaintiff's claim against it for failure to pay overtime wages owed, and also recommended that the Court grant summary judgment in Kelly's favor as to all of Plaintiff's claims against it. *Id.* at *4. Kelly subsequently filed a motion seeking an award of its costs as a prevailing party in the total amount of $2,375.40, pursuant to Rule 54(d). The Magistrate Judge recommended Kelly's request to tax Plaintiff with the expenses listed in its bill of costs should be denied. *Id.* at *5. Plaintiff argued that Kelly's request to tax him with its costs should be denied because he had limited financial resources as compared to Kelly, because awarding Kelly its costs might have a chilling effect on future class action wage & hour claim litigation, because the issues in the case were close and difficult, and because Plaintiff litigated in good faith. *Id.* at *6-7. The Court agreed with Plaintiff that to award Kelly its costs would have a significant and undesirable chilling effect on future class action wage & hour claim litigation. *Id.* at *8-9. The Magistrate Judge stated that if a potential representative of a putative class of wage claimants faced the prospect of being taxed with a Defendant's costs in the event of judgment in favor of Defendant, that prospect can be expected to have a chilling effect on the potential representative's interest in representing the putative class. *Id.* at *9. The Magistrate Judge therefore recommending denying Kelly's request in the interests of justice to avoid creating a disincentive to bring wage & hour litigation on a class action basis in the future.

***Morales, et al. v. MW Bronx,* 2017 U.S. Dist. LEXIS 165555 (S.D.N.Y. Oct. 5, 2017).** Plaintiffs, a group of former employees, filed a collective action alleging that Defendant failed to pay overtime and the minimum wage in violation of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs filed a motion for default judgment based on Defendant's failure to answer the complaint or otherwise appear in the case. The Court granted Plaintiffs' motion for default judgment. *Id.* at *3-4. Plaintiffs moved for approval of attorneys' fees and reimbursement of expenses in connection with the default judgment. The Court granted Plaintiffs' motion. Plaintiffs based their fee calculation on a proposed hourly rate of $275 of $350 for the services of three attorneys and $100 for the services of legal support staff members. *Id.* at *5-6. In support of the rates, Plaintiff submitted evidence of cases in the district in which judges had approved higher hourly rates and information about the legal experience of the attorneys. *Id.* at *6. Having reviewed the information submitted by Plaintiffs and the hourly rates approved by other judges, the Court found that Plaintiffs' proposed hourly rates were reasonable and fell squarely within the range for attorneys with comparable levels of experience. Plaintiffs further submitted that counsel performed 113.4 hours of work in connection with the case and supported the assertion with contemporaneous time records that included descriptions of the nature of the work performed during those hours. *Id.* at *7. The Court reviewed the time entries and determined that the work was "relevant and productive, and not duplicative." *Id.* at *8. Finding no basis for a reduction, the Court concluded that the number of hours expended on the case was both reasonable and properly included as a factor in the lodestar calculation. *Id.* The Court also reviewed the miscellaneous costs and litigation expenses that Plaintiffs submitted in connection with the legal services that counsel provided. The requested reimbursement figure reflected filing fees and service costs, which were both incidental and necessary to the adequate representation of Plaintiffs. The Court thus held that the request was reasonable and that Plaintiffs were entitled to reimbursement for litigation costs and expenses. *Id.* Accordingly, the Court granted Plaintiffs' motion for attorneys' fees and costs.

***Randolph, et al. v. Powercomm Construction,* 2017 U.S. App. LEXIS 21622 (4th Cir. Oct. 31, 2017).** Plaintiff filed a class and collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA and the Maryland Wage & Hour Law ("MWHL"). The District Court conditionally certified a collective action under the FLSA, and 64 additional employees or former employees joined the lawsuit. The District Court dismissed 10 opt-in Plaintiffs after concluding that the statute of limitations barred their claims, but granted the motion for certification of a collective action. *Id.* at *2. The District Court then approved the parties' settlement of this action for $100,000 and ultimately awarded $183,764 for attorneys' fees. Defendants appealed the ruling, arguing that the District Court abused its discretion by failing to reduce the award to deduct time spent by Plaintiff's counsel pursuing the claims of the 10 dismissed opt-ins. *Id.* at *3. The Fourth Circuit agreed with Defendants, and reversed and remanded for further proceedings. The District Court cited the general principle that an award need not be reduced for unsuccessful claims that share a common core of facts with successful claims. The Fourth Circuit found that it difficult to imagine how the time-barred claims of the dismissed opt-in Plaintiffs were intertwined with successful claims, other than the two categories of claims sharing the same Defendants and both relating to unpaid wages. *Id.* at *5. To the extent that the District Court relied on the overall outcome of the litigation to justify not reducing the award for the unsuccessful claims, the Fourth Circuit concluded that the District Court misapplied the fee analysis framework because the relief obtained was more appropriately considered after deducting the time spent by Plaintiff's counsel pursuing unrelated, unsuccessful claims. *Id.* at *5-6. The Fourth Circuit also addressed the District Court's step three analysis to offer additional guidance on remand. The Fourth Circuit explained that the Supreme Court has recognized that the "most critical factor" in determining a reasonable fee is the degree of success obtained by Plaintiff. *Id.* at *6. Here, the District Court declined to reduce the fee award based on the results obtained because Plaintiff purportedly received 38% of the claimed damages incurred during the statute of limitations period, and the District Court did not want to discourage Plaintiffs' attorneys from reaching reasonable settlements by reducing the fee award. Although it opined that the latter justification might be persuasive, the Fourth Circuit found that the District Court clearly erred in its characterization of the percentage of claimed damages received by Plaintiff. The Fourth Circuit held that the District Court overlooked the fact that Plaintiff pursued liquidated damages under both the MWHL and the FLSA, resulting in a total alleged damages of $789,916, so when the settlement amount was divided by this figure, Plaintiff only received about 13% of the damages sought. *Id.* at *8. Therefore, on remand, the Fourth Circuit directed the District Court to reconsider its finding at step three that the relief obtained represented 38% of the relief claimed by Plaintiff for claims that accrued within the statute of limitations. Accordingly, the Fourth Circuit vacated and remanded the District Court's ruling.

***Ridgeway, et al. v. Wal-Mart Stores, Inc.*, 2017 U.S. Dist. LEXIS 149440 (N.D. Cal. Sept. 14, 2017).** Plaintiffs, a group of truck drivers, filed a class action alleging that Defendant violated various provisions of the California Labor Law. Following a trial, the jury returned a verdict in favor of Plaintiffs on four of the 11 causes of action at issue, including performing pre-trip inspections, performing post-trip inspections, taking 10-minute rest breaks, and taking 10-hour lay-overs. *Id.* at 1. The jury awarded damages of over $55 million. Plaintiffs moved for an award of attorneys' fees of $20,266,670.50 to be paid from the common fund, off-set by an award of fees from Defendant in the same amount through statutory fee-shifting. Plaintiffs further requested $220,149.89 in statutory costs to be paid by Defendant and an additional $1,593,781.44 in expenses from the common fund. Defendant argued that Plaintiffs' fee request was unreasonable and, if fees are allowed, Plaintiffs should be awarded no more than a lodestar of $2,831,149.09. *Id.* at *4. Plaintiffs' counsel submitted declarations and time records showing that they spent over 10,000 hours on the case. Defendant did not argue that the requested hourly rates, standing alone, were unreasonable, but requested that the Court reduce the hourly rates based on what it termed as unreasonable billing practices. In light of the evidence submitted, the Court found that the hourly rates Plaintiffs sought were reasonable, that the time spent on discovery was not needless, that Plaintiffs' counsels' time records were not overly vague, and that their block billing was reasonable. However, the Court reduced travel time expenses by 30%, and subtracted duplicative billing entries and clerical time. Taking into account these deductions – and a 5% reduction Plaintiffs offered to take – bought Plaintiffs' lodestar to $6,491,662.12. *Id.* at *40. Plaintiffs contended that a multiplier of at least 2.717 was warranted because of: (i) class counsel's contingent risk; (ii) the "exceptional" results obtained; (iii) the novelty, difficulty, and complexity of the case, and class counsel's efficiency; (iv) class counsel's preclusion from other employment; and (v) public interest served by enforcing California's minimum wage laws. *Id.* at *41-42. Defendant argued that all the factors cited by Plaintiffs were already subsumed within the lodestar calculation, and therefore Plaintiffs should not be

entitled to a multiplier The Court found that these factors – in particular the contingent risk, the novelty, difficulty and complexity of the litigation, and the preclusion of other employment – supported a multiplier of 2.0. Accordingly, the Court granted in part Plaintiffs' motion for attorneys' fees and costs of $12,983,324.25.

***Stewart, et al. v. San Luis Ambulance, Inc.*, 2017 U.S. App. LEXIS 21186 (9th Cir. Oct. 25, 2017).** Plaintiff filed a class and collective action alleging that Defendant failed to pay all wages owed in violation of the FLSA and the California Labor Code. Defendant appealed the award of attorneys' fees to Plaintiff following the entry of judgment in Plaintiff's favor on her wage & hour claims. On appeal, the Ninth Circuit vacated and remanded the District Court's ruling. The Ninth Circuit found that the District Court erred in failing to properly determine the off-set required to account for the fees paid to the Baltodano and Boren firms for their work as interim class counsel. On remand, the Ninth Circuit directed the District Court that Plaintiff would have the burden of: (i) producing the actual amount of the settlement in a related matter – the *Javine* action – that was ultimately paid to the Baltodano and Boren firms for their legal work in that matter; and (ii) proving that the amount already paid was insufficient compensation for the work performed. *Id.* at *2. The Ninth Circuit further determined that the District Court erred when it included all attorneys' fees – including those for claims on which Plaintiff did not ultimately prevail – in its comparison analysis under Rule 68. On remand, the Ninth Circuit instructed the District Court to calculate a reasonable attorneys' fee that it would award Plaintiff for success on claims one and two as of the date of Defendant's first offer of judgment, and as of the date of its second offer of judgment. The Ninth Circuit stated that it must then add $750 in FLSA liability to those values and compare those totals to the $11,000 first offer of judgment and the $20,000 second offer of judgment. *Id.* If the District Court determined that Plaintiff did not obtain a more favorable judgment, it then must award Defendant post-offer costs. Accordingly, the Ninth Circuit reversed and remanded the District Court's ruling.

(vii) Communications With Class Members In FLSA Collective Actions

***Finder, et al. v. Leprino Foods,* 2017 U.S. Dist. LEXIS 8346 (E.D. Cal. Jan. 20, 2017).** Plaintiff, an hourly employee, filed a wage & hour class action alleging California Labor Code violations including failure to provide a second meal break or accurate itemized statements, waiting time violations, violation of the Unfair Business Practices Act, and violation of the Private Attorney General Act. *Id.* at *2. Defendant filed a motion to limit Plaintiff's class communications, which the Court denied. Defendant argued that the communications of Plaintiff's counsel's with putative class members in a Facebook group were inappropriate and intentionally misleading. Defendant contended that Plaintiff's counsel intended to harass employees and create a disruptive effect on Defendant's organization. *Id.* at *3. Specifically, Defendant alleged that sometime in October 2016, it received reports from several employees stating that their names, as well as the names of Defendant's supervisors and other putative class members, had been published in several posts in a semi-private Facebook group. *Id.* at *4. Defendant alleged that the Facebook page named the 27 individuals whose declarations were submitted by Defendant in support of its opposition to class certification, asking those in the group to notify Plaintiff's counsel "if you know anything about the following individuals who are testifying for Leprino." *Id.* Another post identified a single employee, indicated the department in which she worked, and quoted a portion of her declaration. On the Facebook page, Plaintiff's counsel made comments indicating that the employee's declaration was contrary to hundreds of other employee statements, and asked that Facebook group members contact him with reasons why that employee would provide conflicting information. *Id.* at *5. Defendant argued that the conduct of Plaintiff's counsel was likely to have a chilling effect on employees who were willing to speak on behalf of Defendant, thereby hampering Defendants' ability to defend against the case. *Id.* at *6. Plaintiff contended that the private Facebook group was created by a former employee to let other current and former employees know about the case and was an appropriate way to communicate with the putative class. The Court found that the Facebook group was lawfully created by an interested potential class member. *Id.* at *11. The Court determined that Plaintiff's counsel was only a party to the Facebook page because an employee invited him to join the private Facebook group and he consented to the request, and not because he created the page. *Id.* at *13. The Count stated that as neither Plaintiff's counsel nor his law firm created the Facebook group, it had little concern that members were being harassed or improperly influenced in their voluntary communications with Plaintiff's counsel. *Id.* The Court opined that several of the communications of Plaintiff's counsel were directed at uncovering information about potential witnesses for Defendant, which was not improper. *Id.* at *13-14. The Court found that Plaintiff and his counsel were entitled to speak freely about the lawsuit with any potential class member that contacted them. *Id.* at *14. While the Court acknowledged that the comments of Plaintiff's counsel

consisted of insinuations that cast Defendants and the supporting declarants in a negative light, those comments did not mislead employees about their rights as potential class members. *Id.* The Court further determined that the comments of Plaintiff's counsel did not create confusion or seek to influence whether class members opt-in or opt-out of the class. *Id.* at *15. Finally, based on the record, the Court did not find that the comments by Plaintiff's counsel would produce a chilling effect because: (i) the declarants' names and their supporting declarations were already publicly available on the Court's docket; (ii) Plaintiff's counsel already requested that members of the Facebook group refrain from "intimidating" Defendant's witnesses by contacting them; and (iii) the statements were not misleading or abusive. *Id.* at *18. Accordingly, the Court denied Defendant's motion requesting that the Court limit the class communications.

***Myers, et al. v. Marietta Memorial Hospital*, 2017 U.S. Dist. LEXIS 60430 (S.D. Ohio April 20, 2017).** Plaintiffs, a group of former nurses, brought a putative collective action and class action alleging that Defendants failed to pay them overtime compensation and minimum wages in violation of the FLSA and Ohio wage & hour laws. Plaintiffs alleged that Defendants "coerced, intimidated, and harassed" potential class members, creating an "atmosphere of fear" such that they were afraid to join the lawsuit. *Id.* at *3. Plaintiffs filed a motion for a preliminary injunction, and requested an order enjoining Defendants from engaging in further unilateral communications about this lawsuit with potential class members. *Id.* at *5. The Court stated that when considering a motion for preliminary injunction, it must balance four factors, including: (i) whether the movant has a strong likelihood of success on the merits; (ii) whether the movant would suffer irreparable injury without the injunction; (iii) whether issuance of the injunction would cause substantial harm to others; and (iv) whether the public interest would be served by the issuance of the injunction. *Id.* at *11-12. The Court held that, at this stage of the litigation, Plaintiffs had established a likelihood of success on the merits on their substantive claims and had established sufficient harm to limit Defendants' unilateral communications with putative class members. *Id.* at *13. The Court further determined that the evidence also established irreparable harm, because if potential class members were intimidated and afraid to join the lawsuit, they could not vindicate their rights under the FLSA and Ohio law. *Id.* at *14. Plaintiffs argue that the grant of a preliminary injunction would not substantially harm Defendants, as they did not have an "absolute right to unilaterally investigate the claims in this case," and any information to aid in the preparation of their defense could be gained through the formal discovery process. *Id.* at *16-17. Defendants argued that an injunction would substantially harm the hospital's ability to conduct business and to defend the lawsuit. The Court disagreed, and stated that Defendants were the county's largest employers, which made it more likely for employees to be aware of what was occurring or what other employees were facing and become intimidated. Hence, this made potential class members particularly vulnerable in light of their reliance on the business relationship with Defendants. *Id.* at *18-19. The Court also opined that given that the class discovery period was over, Defendants would not suffer harm from a continued injunction until the Court ruled on class certification. *Id.* at *19. The Court determined that Defendants could continue to investigate their claims through formal discovery after a decision on class certification. Finally, the Court found that protecting both FLSA rights and free speech was in the public interest. By granting an injunction, the Court could protect both parties by only narrowly infringing on Defendants' speech rights, while still ensuring that class members had the opportunity to opt-in to the lawsuit. *Id.* at *20. Accordingly, the Court granted Plaintiff's motion for a preliminary injunction.

(viii) Concurrent State Law Claims In Wage & Hour Class Actions

***Bell, et al. v. The Home Depot,* 2017 U.S. Dist. LEXIS 145120 (E.D. Cal. Sept. 7, 2017).** Plaintiffs, a group of employees, brought an action asserting that Defendant failed to pay overtime compensation in violation of the FLSA and the California Labor Code. Defendant filed a motion for summary judgment on Plaintiffs' derivative claims for penalties under §§ 203 and 226 of the California Labor Code. The Court had previously granted summary judgment to Defendant on several of Plaintiffs' claims. However, the Court denied the motion for summary judgment on Plaintiffs' claim that Defendant failed to pay all required overtime to employees who worked shifts over eight hours that spanned two workdays by working overnight. *Id.* at *2. The Court noted that although Defendant did not submit direct evidence of a *bona fide* business purpose for its initial workday designation, it has presented circumstantial evidence tending to show the company did not design the workday for the purpose of evading overtime wages. *Id.* at *4. Defendant submitted a declaration from Christina Barnaby, the Director of Human Resources, which stated that Defendant established its workday in the 1980s, that this designation has never changed, that this designation had always applied on a company-wide basis, that the first

California store opened in 1985, and that Defendant had never, prior to this litigation, analyzed the impact that its workday definition has on the overtime the company saved or paid. *Id.* at *7. The Court found the history of company-wide practice relevant because it demonstrated that Defendant defined the workday before it was subject to daily overtime laws in California and maintains the same workday in places that did not regulate daily overtime. *Id.* at *8. The Court noted that the fact that Defendant had not analyzed the impact of the workday definition on overtime savings or payments further indicated a lack of purposeful design. The Court determined that Plaintiffs had not shown that Defendant's defense was unsupported, unreasonable, or presented in bad faith. Plaintiffs objected to Barnaby's declaration on the grounds of hearsay and lack personal knowledge. The Court was not persuaded that these reasons should require it disregard consideration of her statements. *Id.* at *9. The Court stated that although the statements concerning the history of the company's workday definition were based, in part, on hearsay, they were also based on her personal knowledge of company policies and practices. In sum, the Court held that although a jury presented with the totality of the evidence might still find Defendant liable on the overtime claim, Defendant presented a good faith defense to such liability. Accordingly, the Court granted Defendant's motion for summary judgment as to Plaintiffs' §§ 203 and 226 claims.

***Bernstein, et al. v. Virgin America, Inc.,* 277 F. Supp. 3d 1049 (N.D. Cal. 2017).** Plaintiffs, a group of flight attendants, filed a class action against Defendant alleging that Defendant failed to pay for hours worked, before, after, and between flights, overtime and minimum wages, time spent in training, time spent taking mandatory drug tests and completing incident reports, and did not provide accurate wage statements under the California Labor Code and California Industrial Wage Order 9-2001. Plaintiff also filed derivative claims under the California Unfair Competition Law and the Private Attorney General Act ("PAGA"). Defendant filed a motion for summary judgment on three grounds and the Court denied the motion in part and granted it in part. First, Defendant asserted that Plaintiffs should be barred from making wage & hour claims under California law because it would violate the presumption against extraterritorial application and the dormant commerce clause. The Court denied summary judgment on this ground, and rejected Defendant's argument that an employee must work primarily in California to benefit from protections of California law. The Court also rejected Defendant's argument that Plaintiffs could not seek protection of California law for work performed outside the state of California. The Court held that the presumption against extraterritorial application did not apply because the alleged wrongful conduct occurred in California as Defendant's compensation policies at issue were determined in its headquarters in Burbank, California. The Court, however, noted that some conduct – such as failure to provide meal periods and rest breaks – did not originate in California, and as some of these alleged violations occurred outside California, Plaintiffs could not recover for those specific violations. However, the Court denied Defendant's motion for summary judgment on the meal and rest break claim because there was evidence that Plaintiffs were deprived of some of these meal periods and breaks in California. Defendant also asserted that if forced to comply with the California Labor Code, it also would have to comply with other states' wage & hour laws, thereby placing an undue burden on interstate commerce in violation of the dormant commerce clause. The Court rejected the premise that Defendant would be required to comply with each states' wage & hour laws, noting that Defendant was subject to California law due to Plaintiffs' ties to California and the compensation policies at issue came from Defendant's headquarters in California. Second, Defendant sought summary judgment on grounds that Plaintiffs' meal and rest break claims were preempted by the Federal Aviation Act ("FAA") and the Airline Deregulation Act. The Court rejected both preemption arguments. The Court opined that the FAA had only one regulation on meal and rest breaks, which was a prohibition of working periods longer than 14 hours and a requirement of a nine-hour rest period between flights. Defendant argued that there were potential conflicts between the FAA's regulations and California's meal and rest break requirements. Defendant asserted that California law requires employees to be relieved of all duties during a 30-minute meal break every five hours and this conflicted with the FAA regulations that do not permit Plaintiff to "forego their responsibilities in flight." *Id.* at 1064. Defendant also stated that the FAA permitted flight attendants to stay on-duty for up to 14 hours, whereas California law requires a 10-minute rest period for every four hours and a 30-minute meal period every five hours. The Court rejected the assertion that it was physically impossible to comply with both requirements, as Defendants could staff longer flights with additional flight attendants to allow for duty free breaks. The Defendant further argued that the Airline Deregulation Act preempted the California Labor Code. The Court rejected the Defendant's argument that providing breaks as required under California law would prevent the airline from being prepared for take-off and boarding on time because these laws were not significantly related to rates, routes, or services. Finally, Defendant moved for summary judgment on the basis

that its policies complied with California law requirements that employers in the transportation industry pay minimum wage "for all hours worked." The Court denied summary judgment on this issue because Defendant's compensation formula did not account for some duties like boarding and deplaning passengers and as Defendant was required to compensate employees for all their time worked "in some way" irrespective of how it calculates compensation. *Id.* at 1070. Furthermore, the Court denied summary judgment as to the wage statements violation issue because Defendant conceded that its wage statements did not provide an hourly rate of pay as required under California law. The Court rejected Defendant's argument that it complied in good faith, as that is not a defense to violating the requirement. The Court also denied the motion for summary judgment on the overtime issue and break claims because there was evidence that Plaintiffs worked more than eight hours some days. However, the Court granted Defendant's motion for summary judgment as to compensation for all hours worked doing non-flight activities, such as time spent undergoing mandatory drug testing and attending mandatory training because the compensation formula allotted pay for these activities. Additionally, the Court granted summary judgment as to Plaintiffs' claim for business expenses under the California Labor Code because Plaintiffs presented no evidence that they incurred any business expenses relating to their passports as alleged in the complaint. Because the Court did not dismiss all of Plaintiffs' underlying claims for unpaid wages, it also denied summary judgement on the remaining derivative claims and claims under the PAGA.

Berry, et al. v. Transdev, **2017 U.S. Dist. LEXIS 58398 (W.D. Wash. April 14, 2017).** Plaintiffs, a group of drivers, brought a collective action alleging that Defendants failed to provide rest breaks in violation of the Washington Minimum Wage Act ("MWA") and the Industrial Wage Act ("IWA"). Defendant First Transit moved to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Under separate contracts with King County Metro, Defendants Transdev and First Transit collaborated to provide paratransit services for disabled residents. *Id.* at *2. Transdev was responsible for hiring and deploying the drivers and First Transit developed schedules and routes. *Id.* at *2-3. Drivers were required to communicate with First Transit to stay apprised of scheduling and route changes. First Transit argued that the claims against it must be dismissed because it was not a joint employer with Transdev. The Court found that the regulatory and common law factors weighed in favor of finding that First Transit was a joint employer. *Id.* at *12. The Court noted that two of the five regulatory factors support a finding of joint employment because First Transit maintained substantial control over Plaintiffs and regularly supervised their work. Further, the Court opined that five of the eight common law factors also support a finding of joint employment, as Plaintiffs extensively used First Transit's communication equipment; Plaintiffs' work was not specialized; they lacked any opportunity for profit or loss; their relationship with First Transit existed on a permanent basis; and First Transit could not fulfill its contractual obligations unless Plaintiffs performed their integral role of transporting passengers. *Id.* at *13. Accordingly, the Court found that Plaintiffs had alleged sufficient facts supporting First Transit's status as a joint employer such that dismissal pursuant to Rule 12(b)(6) was not appropriate.

***Biasi, et al. v. Wal-Mart Stores,* 2017 U.S. Dist. LEXIS 40887 (N.D.N.Y Mar. 22, 2017).** Plaintiff, a retail employee, filed a class action against Defendant alleging violations of New York's Hospitality Industry Wage Order ("HIWO"). Specifically, Plaintiff claimed that, because he was required to wear a uniform vest at work, Defendant was required to compensate him with "uniform maintenance pay." *Id.* at *2. Plaintiff sought damages for unpaid minimum wages for uniform maintenance. *Id.* Defendant moved for partial summary judgment and to strike portions of Plaintiff's declarations that were submitted in opposition to Defendant's motion for summary judgment. *Id.* at *1. Plaintiff also sought leave to file a third amended complaint. *Id.* As to summary judgment, Defendant asserted that under the HIWO, Plaintiff must establish that he worked in the deli department at the Wal-Mart store and that it was a "restaurant," as defined in the HIWO. *Id.* at *12, *15. The Court granted Defendant's motion, ruling that Plaintiff failed to create genuine issues of material fact as to whether the deli department met the definition of a restaurant and whether Plaintiff even worked in the deli and was an employee for purposes of the HIWO. *Id.* at *35-36. The Court rejected Plaintiff's contention that he needed additional discovery to address these factual arguments. The Court noted that Plaintiff's response did not even mention Rule 56(d) and failed to include an affidavit pursuant to Rule 56(d). *Id.* at *46. The Court also denied Defendant's motion to strike on the grounds that it was unnecessary to strike facts because the Court had considered and identified the undisputed material facts for purposes of Defendant's motion for summary judgment. *Id.* at *35. Further, the Court denied Plaintiff's motion for leave to amend his complaint because the HIWO did not apply to the deli department and any amendment would be futile. *Id.* at *48. Accordingly, the Court

granted Defendant's motion for partial summary judgment, denied Defendant's motion to strike, and denied Plaintiff's motion to amend his complaint.

***Calabrese, et al. v. TGI Friday's, Inc.,* 2017 U.S. Dist. LEXIS 181598 (E.D. Pa. Nov. 2, 2017).** Plaintiff, a restaurant server, filed a putative collective and class action under the Fair Labor Standards Act ("FLSA"), the Pennsylvania Minimum Wage Act ("PMWA"), and the New Hampshire Minimum Wage Law ("NHMWL"). Plaintiff claimed that: (i) he was not given proper notice of tip credit provisions, as required under the FLSA and the states' laws; and (ii) Defendant violated New Hampshire law by requiring him to participate in a tip pool. *Id.* at *6. Plaintiff filed a motion for class certification of his claims. Defendant moved for summary judgment as to all claims, and the Court granted Defendant's motion in its entirety. Defendant asserted that it was entitled to judgment as a matter of law because the evidence established that Defendant: (i) provided Plaintiff with proper notice of the tip credit provisions; and (ii) did not require Plaintiff to share his tips with other employees in New Hampshire. The Court ruled that Defendant fulfilled its tip credit notice obligations in their entirety at both the New Hampshire and Pennsylvania locations. *Id.* at *12. In its ruling, the Court pointed to the record that established that it was Defendant's policy to inform all newly-hired tipped employees both verbally and in writing that Defendant would be taking a tip credit. *Id.* Defendant gave each new employee an employee handbook that explained the tip credit. New hires were required to review the handbook, sign an acknowledgment of receipt and understanding, and to submit to testing on the contents of the handbook. *Id.* at *14. Furthermore, each restaurant had labor law posters that explained the relevant state and federal laws relating to minimum wage and tip credits that were posted in areas that employees frequented. *Id.* Further, the evidence established that Plaintiff was notified of the tip credit at orientation and training and Defendant produced a signed copy of Plaintiff's tip credit notification form, training records, and tests. *Id.* Plaintiff responded that he did not recall hearing the term "tip credit" and had no recollection of being told that Defendant would be taking a tip credit. *Id.* at *14. Plaintiff admitted that might have been told about the wage component of his pay before he began his employment and he did recall being told that there would be an hourly rate that would be less than the minimum wage. Further, when questioned about whether certain questions from the employee handbook concerning the payment of wages and tips were covered during his training, Plaintiff responded that they were all covered. *Id.* at *16. The Court concluded that based upon this evidence, Defendant notified Plaintiff that New Hampshire and Pennsylvania were tip credit states and the restaurants would be taking a tip credit against the minimum wage. Accordingly, the Court ruled that summary judgment in favor of Defendant was proper as to all of Plaintiff's tip notice claims. *Id.* at *17. With respect to Plaintiff's claim that Defendant unlawfully compelled him to participate in a mandatory tip pool in New Hampshire, the Court ruled that Defendant was entitled to summary judgment on this claim as well. *Id.* at *18. The Court took special notice of the declaration of the general manager that she personally informed all tipped employees, which would have included Plaintiff, that they were not required to share tips with anyone and were entitled to keep all the tips that they received. *Id.* at *20. The Court pointed to Plaintiff's deposition testimony that he was told that he could keep any tips that he received. *Id.* While Plaintiff testified that he was strongly encouraged to "tip out" bartenders, he further testified that it was entirely his decision whether to share tips and how much, if anything, to give to bartenders. *Id.* at *21. The Court concluded that there was no evidence that Defendant required or coerced tip pool participation and at best, Plaintiff may have experienced peer pressure from bartenders to "tip out." *Id.* Accordingly, the Court granted Defendant's motion for summary judgment in its entirety. At the same time, the Court issued a minute order stating that Plaintiff's motion for class certification pursuant to Rule 23 was denied as moot.

***Chen, et al. v. MG Wholesale Distributors*, 2017 U.S. Dist. LEXIS 188533 (E.D.N.Y. Nov. 13, 2017).** Plaintiff, a truck loader and driver, brought a collective action alleging that Defendant failed to pay the minimum wage in violation of the FLSA and the New York Labor Law ("NYLL"). Defendant filed a motion for partial summary judgment, which the Court granted. Plaintiff was paid bi-weekly in cash, with a weekly salary between $588.46 and $600. Plaintiff alleged that he worked 78 to 84 hours per week in his complaint, between 72 and 96 hours each week in the opposition to summary judgment, and "for about twelve hours a day" during his deposition. *Id.* at *3-4. Plaintiff further contended that "his hours were so high that his average hourly rate fell below [FLSA's] statutory minimum." *Id.* at *4. Defendant asserted that Plaintiff was promised a minimum weekly salary of $588.46 and that his weekly compensation was the greater of $588.46 or the sum of: (i) an hourly rate for the first 40 hours worked; (ii) overtime in the amount of one and a half times his hourly rate; and (iii) a "bonus hour" at his hourly rate for each day that he worked more than 10 hours in a day. The Court found that using Plaintiff's

own testimony about the number of hours he worked – *i.e.*, that he worked 12 hours per day for a total of 72 hours per week or that he worked three early days and three late days for a maximum of 77 hours per week – no jury could find that Plaintiff worked more than 81.17 hours in a given week, which is the minimum number of hours that Plaintiff would had to have worked to be paid less than minimum wage. *Id.* at *12. Furthermore, the Court determined that Plaintiff admitted that he had no extrinsic evidence of the number of hours he worked from which the Court could find a genuine dispute of material fact. Accordingly, the Court granted Defendants' motion for summary judgment on Plaintiff's FLSA claims. As a result, the Court declined to exercise supplemental jurisdiction over Plaintiff's state law claims, which it dismissed without prejudice.

***Frlekin, et al. v. Apple, Inc.*, 870 F.3d 867 (9th Cir. 2017).** Plaintiffs brought a wage & hour class action on behalf of current and former non-exempt employees seeking compensation for time spent waiting for and undergoing exit searches pursuant to Defendant's "employee package and bag searches" policy (the "policy"). *Id.* at *870. Defendant's policy required any employee with a bag to have the bag searched by a manager prior to leaving the store. Employees received no compensation for the time spent waiting for and undergoing exit searches, and they were required to clock-out before undergoing a search. Further, employees who failed to comply with the policy were subject to disciplinary action, up to and including termination. *Id.* The California Industrial Welfare Commission Wage Order No. 7 provides: "Every employer shall pay to each employee . . . not less than the applicable minimum wage for all hours worked in the payroll period . . . ." and "'hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." *Id.* at *871. The District Court granted Defendant's motion for summary judgment and ruled that time spent by class members waiting for and undergoing exit searches pursuant to the policy was not compensable as "hours worked" under California law because such time was neither "subject to the control" of the employer nor time during which class members were "suffered or permitted to work." *Id.* Plaintiffs appealed. Defendant conceded on appeal that employees who brought a bag or package to work and therefore must follow the search procedures were clearly under the "control" of the employer while awaiting, and during, the search. *Id.* at *871. Defendant nevertheless contended that "control" during the search was insufficient to constitute "hours worked." *Id.* According to Defendant, the search also must be "required." *Id.* Because the employees could avoid a search by declining to bring a bag or package to work, the search was not "required." *Id.* The Ninth Circuit opined that case at issue involved only those employees who voluntarily brought bags to work purely for personal convenience and it was certainly feasible for a person to avoid the search by leaving bags at home. *Id.* at *872. As a practical matter, many persons routinely carry bags, purses, and satchels to work, for all sorts of reasons, and although not "required," employees may feel that they have little true choice when it came to the search policy. *Id.* The Ninth Circuit stated that it had little guidance on determining where to draw the line between purely voluntary actions and strictly mandatory actions for purposes of ruling on Plaintiffs' claims. The Ninth Circuit therefore requested that the Supreme Court of California exercise its discretion to decide the certified question of California law dispositive of the appeal, since no clear controlling California precedent existed. *Id.* The Ninth Circuit accordingly certified the following question of state law to the Supreme Court of California: Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7?

***Gould, et al. v. First Student Management LLC,* 2017 U.S. Dist. LEXIS 138666 (D.N.H. Aug. 28, 2017).** Plaintiffs, a group of bus drivers and driver assistants, brought an action alleging that Defendants' wage payment practices violated state and federal laws. Defendant filed a motion to dismiss for failure to state a claim. *Id.* at *2. Plaintiffs asserted that Defendant subjected them to three illegal payment practices, including: (i) they were not compensated for preliminary and "postliminary" activities that they must perform before and after driving; (ii) failing to pay for time spent on trips that exceed pre-set limits; and (iii) miscounting the hours they worked on charter routes. *Id.* at *3-4. Plaintiffs sought damages for straight time and overtime that Defendant failed to pay them in violation of both New Hampshire's wage & hour laws and the FLSA. As to Plaintiffs' straight time claims, Defendant argued that drivers did not sufficiently allege that they had a contract with Defendant that obligated the company to pay the omitted wages. *Id.* at *7. However, the Court stated that Plaintiffs alleged that they bargained with Defendant to receive certain rates "for all time in service," and they adequately alleged that through a variety of mechanisms Defendant failed to pay them wages due under that arrangement. *Id.* The

Court thereby found that Plaintiffs submitted sufficient evidence to survive a motion to dismiss of the state law straight-time claims. Plaintiffs also brought a claim for straight-time wages under the FLSA, seeking compensation at a regular rate of pay for hours worked under 40 in a week. The Court agreed with Defendant that this claim was not cognizable under the FLSA. The claim asserted by Plaintiffs sought to recover a regular rate of pay for uncompensated hours worked under 40, however the scope was limited to only weeks during which they also worked overtime. *Id.* Plaintiffs thus distinguished the "overtime gap time" claim from a "pure gap time" claim seeking unpaid straight-time during weeks in which they did not also work overtime. *Id.* at *8. The Court concluded that Plaintiffs' overtime gap time claim was not cognizable under the FLSA. *Id.* at *8-9. The Court opined that the plain language of the overtime provision provides an employee a cause of action only for "compensation for his employment in excess of [forty] hours." *Id.* at *9. Plaintiffs also brought a traditional claim for overtime pay under the FLSA. The Court dismissed the claim, finding that Plaintiffs failed to sufficiently plead that they worked more than 40 hours in any week. *Id.* at *13. The Court held that to state an overtime violation, Plaintiffs must allege that they "on a regular basis worked in excess of forty hours, when all time is properly counted, and were not paid time and a half for hours worked over forty hours in the given week." *Id.* at *16. The Court concluded that Plaintiffs did not provide sufficient factual allegations to plausibly infer an overtime violation. *Id.* at *17. Plaintiffs also brought a claim for overtime under New Hampshire law. The Court noted that the claim was structured in three ways, and each warranted dismissal. Accordingly, the Court granted in part Defendant's motion to dismiss.

***Guerrero, et al. v. Haliburton Energy Services*, 231 F. Supp. 3d 797 (E.D. Cal. 2017).** Plaintiff, a truck driver, filed a putative class action against Defendant for failure to pay overtime and failure to provide meal and rest breaks, as well as other violations of the California Labor Code ("CLC"). Plaintiff sought damages and injunctive relief. Defendant moved to dismiss several of Plaintiff's claims pursuant to Rule 12(b)(6). Defendant moved to dismiss Plaintiff's claim of failure to pay overtime claim on the basis that Plaintiff's hours were regulated by the U.S. Department of Transportation ("DOT"), and therefore exempt from California's overtime laws. Plaintiff argued that the overtime claim was proper because the assertion of an exemption from California overtime laws is an affirmative defense and Defendant had the burden of demonstrating that the exemption applied to Plaintiff. The Court denied Defendant's motion, finding that Plaintiff's assertion that he was not covered by the DOT exemption was sufficient to survive Defendant's motion to dismiss. Defendant also moved to dismiss Plaintiff's claim that Defendant failed to provide the meal and rest periods required by California law. In addition to alleging that Defendant failed to provide the required meal and rest periods, Plaintiff alleged in the alternative that Defendants' business model was such that employees were routinely forced to work through their rest periods for fear of losing their jobs. Defendant moved to dismiss Plaintiff's meal and rest period claims on the basis that these claims lacked the necessary factual support, specifically noting that Plaintiff's subjective perceptions were insufficient to make plausible the allegations that Defendant prevented Plaintiff from taking meal and rest breaks. The Court agreed that Plaintiff's allegations were too vague and conclusory, and dismissed these claims with leave to amend. Plaintiff also asserted that Defendant's failure to pay all straight time and overtime wages earned, failure to provide complaint meal and rest breaks, failure to itemize and keep accurate records, and failure to pay all wages due at the time of termination were unlawful under the California Unfair Competition Law ("UCL"). The Court granted Defendant's motion and found that wages do not constitute restitution that is recoverable under UCL. Finally, Defendant moved to strike Plaintiff's request for attorneys' fees on the basis that there was no statute or agreement between the parties that authorized an award of attorneys' fees to a party that prevails on a claim under the CLC. The Court declined to grant the motion to strike, noting that under California Civil Rules of Procedure ("CRCP"), attorneys' fees could be appropriate in this case, but Plaintiff's motion did not mention the CRCP. Accordingly, the Court dismissed Plaintiff's request for attorneys' fees with leave to amend.

***Hill, et al. v. Employee Restaurant Group, LLC,* 2017 U.S. Dist. LEXIS 100841 (S.D. W. Va. June 29, 2017).** Plaintiffs, a group of servers, alleged that Defendants took an unlawful tip credit in violation of the FLSA, failed to inform servers of tip credit provisions of the FLSA, and failed to pay minimum wage. Plaintiff further alleged that Defendant failed to pay their former employees all wages owed within the time periods required by the West Virginia Wage Payment and Collection Act ("WVWPCA") following the severance of the employment relationship. *Id.* at *2. Plaintiff resigned on December 27, 2014 and her next scheduled payday was December 30, 2014. However, Defendant did not pay Plaintiff her final wages until January 13, 2015. *Id.* at *3. Defendant

moved to dismiss Plaintiff's WVWPCA claims and argued that the Plaintiff complained about the amount she was paid and not about the timing or manner in which she was paid. *Id.* at *4. Plaintiff asserted that her factual allegations regarding the timing of her final paycheck supported her WVWPCA claims. *Id.* The Court found that Plaintiff properly asserted a WVWPCA claim. The Court noted that the version of the WVWPCA in effect at the time of the Plaintiff's resignation provided that "[w]henever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages in full no later than the next regular payday." *Id.* at *5. Plaintiff alleged that Defendant did not pay her final wages until approximately two weeks after the regular payday following her resignation. *Id.* Thus, the Court concluded that Plaintiff stated a valid WVWPCA claim, and thereby denied Defendants' motion to dismiss.

***Lawtone-Bowles, et al. v. City Of New York*, 2017 U.S. Dist. LEXIS 155140 (S.D.N.Y. Sept. 22, 2017).** Plaintiffs, six Motor Vehicle Operators ("MVOs") employed by the New York City Department of Homeless Services ("DHS"), brought an collective action on behalf of themselves and all others similarly-situated alleging that Defendant failed to comply with various provisions of the FLSA. Specifically, Plaintiffs alleged that Defendant failed to properly compensate them for overtime, incorrectly calculated their overtime rate of pay, and failed to pay overtime compensation in a timely manner. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim. Defendant argued that Plaintiffs fail to plausibly plead an overtime claim with respect to named Plaintiffs Lawtone-Bowles, Alli, Smith, and Brown. Plaintiffs alleged that they were scheduled for five shifts of 8 hours and 30 minutes each week, for which 30 minutes was uncompensated meal time. *Id.* at *6. Plaintiffs asserted that they "frequently" worked through their unpaid meal periods and "frequently" worked additional time before the official start and end of their scheduled shifts. *Id.* at *7. Plaintiffs alleged they began working 10 to 30 minutes before their shifts to perform pre-shift activities and performed uncompensated post-shift work activities approximately two to four times per week. *Id.* Plaintiffs also asserted specific examples of pre-shit and post-shift work. Defendant argued that Plaintiffs' allegations were insufficient to state a claim. The Court disagreed, finding that Plaintiffs provided details about the length, frequency, and nature of their pre-shift, post-shift, and lunch-time activities, on top of allegations that Plaintiffs were scheduled to work 40 hours per week. Accordingly, the Court denied Defendant's motion to dismiss as to Lawtone-Bowles, Alli, Smith, and Brown's overtime claims. As to Plaintiffs Predmore and Tobin, the Court noted that, although they failed to cite a specific week when overtime violations occurred, this omission was not fatal because their baseline workweek was already 40 hours. *Id.* at *15. The Court, therefore, concluded that all Plaintiffs adequately stated claims for uncompensated overtime. Defendant also asserted that Plaintiffs failed plausibly to plead their claim that Defendant miscalculated overtime pay by failing to include the night shift differential. *Id.* at *16. The applicable collective bargaining agreement specified that Plaintiffs should receive a 10% shift differential for all scheduled hours worked between 6:00 p.m. and 8:00 a.m. with more than one hour of work during those hours. Defendant argued that Plaintiffs failed to plead that their regular rate included hours between 6:00 p.m. and 8:00 a.m. and that they had not alleged that they worked at least a full hour between 6:00 p.m. and 8:00 a.m. so as to qualify for the night shift differential. *Id.* at *17. The Court found Defendant's concerns valid as to certain Plaintiffs. The Court found no factual allegations specific to Plaintiffs Alli and Predmore that established that they worked hours entitling them to night shift differential pay. *Id.* at *18. Accordingly, the Court dismissed any claims brought on these grounds with respect to Plaintiffs Alli and Predmore. *Id.* at *18-19. Finally, Plaintiffs alleged that, when they were paid for overtime compensation in cash, Defendant delayed the payment of overtime compensation beyond the next pay period for which Plaintiffs were paid for regular work hours. Defendant pointed to a difference between two groups of Plaintiffs in how their claims were pled. The Court ruled that, whereas Plaintiffs pointed to specific weeks of overtime for Brown and Lawtone-Bowles that were not timely paid, in the absence of similarly specific allegations for the other four named Plaintiffs, their claims were only conclusory. *Id.* at *20. The Court, therefore, granted the motion to dismiss regarding claims for timely overtime payment for Plaintiffs Alli, Smith, Predmore, and Tobin.

***Leone, et al. v. H & B Land, Inc.,* 2017 U.S. Dist. LEXIS 121348 (E.D. Mich. Aug. 2, 2017).** Plaintiffs, a group of tow truck drivers, filed a collective action alleging overtime violations under the FLSA. Defendant filed a counterclaim against an individual Plaintiff, alleging that he threatened to report Defendant to the IRS and insurance investigators if Defendant did not settle. *Id.* at *8. Defendant moved for summary judgment on Plaintiffs' overtime claim and its counterclaim, and the Court denied both motions. *Id.* at *32. Plaintiffs testified that during their shifts they were required to remain at Defendants' facility between towing calls. *Id.* at *4. Former

and current employees of Defendants offered evidence that Plaintiffs were not required to spend their shifts on Defendants' premises and that they often left and used time for personal purposes. *Id.* at *6. Defendants asserted that they did not owe Plaintiffs compensation for time spent waiting for towing calls. *Id.* at *10. The Court ruled that genuine issues of material fact existed as to whether their waiting time was compensable. The Court noted the critical inquiry for determining whether the time was compensable was whether the time spent waiting was primarily for the benefit of the employer or employee. *Id.* at *11. The Court considered the various factors, including: (i) whether the agreement and understanding between the employer and employee indicated that waiting time will be compensated; (ii) whether the employer requested or required that the employee wait; (iii) the extent to which an employee's free will was constrained during waiting time; and (iv) the extent to which the employer benefited from the waiting time. *Id.* at *11. The Court denied Defendant's motion for summary judgment because in looking at the evidence in the light most favorable to Plaintiffs, all factors weighed in favor of Plaintiffs. *Id.* at *24. Defendants also argued that their claim of extortion should be construed as an abuse of process counterclaim in the form of extortion. *Id.* at *25. However, because Defendants' motion for summary judgment addressed the abuse of process counterclaim, rather than the pleaded extortion counterclaim, the Court denied the motion for summary judgment on the extortion counterclaim as well. *Id.* at *32.

***Livi, et al. v. Hyatt Hotels Corp.,* 2017 U.S. Dist. LEXIS 183053 (E.D. Pa. Nov. 6, 2017).** Plaintiff filed a putative class action alleging violations of the Pennsylvania's Minimum Wage Act ("PMWA") and Wage Payment & Collection Act ("WPCL"), as well as a claim for unjust enrichment. Defendant moved for summary judgment and the Court granted the motion in its entirety. *Id.* at *2. Plaintiff was a banquet server and was responsible for serving food and beverages to guests at hotel banquets, meetings, and events. *Id.* at *3. Customers and Defendant executed written contracts for banquet events that contained a service charge provision. *Id.* at *4. Defendant retained a portion of the service charge and remitted 15% of the cost of food and beverages for each banquet event to banquet servers. *Id.* at *5. Plaintiff did not receive tips and sometimes worked over 40 hours in a week for which she was not paid 1.5 times her regular hourly wage. *Id.* at *6. Plaintiff earned $57,000 in total compensation, and the distributions from the service charges constituted $37,500 of the total compensation. *Id.* As to Plaintiff's unpaid overtime claim, Defendant claimed that Plaintiff was exempt from overtime under the Pennsylvania Code exemption because more than half of her compensation consisted of commissions on goods and services. *Id.* at *18. Because the PMWA was silent on the definition of commissions, the Court looked to the FLSA and determined that service charges are commissions under federal law. *Id.* at *26. As such, Defendant met its burden of proving that the more than half of Plaintiff's payments received was a commission, Defendant was exempt from the PMWA's overtime requirements. The Court, therefore, granted Defendant's motion for summary judgment motion as to Plaintiff's overtime claim. *Id.* at *30. Plaintiff also claimed that Defendant violated § 333.103(d)(2) of the PMWA by retaining a portion of the service charges imposed in banquet contracts. The Court granted summary judgment in favor of Defendant because Plaintiff's wages were more than 1.5 times the minimum wage. Therefore, it was clear that Defendant did not take a "tip credit" to off-set the wage it was required to pay Plaintiff. *Id.* at *34. As to Plaintiffs WPCL claim, Plaintiff alleged that Defendant violated the statute because Defendant failed to pay Plaintiff wages that it contractually owed her. Plaintiff claimed that she was a third-party beneficiary to the banquet event contracts, and therefore Defendants were subject to a binding legal duty to provide the compensation. *Id.* at *35. The Court ruled that because it was clear that there was no express intent to benefit the banquet servers in the banquet contracts themselves, Plaintiff was not contractually entitled to compensation from wages. Accordingly, the Court granted summary judgment as to the WPCL claim. Finally, Plaintiff claimed that Defendant was unjustly enriched by the work and efforts of Plaintiff. *Id.* at *37. The Court granted summary judgment as to this claim as well, opining that because Plaintiff's claims for unpaid overtime and unpaid service charge distributions failed, the unjust enrichment claim failed as well. Accordingly, the Court granted Defendant's motion for summary judgment in its entirety.

***McCray, et al. v. Marriott Hotel Services,* 2017 U.S. Dist. LEXIS 41831 (N.D. Cal. Mar. 22, 2017).** Plaintiff brought a class action alleging that Defendant failed to pay the San Jose minimum wage in compliance with a municipal wage ordinance. A collective bargaining agreement ("CBA") governed Plaintiff's employment, which provided for a waiver of the San Jose minimum wage ordinance. *Id.* at *1. In addition, the San Jose ordinance provided a waiver for CBAs. *Id.* The Court stated that in order to determine if Defendant's hourly rate was lawful, it must first assess which law to apply to the dispute. *Id.* at *1-2. Defendant argued that CBAs were governed by federal law, so federal preemption applied, and the Court should begin its analysis with the provisions of the

Labor-Management Relations Act ("LMRA"). Plaintiff argued that the complaint was based on violations of municipal law, so the Court must begin its inquiry by interpreting the San Jose minimum wage ordinance. *Id.* at *2. Defendant moved for summary judgment, arguing that: (i) the LMRA preempted the municipal claims; (ii) Plaintiff failed to exhaust the applicable grievance procedure; (iii) Plaintiff's claims were time-barred; and (iv) Plaintiff's claims failed as a matter of law because the San Jose ordinance expressly permits collectively-bargained waivers of the ordinance. *Id.* at *3. At the outset, the Court noted that § 301 of the LMRA states that disputes regarding collective bargaining agreements are exclusively governed by federal jurisdiction. *Id.* Section 301 provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties." *Id.* at *4. The Court already concluded that the central question in this case was whether the CBA waiver of state and municipal law was applicable, so federal jurisdiction was therefore appropriate. *Id.* Because the Court concluded that federal jurisdiction was appropriate, it also found that the LMRA preempted Plaintiff's state law causes of actions. *Id.* at *5. In doing so, the Court acknowledged that the LMRA requires the Court to start its analysis by looking at applicable federal law and the provisions in the CBA. *Id.* at *5-6. The Court reasoned that a claim is not preempted if it poses no significant threat to the collective bargaining process and furthers a state interest in protecting the public transcending the employment relationship. *Id.* at *6. The Court found that all of Plaintiff's claims were related to the amount and process of work pay, which was covered by the CBA. Thus, the Court must construe Plaintiff's claims as breaches of the CBA. *Id.* The Court therefore also held that Plaintiff must first attempt to exhaust any mandatory or exclusive grievance procedures in the agreement. Plaintiff argued that the union refused to file a grievance on his behalf. *Id.* at *7. However, the Court opined that Plaintiff did not alleged that the union breached its duty of fair representation and there was no dispute of fact that Plaintiff did not exhaust his contractual remedies under the CBA. *Id.* Therefore, the Court granted Defendant's motion for summary judgment.

***Mendoza, et al. v. Nordstrom, Inc.,* 865 F.3d 1261 (9th Cir. 2017).** Plaintiffs, a group of retail employees, filed an action alleging that Defendant violated the California Labor Code and Private Attorney Generals Act ("PAGA") by failing to adhere to the "rest day" provision, which provides that "every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." *Id.* at 1262. The District Court had previously dismissed the action. The District Court held that the employees were not "aggrieved" under the requirements of § 2699.3 of the Labor Code because the employees did not work more than six consecutive days in any one workweek, that the employer did not "cause" Plaintiffs to work more than seven consecutive days inasmuch as there was no coercion, and that Plaintiffs waived their rights under § 551 by accepting additional shifts when they were offered. On appeal, the Ninth Circuit affirmed the District Court's ruling. Named Plaintiff Mendoza claimed that he worked more than six consecutive days on three occasions but did not work more than six hours on all consecutive days. Defendant did not originally schedule Mendoza to work more than six consecutive days at any time, and he did so after being asked by either his supervisor or a co-worker to fill in for another employee. *Id.* at 1263. The named Plaintiff Gordon worked more than six consecutive days on one occasion and, on two of those days, worked less than six hours. *Id.* Noting that "no clear controlling California precedent existed" with respect to the District Court's holdings, the Ninth Circuit certified three questions to the California Supreme Court. *Id.* at 1264. The first question asked if "the day of rest required by §§ 551 and 552 calculated by the workweek, or does it apply on a rolling basis to any seven-consecutive-day period, and the California Supreme Court responded that "a day of rest is guaranteed for each workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not per se prohibited." *Id.* The second question asked if "the section 556 exemption for workers employed six hours or less per day apply so long as an employee works six hours or less on at least one day of the applicable week, or does it apply only when an employee works no more than six hours on each and every day of the week." *Id.* The California Supreme Court responded that "the exemption for employees working shifts of six hours or less applies only to those who never exceed six hours of work on any day of the workweek. If on any one day an employee works more than six hours, a day of rest must be provided during that workweek, subject to whatever other exceptions might apply." *Id.* The third question asked "what does it mean for an employer to 'cause' an employee to go without a day of rest (§ 552): force, coerce, pressure, schedule, encourage, reward, permit, or something else," to which the California Supreme Court responded that "an employer causes its employee to go without a day of rest when it induces the employee to forgo rest to which he or she is entitled. An employer is not, however,

forbidden from permitting or allowing an employee, fully apprised of the entitlement to rest, independently to choose not to take a day of rest." *Id.* As a result, the Ninth Circuit found that, because the stipulated facts demonstrated that neither named Plaintiff worked more than six consecutive days in any one workweek, each of their individual claims under §§ 551 and 552 failed. Plaintiffs argued, however, that they should be permitted to have a new PAGA representative who suffered violations of §§ 551 and 552 "step forward" and continue litigating this dispute. *Id.* The Ninth Circuit stated that, even if aggrieved employees did exist, under the requirements of § 2699.3 of the Labor Code, they would have to exhaust their claims administratively before bringing a PAGA action. *Id.* at 1265. Accordingly, the Ninth Circuit affirmed the District Court's ruling dismissing Plaintiffs' claims.

***Reyes, et al. v. Checksmart Financial,* 2017 U.S. App. LEXIS 13442 (9th Cir. July 25, 2017).** Plaintiff, a bank teller, filed an action alleging meal and rest break violations and constructive discharge claims in violation of California's Deferred Deposit Transactions Law ("CDDTL"). The District Court granted Defendant's motion for summary judgment as to Plaintiff's claims. On appeal, the Ninth Circuit affirmed the District Court's grant of summary judgment to Defendant. Plaintiff alleged that she was required to train tellers to offer the "Manager's Special," a transaction that she alleged violated the CDDTL. *Id.* at *3. Plaintiff further asserted that she resigned due to the stress of being complicit in Defendant's alleged illegal activities. The Ninth Circuit found that Plaintiff's allegations meet the three requirements for Article III standing, as loss of employment was certainly an "injury-in-fact." *Id.* Further, the Ninth Circuit stated that if Plaintiff's allegations in her complaint were taken as true, she resigned because of the stress of participating in Defendant's illegal conduct, making her injury "fairly traceable" to Defendant's actions. *Id.* Finally, her loss of employment was "redressable" with an award of damages. *Id.* However, the Ninth Circuit found that Plaintiff did not offer any evidence on summary judgment that Defendant did not provide her with meal and rest breaks. Accordingly, Ninth Circuit found that the District Court did not err in granting summary judgment as to Reyes' meal and rest break claims. The Ninth Circuit explained that there are three areas of inquiry to test whether a constructive discharge claim can be proved, including: (i) whether there were intolerable conditions; (ii) whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit; and (iii) whether the employee's resignation was employer-coerced, and not caused by the voluntary action of the employee or by conditions or matters beyond the employer's reasonable control. *Id.* at *4. The Ninth Circuit stated that Plaintiff failed to allege that her working conditions were intolerable such that any reasonable person faced with such conditions would have no reasonable alternative but to quit. Accordingly, the Ninth Circuit found that the District Court correctly granted summary judgment on Plaintiff's constructive discharge claims.

***Speer, et al. v. Cerner Corp.,* 2017 U.S. Dist. LEXIS 38370 (W.D. Mo. Mar. 17, 2017).** Plaintiffs, a group of service center analysts, brought an action alleging that Defendant violated the FLSA and the Missouri Minimum Wage Law ("MMWL") by improperly calculating their overtime compensation by using a fluctuating workweek ("FWW") method. *Id.* at *2. According to the complaint, Defendant's FWW method divided employees' fixed earnings by the number of hours they worked in a given week to arrive at a regular rate and then added one-half of the regular rate as overtime for all hours over 40. *Id.* Because Plaintiffs and other proposed class members received other payments in addition to their fixed salary, they alleged that the payments invalidated the FWW method, which entitled them to the statutorily prescribed overtime rate of one-and-one-half times their regular hourly rate. *Id.* at *2-3. In addition, Plaintiffs alleged that Defendant systematically paid the inadequate overtime compensation late. *Id.* The Court had previously granted conditional certification of a FLSA collective action and Rule 23 class certification of Plaintiffs' state law claims. Among the classes certified was a class of all non-exempt persons employed by Defendant in Missouri, at any time since March 5, 2012 through the final judgment in this matter, whose overtime compensation was not paid on the next regular payday for the period in which the overtime work was performed ("late payment of overtime class"). *Id.* at *3. Defendant subsequently moved for summary judgment as to both the state and federal late-overtime claims alleging that: (i) the FLSA does not prohibit the reasonable and consistent pay schedule under which Defendant paid a portion of its non-exempt employees their overtime; (ii) under the FLSA, Defendant paid all overtime "as soon as practicable" after it issued regular pay; and (iii) under Missouri law, no statute permits a private right of action for the conduct alleged in this Plaintiffs' complaint. *Id.* at *3-4. The Court denied Defendant's motion. Defendant calculated and submitted employees' overtime information for payment the Friday after the close of next two-week pay period after the period when the overtime occurred. *Id.* at *5. The Court noted that § 778.106 states that payment may

not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. *Id.* at *10-11. The Court therefore determined that summary judgement must be denied on this point, as the parties disputed whether the payments were made in a reasonable time. Defendant argued that even if the Court held that § 778.106 created a cause of action under the FLSA, by its express terms it contemplated that overtime payments may be delayed when they cannot be calculated at the same time as regular pay and that they may be made on the subsequent payroll. *Id.* at *12. Defendant argued that its payment of overtime in the subsequent pay period was reasonable under the circumstances of this case. The Court held that Plaintiffs set forth numerous facts supporting their claim that Defendant could have calculated employees' overtime sooner, but chose not to do so. *Id.* at *12-13. Therefore, the Court found that questions of material fact remained as to whether Defendant was paying overtime as soon as practicable or convenient under the circumstances. *Id.* at *13. Finally, Defendant argued that the MMWL was silent as to a private cause of action due to the timing of pay. The Court opined that the MMWL must be interpreted consistently with the FLSA. The Court also found no reason to depart from a prior ruling in this matter, wherein the Court stated that the MMWL would incorporate the timing provisions of § 778.106. *Id.* at *14. Accordingly, the Court denied Defendant's motion for summary judgment.

Sydney, et al. v. Time Warner Entertainment-Advance, **2017 U.S. Dist. LEXIS 44902 (N.D.N.Y Mar. 28, 2017).** Plaintiffs, sales representatives for a telecommunications company, brought a collective action against Defendant alleging unpaid overtime compensation pursuant to the FLSA and a class action for violations of the New York Labor Law ("NYLL") alleging unpaid overtime and unpaid commissions. *Id.* at *5. Plaintiffs also brought individual claims of retaliation. *Id.* Defendant moved for summary judgment as to all claims. As to the overtime claim, Plaintiffs alleged that they worked between 50 to 70 hours a week in violation of the FLSA and the NYLL. *Id.* at *2. Defendant asserted that there was no genuine issue of material fact as to Plaintiffs' overtime claims because Plaintiffs were outside salespeople, and therefore exempt from the FLSA and the NYLL overtime requirements. The Court agreed and granted summary judgment as to Plaintiffs' overtime claims, finding that as a matter of law that Plaintiffs were outside salespeople. *Id.* at *15. The Court considered that most of Plaintiffs' work was conducted off-site for the purpose of obtaining commissions and the majority of their salaries were based upon commission. *Id.* at *10, 12. The Court also granted summary judgment as to Plaintiffs' unpaid commission claims pursuant to the NYLL. The Court determined that Plaintiffs were not covered under the NYLL breach of contract provision because they were employees and not independent contractors. *Id.* at *16. Furthermore, pursuant to the NYLL, a commissioned salesperson must be paid in accordance with their employer's plan. *Id.* at *17. Defendant required that all employees to file any discrepancies regarding their commission within 5 days of the end of the month. *Id.* The Court found that Plaintiffs allegations where vague and that they failed to state that they filed a discrepancy complaint within the required time-period. *Id.* at *18. Accordingly, the Court found that there was no genuine issue of material fact and granted summary judgment on the unpaid commissions claims. *Id.* at *18. The Court also granted Defendant summary judgment as to Plaintiffs' retaliation claims under the FLSA and the NYLL. As to the FLSA retaliation claim, Plaintiffs failed to allege facts from which a reasonable jury could find that they engaged in a protected activity. *Id.* at *23. As to the NYLL claim, the Court found that Plaintiffs made out a *prima facie* case of retaliation in violation of the NYLL. *Id.* at *25. However, the Court held that Defendant presented sufficient evidence that it had legitimate, non-discriminatory reasons for terminating both Plaintiffs. *Id.* at *26. Accordingly, Defendant's motion for summary judgment was granted on Plaintiffs' NYLL retaliation claims.

Tyus, et al. v. Wendy's Of Las Vegas, Inc., **2017 U.S. Dist. LEXIS 65932 (D. Nev. April 30, 2017).** Plaintiffs, a group of employees, filed a class action alleging that Defendant violated the Nevada Minimum Wage Amendment ("MWA") by paying them less than the minimum wage for hourly work. The parties previously filed cross-motions for summary judgement. In the Court's order on the motion, a question of law interpreting the MWA was certified to the Nevada Supreme Court. *Id.* at *1. After the question was addressed by the Supreme Court, Plaintiffs filed a renewed motion for class certification, and Defendant filed a renewed motion for summary judgment. The parties also filed a joint motion for certification of another question of law to the Supreme Court and a stipulation requesting the Court to extend the time in which Plaintiffs could respond to Defendant's motion for summary judgment. The Court found no compelling reason to certify the additional questions of law to the Supreme Court. The Court noted that the Supreme Court recently issued controlling

authority on the parties' question and as such, sending the same issue for resolution would waste both the parties' and the judicial systems' time, energy, and resources. *Id.* at *5. Accordingly, the Court denied the motion for certification a question of law to the Supreme Court.

***Zorrilla, et al. v. Carlson Restaurants, Inc.*, 2017 U.S. Dist. LEXIS 88242 (S.D.N.Y. May 25, 2017).** Plaintiffs, a group of tipped employees at TGI Friday's restaurants, filed an action alleging that Defendants violated various provisions of the FLSA and various state laws. Defendants filed a motion to dismiss certain claims, including the: (i) New Jersey tip-pooling claim; (ii) Connecticut uniform claim; (iii) Michigan tip credit claim; and (iv) some of the California Unfair Competition Law claims. *Id.* at *4-5. Defendants also argued that the statute of limitations barred all of Plaintiffs' California Labor Code claims. *Id.* at *5. The Court granted Defendants' motion in part and denied it in part. Plaintiffs alleged that Defendants violated New Jersey law by distributing a portion of tips to workers who were not food servers or food clearers in violation § 12:56-8.2 of the New Jersey Administrate Code. *Id.* at *11. Defendants argued that this claim should be dismissed because § 12:56-8.2 does not contain any reference to tip pooling and does not restrict participation in tip pools. The Court held that § 12:56-8.2 does not limit the universe of workers who may pool and split their tips. *Id.* at *13. The Court, therefore, dismissed the New Jersey tip-pooling claim. Plaintiffs also alleged that Defendants required the named Plaintiff Marino to wear a uniform but did not launder or maintain the uniform in violation of Connecticut law. Defendants argued that this claim should be dismissed because Connecticut law does not require employers to pay for the maintenance of uniforms. *Id.* at *14-15. The Court held that, according to Connecticut law, an employer is not required to pay a set amount for an employee's uniform maintenance; rather, when an employer elects to maintain an employee's apparel, the employer is entitled to take a deduction. Plaintiffs also alleged that Defendants required the named Plaintiff Lombard to perform a substantial amount of non-tip producing duties in excess of 20% of his work time and that his compensation was limited to the tipped minimum wage rate in violation of § 408.414d of the Michigan Compiled Law, which permits an employer to take a tip credit only when "the employee receives gratuities in the course of his or her employment." *Id.* at *17. Defendants argued that this claim should be dismissed because § 408.414d does not place any specific threshold on the amount of time an employee may spend on tasks that do not produce gratuities. The Court held that, under Michigan law, an employee can be said to have "received gratuities in the course of his or her employment," even though not every act that he or she performed generated gratuities. *Id.* at *18. Applying this interpretation to the alleged facts – that not all of Plaintiffs' labor was tip-producing – the Court concluded that Plaintiffs failed to allege a violation of § 408.414. The Court, therefore, dismissed the Michigan tip credit claim. Plaintiffs also alleged that Defendants violated various California Labor Code provisions. Defendants contended that these claims should be dismissed because they did not employ the sole named Plaintiff from California within three years of Plaintiffs' filing of the fourth amended complaint, and therefore the statute of limitations barred these claims. *Id.* at *21. Plaintiffs argued that, under Rule 15(c), their claims related back to the first complaint, and therefore their claims were not time-barred. The Court ruled that Plaintiffs' overtime, uniform, and unlawful deduction claims related back to the original pleading, but that their waiting-time claim did not. *Id.* at *22. Accordingly, the Court granted Defendants' motion to dismiss as to the New Jersey tip-pooling claim, the Connecticut uniform claim, the Michigan tip credit claim, and the waiting time California claims, and it denied the motion with respect to the remaining California Labor Code claims. *Id.* at *33.

(ix) Discovery In FLSA Collective Actions

***Harris, et al. v. Best Buy Stores,* 2017 U.S. Dist. LEXIS 145936 (N.D. Cal. Sept. 8, 2017).** Plaintiff, a former employee, filed a collective and class action alleging that Defendant violated various provisions of the FLSA, the California Labor Code, and the Private Attorneys General Act ("PAGA"). Plaintiff filed a motion to compel discovery responses. First, Plaintiff sought responses to three interrogatories seeking the identities and contact information for putative class members and PAGA-aggrieved employees, including names, addresses, phone numbers, and email addresses. Plaintiff argued that she was entitled to the information subject to a protective order. *Id.* at *6. Defendant argued that Plaintiff was not entitled to the private contact information of more than 10,000 employees simply because she had asserted a PAGA claim and called her case a class action. *Id.* at *7. However, the Court agreed with Plaintiff that "the disclosure of class members' contact information, such as their names, addresses, telephone numbers, and email addresses, is a common practice in the pre-class certification context." *Id.* at *8. Accordingly, the Court concluded that Plaintiff sufficiently established that she required the information sought to substantiate the class allegations. Notwithstanding that conclusion, the Court agreed that

Plaintiff was not entitled to the contact information for all putative class members and PAGA-aggrieved employees. Given the large size of the putative class, the Court held that the 500 employees previously offered by Defendant was appropriate. Accordingly, the Court ordered Defendant to produce the name, last known address, phone number, and email address of each member of a randomly-obtained sample. *Id.* at *9. Second, Plaintiff sought the last dates of employment for putative class members who either resigned or were terminated. The Court ordered Defendant to produce the information to Plaintiff. *Id.* at *10. Third, Plaintiff requested "all documents relating to the dates their employment was terminated, including time entry records, discharge notices, and searchable electronic documents." *Id.* Defendant argued that fully responding to these requests would require manually sorting through employee files to locate responsive documents and then taking steps to redact those documents, which would take an estimated 15 to 30 minutes per employee. At this juncture, and in light of all of the other information already produced, the Court concluded that this type of individualized, pre-certification discovery ran afoul of Rule 26's proportionality requirement. The Court, therefore, denied Plaintiff's request to compel those records. Accordingly, the Court granted in part and denied in part Plaintiff's motion to compel.

***Kilby, et al. v. CVS Pharmacy, Inc.*, Case No. 09-CV-2057 (S.D. Cal. Dec. 13, 2017).** Plaintiff, an employee, filed a class action alleging violations of the California Labor Code. The parties filed a joint motion for a determination of discovery disputes, seeking clarification of the Court's previous discovery order. *Id.* at 1. Plaintiff also sought sanctions pursuant to Rule 37 for Defendant's failure to comply with the Court's discovery order. The disputed portion of the Court's order stated "identify each clerk/cashier anywhere in the United States who, at any time between June 9, 2008 and the present, used a seat or stool while operating the cash register." *Id.* at 2. In ruling on the motion, the Court clarified the order, stating that "identify" meant to provide contact information (including name last known address, last known telephone number, and store information), but contrary to Plaintiff's contention, the order did not require Defendant to state the amount of time each individual identified used a seat or stool while operating a cash register. *Id.* at 3. The Court also noted that any information produced in response to the interrogatory was subject to the protective order governing the exchange of conditional information. *Id.* The Court additionally determined that to the extent Plaintiff contacted any individual identified in response to the interrogatory, Plaintiff could not request medical information, and could only request information that was relevant to the matters at issue in the case. *Id.* at 3-4. The Court warned Defendant not to take any steps to interfere with Plaintiff's ability to obtain non-medical information from the specified individuals. *Id.* at 4. Finally, the Court denied Plaintiff's motion for sanctions, but forewarned Defendant that if it did not comply with the discovery order, the Court was apt to impose sanctions. *Id.*

***Kutzback, et al. v. LMS Intellibound, LLC,* Case No. 13-CV-2767 (W.D. Tenn. July 14, 2017).** Plaintiff, a loader at Defendants' facility, filed a collective action seeking unpaid wages under the FLSA. Plaintiff previously filed a motion to compel Defendants to respond to Plaintiff's request for production number 49 ("RFP 49"). The Court previously issued an omnibus order and took RFP 49 under advisement, but then noted that the parties resolved the request. Plaintiff advised the Court that the parties had not resolved the request as it pertained to electronically-stored information ("ESI"), and filed a motion for clarification and reconsideration regarding the previously filed motion to compel. Upon review, the Court found that the omnibus order did not rule on the issue of ESI discovery in RFP 49, and therefore it considered Plaintiff's request. Defendants argued that RFP 49 was overbroad and unduly burdensome because it would require them to provide "individual answers regarding more than 3,380 individuals." *Id.* at 2. Defendants further objected on the grounds that RFP 49 sought information beyond what was allowed by the joint supplemental discovery plan and that it was duplicative of RFP 48. *Id.* The Court found that Plaintiff's request for "all records" of "electronic correspondence on Defendants' email server, text messages in Defendants' telephones, notes from calls complaining of Defendants' hotline, or any other documents relating to not being compensation for hours worked" was not proportional to the needs of the case. *Id.* at 3. The Court therefore concluded that RFP 49 was overly broad and unduly burdensome. As a result the Court denied Plaintiff's motion to compel discovery.

***Reichert, et al. v. Hoover Foods, Inc.*, 2017 U.S. Dist. LEXIS 116218 (N.D. Ga. July 26, 2017).** Plaintiff filed a collective action asserting that Defendant failed to pay overtime in violation of the FLSA. Plaintiff sought production of a settlement agreement Defendant signed in *Love, et al. v. Hoover Foods, Inc.*, Case No. 15-CV-1269 (M.D. Fla.) ("*Love"*). Defendant refused to produce the settlement agreement on the basis that it was not

relevant to Plaintiff's claims. The Court held a conference with the parties to discuss their discovery dispute, and, at the Court's request, Defendant submitted the settlement agreement for *in camera* inspection. The Court noted that Plaintiffs in *Love* filed an FLSA action in Florida asserting minimum wage and overtime violations against Defendant and three other companies. The parties subsequently filed a stipulation of dismissal without prejudice. *Id.* at *3. The stipulation of dismissal stated: "The Parties have stipulated and certified that Plaintiffs' FLSA claims have been paid in full and have not been compromised. The Parties carefully determined the amount of alleged overtime worked by Plaintiffs Love and Staffa and the full amount of back wages allegedly owed to Plaintiffs Love and Staffa. The settlement entered into amongst the Parties provides for the full and complete payment of all back wages allegedly owed to Plaintiffs Love and Staffa, as well as liquidated damages in an amount equal to each Plaintiff's respective back wages." *Id.* at *3-4. The *Love* settlement agreement was not filed on the docket or publicly disclosed. Plaintiff argued that the settlement agreement was relevant because it would show: (i) whether Defendant paid overtime compensation and liquidated damages; (ii) whether the settlement amounts were calculated on the basis of a two or three-year statute of limitations; and (iii) whether Defendant knowingly violated the FLSA. *Id.* at *4. The Court found that the information sought in Plaintiff's first contention was already available from documents publicly filed in *Love*. *Id.* The stipulation of dismissal stated that Defendant paid the Plaintiffs' FLSA claims in *Love* "in full," including their claims for overtime compensation and liquidated damages. *Id.* With respect to Plaintiff's second contention, the Court stated that the information Plaintiff sought was not ascertainable from the settlement agreement. With respect to Plaintiff's third contention, the Court noted that the settlement agreement did not show whether Defendant knowingly violated FLSA. *Id.* Defendant did not concede any liability and represented only that Plaintiffs' claims in *Love* had been paid "in full" for amounts not less than the FLSA required. *Id.* at *5. Accordingly, the Court denied Plaintiff's motion and held that Defendant need not produce the settlement agreement.

***Rodriguez, et al. v. Hermes Landscaping, Inc.,* 2017 U.S. Dist. LEXIS 171118 (D. Kan. Oct. 17, 2017).** Plaintiffs, a group of H-2B workers, filed a collective action on behalf of themselves and others similarly-situated alleging that Defendant violated the FLSA and state wage & hour laws. Plaintiffs filed a motion for a protective order regarding the method and location of Plaintiffs' depositions. Plaintiffs contended that immigration restrictions made travel to the United States for depositions difficult. *Id.* at *2. Plaintiffs further contended they did not have the financial means to travel to the United States and proposed that the depositions occur in Mexico City or by video-conference. *Id.* Defendant asserted that it would face an undue financial burden if the depositions were to occur in Mexico, and that video depositions would be impractical given the potential length of the depositions, the need for a translator, and the likely number of deposition exhibits. *Id.* at *2-3. While the Court agreed with Plaintiffs that they should not be required to travel to the United States for their depositions, the Court found Plaintiffs' offer of depositions by video conference to be less than ideal. *Id.* at *6. While the Court held that changing the place of depositions to Mexico was appropriate, it did not find it proper to shift all the costs of travel to Defendant. The Court determined that if Plaintiffs expected to be suitable class representatives and Plaintiffs' counsel was to be suitable counsel for the collective action, they should expect to bear certain expenses. *Id.* at *7. The Court therefore granted in part Plaintiffs' motion and ordered that the depositions of three named Plaintiffs be taken in Mexico at one location, during the course of one trip if Plaintiffs paid the reasonable travel expenses (airfare and lodging) for one defense counsel. *Id.* The Court directed the parties to confer regarding other expenses, such as a Court reporter and translator/interpreter. Accordingly, the Court granted Plaintiffs' motion for a protective order in part.

***Sullivan, et al. v. PJ United, Inc.*, Case No. 13-CV-1275 (N.D. Ala. Dec. 15, 2017).** Plaintiffs, a group of deliver drivers, filed an action alleging that Defendant, a franchisee of Papa John's International ("PJI"), violated state and federal wage & hour laws because it under-reimbursed their automobile expense, which cause their pay to fail short of the minimum wage. Plaintiffs served a subpoena on PJI for production of documents, which PJI objected to on relevancy grounds. Subsequently, Plaintiffs filed a motion to enforce the subpoena requiring PJI's custodian of records to attend a deposition and that PJI produce: (i) data reflected in the Checkout Reports for each day the opt-in Plaintiffs worked; and (ii) a list of deliveries made by each opt-in Plaintiff. *Id.* at 1-2. The Court granted in part and denied in part Plaintiffs' motion to enforce the subpoena and denied PJI's motion in opposition and motion to quash. The Court ordered: (i) PJI to produce the Checkout Reports, (ii) Plaintiffs to pre-pay PJI for the cost of compliance with the subpoena, and (iii) Plaintiffs and PJI to make arrangements to schedule the deposition of PJI's custodian of records. The Court was ultimately convinced that Plaintiffs' "entire

theory of the case requires the data contained in the Checkout Reports. . . ." and that "Plaintiffs are obviously entitled to the data in some respect." *Id.* at 17. The Court also noted that the burden on PJI was not as great as it had initially been because approximately 300 members of the class had been dismissed for discovery violations. *Id.* at 15. The Court also concluded that the franchise business directors' in-person visits were sufficient to find that PJI regularly transacts business in person. *Id.* at 9. Nevertheless, the Court recognized that PJI faced a significant burden in complying with the subpoena. Accordingly, the Court ordered that Plaintiffs must pre-pay PJI for the cost of complying with the subpoena. *Id.* at 18. Accordingly, the Court ordered: (i) production of the data in the Checkout Reports for 57 pre-2016 Plaintiffs and produce data for the less than 80 Plaintiffs in the post-2016 time period; (ii) Plaintiffs to contact PJI following the entry the Court's order to jointly develop a schedule for the production of the data contained in the Checkout Reports, as well as an estimate of the costs that PJI will incur finding and downloading the data in the Checkout Reports and organizing that data into a spreadsheet; (iii) PJI must provide within 14 days of the Court's order an itemized list of the costs it expects to incur complying with Plaintiffs' subpoena; (iv) Plaintiffs must tender pre-payment for the costs associated with PJI's compliance with the subpoena (Plaintiffs must pay these costs before PJI must produce the data); (v) after PJI files an itemized list of costs, Plaintiffs then have seven days to tender pre-payment; and (vi) following the expiration of the seven day period, PJI will have 10 days to create the spreadsheet and tender it to Plaintiffs, as well as make arrangements with Plaintiffs for the deposition of PJI's custodian of records.

***Velasquez, et al. v. Bimbo Bakeries, USA, Inc.,* Case No. 15-CV-2324 (D. Colo. Oct. 19, 2017).** Plaintiffs, a group of truck drivers, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. *Id.* at 2. Plaintiffs maintained that Defendant misclassified them as exempt from the FLSA pursuant to the outside sales exemption. Defendant asserted an affirmative defense that Plaintiffs were outside salespersons and were expected to sell additional product to stores when making deliveries. *Id.* Plaintiffs requested documents relating to Defendant's defense that Plaintiffs were outside sales employees. Defendant argued that Plaintiff failed to submit formal requests for the information, and that it had no documents concerning drivers' sales activities other than records of daily driver deliveries. *Id.* The Court ordered Defendant to produce any documents in its possession that were relevant to its outside sales defense. *Id.* Defendant maintained that it did not have any relevant materials. However, during depositions, Plaintiffs' counsel questioned Defendant's representatives regarding documents Plaintiffs had sought, and found that there were documents available that Defendant failed to produce. *Id.* at 3. Defendants subsequently responded to Plaintiffs' request and produced documents relevant to its outside sales defense. *Id.* at 4. Plaintiffs moved to strike Defendant's affirmative defense as a sanction or to issue an order to show cause as to why Defendant failed to produce documents earlier. *Id.* The Court found that the documents Defendant produced should have been produced earlier as they were within the scope of the Court's order to produce. Accordingly, the Court granted Plaintiffs' motion for sanctions and awarded reasonable attorneys' fees for time spent obtaining the documents after the Court's order. *Id.* at 5. The Court further precluded Defendant from using any of the documents produced in trial unless they were first used by Plaintiffs. *Id.*

(x) DOL Wage & Hour Enforcement Actions

***U.S. Department Of Labor v. American Future Systems,* 2017 U.S. App. LEXIS 19991 (3d Cir. Oct. 13, 2017).** The U.S. Department of Labor ("DOL") filed an action alleging that Defendant violated the FLSA by failing to pay minimum wage to sales representatives when it only paid the sales representatives for time which they were logged-off their computers if they were logged-off for less than 90 seconds. The DOL argued that this policy violated § 6 of the FLSA because it failed to compensate the sales representatives for breaks of 20 minutes or less. *Id.* at *4. The DOL sought to recover unpaid compensation and liquidated damages, and a permanent injunction enjoining Defendant from committing future violations. *Id.* Defendant moved for summary judgment and the DOL also moved for partial summary judgment as to the minimum wage and liquidated damages claims. The District Court denied Defendant's motion and granted the DOL's motion with respect to FLSA minimum wage liability and liquidated damages. *Id.* at *5. The District Court noted that the DOL had consistently interpreted § 6 of the FLSA to include rest periods of short duration, running from 5 minutes to about 20 minutes, as hours worked. The District Court agreed that § 785.18 of the DOL's regulations created a bright-line rule and concluded that Defendant therefore violated the FLSA by failing to pay its employees for rest breaks of 20 minutes or less. Defendant appealed on the grounds that: (i) time spent logged-off under its flexible break policy did not constitute work; (ii) the District Court erred in finding that the DOL's interpretive regulation –

on breaks less than 20 minutes long – was entitled to substantial deference; and (iii) the District Court erred in adopting the bright-line rule embodied § 785.18 rather than using a fact-specific analysis. The Third Circuit rejected Defendant's arguments and affirmed the District Court's decision granting the DOL partial summary judgment as to minimum wage liability and liquidated damages. The Third Circuit ruled that the FLSA required employers to compensate employees for breaks of 20 minutes or less during which they were logged-off their computers and were free of any work-related duties. Further, the Third Circuit ruled that the District Court did not abuse its discretion in awarding liquidated damages as Defendant failed to establish that it acted in good faith and that it had reasonable grounds for believing that it was not violating the FLSA. Defendant argued that it sought the advice of counsel on its policy regarding FLSA compliance, yet refused to disclose to the DOL or the District Court what counsel advised. The District Court concluded that, given Defendant's unwillingness to share what it was told by counsel, it would be illogical to classify such conduct as "good faith." *Id.* at *24. Accordingly, the Third Circuit affirmed the District Court's decision. *Id.* at *25.

***U.S. Department Of Labor v. Bland Farms Products & Packing, LLC,* 2017 U.S. Dist. LEXIS 119874 (S.D. Ga. July 31, 2017).** The U.S. Department of Labor filed a lawsuit alleging that Defendants' practices of not paying packing-shed workers U.S. wages when they processed onions grown by other farmers violated the FLSA. Defendants contended that the packing-shed employees were exempt from the FLSA under the agriculture exemption. *Id.* at *5. The Court noted that the overtime requirement of the FLSA does not apply to employees "employed in agriculture." *Id.* at *13. Agriculture, for purposes of the FLSA, includes among other things, "the cultivation and tillage of the soil, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." *Id.* The Court further explained that the definition of agriculture includes: (i) primary agriculture, which includes typical farming activities like the cultivation and tillage of the soil; and (ii) secondary agriculture, a broader category including "any practices, whether or not themselves farming practices," such as processing crops, that are performed by a farmer or on a farm and are incident to or in conjunction with "such" farming operations. *Id.* at *14. Secondary practices, therefore, "must relate to the farmer's own farming operations and not to the farming operations of others." *Id.* Defendants contended that the packing-shed employees were engaged in secondary agriculture. The Court found that this could only be true if Defendants were so intimately involved in the contract growers' operations that they should be considered the farmers of those onions. *Id.* The Court determined that Defendants were not the farmers of the onions grown by the contract growers, and, thus, the processing of those onions was "incidental to, or in conjunction with, the farming operations," of the contract growers and not Defendants. *Id.* at *16. The Could held that the agriculture exemption therefore did not apply to the packing-shed employees when they were processing those onions because the employees were not performing secondary-agricultural practices at that time. Accordingly, the Court concluded that Defendants violated the FLSA by not paying their packing-shed employees overtime wages when they processed onions grown by other farmers.

***U.S. Department Of Labor v. Dominion Granite & Marble, LLC*, 2017 U.S. Dist. LEXIS 95917 (E.D. Va. June 21, 2017).** The U.S. Department of Labor ("DOL") filed an action against Defendants alleging that it failed to pay overtime wages in violation of the FLSA. The DOL asserted that some employees were improperly paid a salary, while others were paid only straight time for hours worked in excess of 40 hours in a week. The DOL further contended that Defendants failed to maintain adequate time-keeping records for hourly employees as required by the FLSA. *Id.* at *2. Following the DOL's investigation into the alleged violations, Defendants ultimately paid their employees the amounts unlawfully withheld. *Id.* at *3. The DOL subsequently sought injunctive and declaratory relief. Defendants filed a motion to dismiss, arguing that the DOL did not sufficiently demonstrate that injunctive relief was warranted or that Defendants were "employers" within the meaning of the FLSA. Defendants contended that the DOL failed to set forth sufficient factual matter to demonstrate that it was entitled to injunctive relief at this initial stage of the proceedings. The Court noted that a motion to dismiss brought under Rule 12(b)(6) only tests whether relief can be granted, not whether it should be granted. *Id.* at *4. The Court held that the DOL's complaint plainly alleged cognizable claims for failure to pay overtime wages and to keep proper records. *Id.* at *5. Moreover, nothing in the complaint foreclosed the possibility that injunctive relief could be warranted should the DOL prevail on its FLSA claims. Although Defendants made an effort to comply with the FLSA, the Court stated that current compliance with the FLSA alone, especially when it resulted from scrutiny by the DOL, was not sufficient grounds for denying a prospective injunction. The DOL's complaint

alleged that Defendants willfully violated the FLSA over a period of three years by failing both to pay employees overtime wages and to keep adequate records. *Id.* at *6. Defendants' efforts at compliance came only after Defendants were caught violating the FLSA. The Court also opined that there was no indication that Defendants provided any reliable assurances of future compliance. *Id.* at *7. The Court therefore stated that it could draw the reasonable inference that "there exists some cognizable danger of recurrent violation, something more than the mere possibility." *Id.* Defendants further argued that the DOL's complaint failed to plead sufficient factual material to establish that the individual Defendants, Mr. Chao and Mr. Berard, were "employers" subject to the FLSA. *Id.* at*8. The Court disagreed, and stated that the DOL alleged that Defendant Chao owned the vast majority of Dominion Granite and Marble, LLC, allegedly "supervised and directed the work of all of the employees of the company, and was involved in the hiring, firing, and scheduling of employees." *Id.* Similarly, Defendant Berard allegedly served as the company's "Operations Manager," and was "involved in the supervision of employees as well as hiring and firing of employees of the company." *Id.* The Court found that the DOL's assertions were more than sufficient to permit a reasonable inference that Defendants Chao and Berard were "employers" within the meaning of the FLSA. *Id.* at *9. Accordingly, the Court denied Defendants' motion to dismiss.

***U.S. Department Of Labor v. DT & C Global Management, LLC*, 2017 U.S. App. LEXIS 21085 (7th Cir. Oct. 25, 2017).** The U.S. Department of Labor ("DOL") and a group of former employees in two consolidated actions alleged that Defendants failed to pay overtime compensation in violation of the FLSA and the Illinois Minimum Wage Act ("IMWA"). The District Court entered default judgments against Defendants for failing to comply with various discovery orders. Defendants moved to vacate the judgments, and the District Court denied the motion. On appeal, the Seventh Circuit affirmed the District Court's ruling. The Seventh Circuit held that Defendants did not show good cause against entry of the default judgment, did not act quickly in filing motions to vacate, and failed to articulate any meritorious defenses. *Id.* at *2. Following Defendants' failure to respond to discovery requests, the DOL filed a motion to compel, which the District Court granted. *Id.* at *3. Following Defendants' failure to comply with the Court's order granting the motion to compel, the DOL moved for sanctions. Defense counsel withdrew from the case, and the District Court ordered Defendants to appear for a hearing. When Defendants failed to appear for the hearing, the District Court struck Defendants' answer, awarded the DOL's attorneys' fees, and entered a default judgment. *Id.* Defendants moved to vacate the judgment pursuant to Rule 60(b)(1) contending that: (i) Defendants did not receive notices during the last few months of the case; and (ii) Defendant Jansen could not keep in contact with his lawyers because of his poor health. *Id.* at *4. The District Court denied the motion, ruling that the default was the result of "inattention to the litigation," and Defendants had not shown that they had a legitimate defense. *Id.* The DOL filed suit against Defendants and against William Lynch, the minority owner and president of Defendant DT & C, alleging the same violations as the employees. The District Court ultimately entered a default judgment in that matter as well. On appeal, the Seventh Circuit affirmed both judgments. The Seventh Circuit found that the District Court reasonably concluded that Defendants failed to establish good cause against entry of the default judgment. As to Defendant Jansen's health problems, the Seventh Circuit noted that Jansen's surgeries were in 2011 and 2014, yet he remained inattentive to the cases for all of 2015, well after the surgeries. *Id.* at *7. The Seventh Circuit similarly rejected Defendants' argument that it did not receive notices of the cases because Jansen moved. The Seventh Circuit stated that, when Jansen moved, he should have notified the District Court of his new address. Finally, the Seventh Circuit agreed with the District Court that Defendants did not take quick action when learning of the default judgments against them because they waited several months to file motions to vacate. *Id.* at *9. The Seventh Circuit, therefore, affirmed the default judgments entered by the District Court.

***U.S. Department Of Labor v. El Tequila, LLC*, 2017 U.S. App. LEXIS 2202 (10th Cir. Feb. 7, 2017).** The U.S. Department of Labor ("DOL") brought an action against Defendant alleging that Defendant failed to pay its employees overtime as required under FLSA. The DOL alleged that Defendant manually altered the electronic time record weekly reports in order to reduce the actual hours shown as worked by employees. *Id.* at *5. Defendant failed to respond to the DOL's amended complaint in a timely matter. *Id.* The DOL filed a motion for summary judgment and Defendant then filed a motion to file an out-of-time answer to the complaint the next day on the ground that the failure to answer was a result of a docketing error. *Id.* at *6. The District Court denied Defendant's motion to file its answer for lack of excusable neglect. As such, the allegation that Defendant manually altered the register time reports to reduce the actual hours shown as worked by employees was

accepted as true. The District Court also accepted as true the DOL's allegation that Defendant violated the FLSA's overtime, minimum wage, and record-keeping requirements as Defendant did not respond to these claims in a timely fashion. *Id.* at *7. The District Court found that Defendant was liable for liquidated damages and enjoined Defendant from violating the FLSA and accepted most of the DOL's back pay calculations because Defendant failed to provide evidence that it paid its employees discretionary bonuses. The District Court denied the DOL's motion for summary judgment with respect to whether Defendant's violations of the FLSA were willful. At trial, the jury subsequently found that Defendant did not willfully violate the FLSA. The District Court then granted the DOL's motion for judgment as a matter of law, holding that no reasonable jury could have arrived at that conclusion that the violation was not willful. The District Court entered a judgment of $2,137,627.44 in favor of the DOL. On appeal, Defendant raised four issues. First, Defendant argued that the DOL should have accounted for discretionary bonuses in calculating overtime wages. *Id.* at *7. The Tenth Circuit rejected this argument because Defendant relied upon the testimony of its CPA that discretionary bonuses should not be included in the regular rate, not that Defendant in fact paid discretionary bonuses. Defendant also relied upon the employer's affidavit that stated that the DOL was imposing overtime charges on discretionary bonuses. The Tenth Circuit determined that the affidavits were conclusory and insufficient to create a genuine issue of material fact. Second, Defendant asserted on appeal that its failure to timely respond to the amended complaint was due to excusable neglect. *Id.* at *7. The Tenth Circuit rejected this argument as well, finding that the District Court did not abuse its discretion in denying Defendant's motion to file an out-of-time answer when Defendant initially claimed a docketing error as the cause. Third, Defendant asserted that the District Court should not have relied upon Defendant's lack of a response to certain issues in granting summary judgment, but instead should have considered lesser sanctions. *Id.* at *7-8. *Id.* Specifically, Defendant asserted that it was an improper sanction for the District Court's to rely upon the DOL's allegation that Defendant's managers altered the time record weekly reports. The Tenth Circuit rejected the argument that this was a sanction. Rather, Defendant's failure to respond to the pleading caused it to be deemed admitted pursuant to Rule 8(b)(6). *Id.* at *13. Finally, Defendant asserted that the District Court erred in granting the DOL's motion for judgment as a matter of law with respect to willfulness. *Id.* at *8. Because the evidence indicated that the employer took affirmative steps to create the appearance that Defendant complied with the FLSA and adjusted records to a show compliance, a reasonable jury could not conclude that Defendant's violations were negligent. *Id.* at *20. Accordingly, the Tenth Circuit affirmed the District Court's decision.

***U.S. Department Of Labor v. Five M's*, 2017 U.S. Dist. LEXIS 28467 (N.D. Ind. Mar. 1, 2017).** The DOL filed an action against Defendants for record-keeping, overtime, and minimum wage violations of the FLSA. The DOL moved for summary judgment and to strike the affidavit of Defendant's payroll manager. The DOL asserted that Defendant failed to maintain sufficient records of their employees' wages & hours worked each workweek for at least two years as required. Defendant admitted that it maintained time-cards for an unknown time, sometimes no longer than six weeks and that there was no policy regarding timesheets. *Id.* at *6. The Court also found that Defendant's records did not reflect accurately the hours worked based upon DOL's interviews with employees. Accordingly, the Court held that as a matter of law, Defendant had violated FLSA's record-keeping requirements. The DOL also asserted that Defendant often paid some employees less than minimum wage. Defendant paid some technicians using a "book rate" system where they were paid based upon the amount of time it took an average mechanic to perform a specific task, as opposed to the amount of time it actually took. For some employees, this "book rate" of pay resulted in minimum wage violations. Defendant attempted to show compliance by producing an affidavit of its payroll manager. The DOL moved to strike portions of the affidavit, asserting that the affidavit was not based upon personal knowledge and was not based upon actual records of hours worked, and was therefore inadmissible hearsay. The DOL asserted that the records produced merely showed salary and total amounts paid, which the affiant then used to determine how much time it claimed the employees worked. The Court rejected this as "reverse engineering" *Id.* at *19. The Court also struck portions of the affidavit that were in direct contradiction to the payroll manager's previous deposition testimony and granted summary judgment in favor of the DOL on the minimum wage and overtime violations. Defendant's payroll records reflected that it did not pay some employees overtime for hours worked in excess of 40 per week. The Court also ruled that because Defendant produced no evidence that its conduct was in good faith and reasonable, liquidated damages were appropriate. Defendant had a long history of failure to comply with wage & hour requirements of FLSA and was on notice of the requirements. As such, the Court found that the violations were willful. Accordingly, the Court issued an injunction because of the inadequate assurances that Defendant

would comply in the future. The Court granted the DOL's motion for summary judgment for violations of minimum wage, overtime, and record-keeping requirements and required Defendants to pay liquidated damages, as well as uncompensated wages and overtime.

***U.S. Department Of Labor v. Kazu Construction, LLC,* 2017 U.S. Dist. LEXIS 58130 (D. Haw. April 17, 2017).** The U.S. Department of Labor ("DOL") filed an action against Defendant on February 22, 2016, asserting record-keeping and overtime violations of the FLSA. *Id.* at *2. Defendant moved for summary judgment, and the Court granted Defendant's motion in part and denied it in part. Defendant argued that the FLSA's two-year statute of limitations barred the DOL's claims. *Id.* at *5. Because the DOL offered evidence that Defendant's violations were willful, the Court found a genuine issue of material fact as to whether the three-year statute of limitations applied. *Id.* The DOL offered evidence that Defendant knew of its obligation to pay overtime and that employees worked overtime that was not recorded. Further, the DOL introduced evidence that Defendant "banked" the hours, instead of compensating employees for overtime. *Id.* at *8. Accordingly, the Court denied Defendant's motion for summary judgment in part, finding a genuine issue of material fact as to whether Defendant's violations were willful and the three-year statute of limitations applied. The Court, however, granted Defendant's motion for summary judgment as to alleged violations occurring before February 22, 2013, on the grounds that they were barred by the statute of limitations. *Id.* at *17. The DOL argued that the statute of limitations should be equitably tolled because the DOL informed Defendant's counsel that the DOL would be pursuing equitable tolling and there was a dispute regarding whether employees worked overtime prior to February 22, 2013. *Id.* at *14. The Court concluded that the equitable tolling doctrine did not apply because the doctrine focuses on Plaintiff's diligence or Defendant's wrongful conduct in preventing Plaintiff from timely asserting a claim. *Id.* The DOL failed to show that it was diligent because the DOL issued a back wage calculation in 2014, and the DOL knew of the statutory limitations as early as February 2015. *Id.* Accordingly, the Court granted Defendant's motion for summary judgment as to all claims before February 22, 2013. *Id.* at *17. The Court also granted Defendant's motion for summary judgment as to some employees, finding that they qualified as exempt employees and were not entitled to overtime. *Id.* at *32. Defendant moved for summary judgment as to some employees on the basis that they did not work overtime and were not owed back wages. However, the DOL provided evidence that showed a genuine issue of material fact as to this issue and, therefore, the Court denied Defendant's motion as to such employees. *Id.* at *35. Accordingly, the Court granted Defendant's motion for summary judgment in part and denied it in part.

***U.S. Department Of Labor v. Manna 2nd Ave. LLC*, 2017 U.S. Dist. LEXIS 169171 (S.D.N.Y. Oct. 12, 2017).** The U.S. Department of Labor ("DOL") brought an action on behalf of a group of pizza chefs alleging that Defendants failed to pay minimum wages and overtime compensation and failed to keep and preserve records in violation of the FLSA. The parties stipulated to several issues, including that none of the pizza chefs were exempt from the FLSA's overtime provisions, that Defendants violated the FLSA's record-keeping requirements, and that Defendants failed to comply with the FLSA's overtime provisions for the period from June 16, 2012, through June 15, 2013. *Id.* at *5. The Court presided over a non-jury trial on the sole issue of whether Defendants' conduct was willful. The parties did not dispute that many of Defendants' employees worked at more than one location in any given workweek and, when they did so, Defendants did not aggregate their hours. For example, if an employee worked 25 hours at one location and 25 hours at another location during the same workweek, Defendants provided a check for each location and did not provide overtime compensation even though the employee worked more than 40 hours total. *Id.* at *6. Likewise, when employees performed different jobs during the same week, Defendants did not aggregate their hours for purposes of paying overtime. Two employees testified on behalf of the DOL. Both employees stated that Defendants paid them separately for each restaurant location at which they worked and deliberately switched their assigned locations to avoid paying them overtime. *Id.* The employees further contended that Defendants paid employees separately for each work assignment and deliberately structured assignments to avoid paying overtime. The DOL also introduced data relating to the employees who worked more than 25 hours in a given workweek during the relevant time period. The Court found that it could draw a strong inference from the data that Defendants' pattern of switching employees' locations and job assignments was the consequence of an intentional effort to limit the hours that those employees worked at any one location during a workweek to avoid paying overtime. *Id.* at *14. Accordingly, the Court held that Defendants deliberately structured their payroll to avoid paying overtime by segregating hours according to restaurant location and job function. *Id.* at *14-15. The Court determined that

Defendants' conduct was reckless and willful and subject to a three-year statute of limitations. *Id.* at *15. Accordingly, the Court entered judgment in favor of the DOL and against Defendants and granted: (i) $101,532.90 in unpaid overtime wages owed for the period June 16, 2012, through June 15, 2013; (ii) $101,532.90 in liquidated damages for the period June 16, 2012, through June 15, 2013; (iii) $45,101.42 in back wages previously awarded by the Court on summary judgment; (iv) $45,101.42 in liquidated damages previously awarded by the Court on summary judgment; (v) $35,007.68 in overtime wages owed to the non-exempt salaried pizza chefs; (vi) $35,007.68 in liquidated damages owed to the non-exempt salaried pizza chefs; and (vii) an injunction against Defendants, their officers, agents, servants, employees, and those persons in active concert or participation with Defendants from violating the provisions of the FLSA. *Id.* at *16.

***U.S. Department Of Labor v. Restaurant Group, Inc*., 2017 U.S. Dist. LEXIS 89640 (D.N.J. June 12, 2017).** The U.S. Department of Labor ("DOL") brought an action against several Defendants that managed, owned, and operated 17 restaurants in New Jersey and New York. *Id.* at *2. The DOL alleged that Defendants engaged in various unlawful tip, payroll, and record-keeping practices. Defendants filed a motion to dismiss, arguing: (i) that the DOL's complaint was factually deficient and failed to meet the pleading standards of Rule 8; and (ii) that the DOL was precluded, under the doctrines of *res judicata* and collateral estoppel, from "relitigating" these claims in light of the New Jersey Department of Labor's (NJDOL") orders of "no violation." *Id.* at *3. The Court denied Defendant's motion to dismiss. The Court found that the DOL's complaint set forth examples and allegations demonstrating that Defendants failed to regularly distribute the entirety of the tip pool to the tipped employees, and kept tip pool money totaling $40,000. *Id.* at *10. Thus, the Court held that the DOL's complaint set forth plausible violations of § 203(m). *Id.* at *11. The Court further stated that the DOL sufficiently alleged that Defendants used the pooled tips to pay the wages of non-tipped employees. *Id.* at *13. Taking the facts as plead in the complaint as true, the Court found that the DOL set forth plausible claims of violations of the FLSA, and therefore it denied Defendants' motion on this basis. Defendants further contended that dismissal was warranted because the DOL was precluded, under the doctrines of *res judicata* and collateral estoppel, from "relitigating" these claims in light of the NJDOL's orders of "no violation." *Id.* at *14. The Court disagreed, and concluded that the record reflected that there was no litigation to inform the determinations of the NJDOL and that the DOL was not a party to the proceedings involving the NJDOL. *Id.* at *16. Further, the evidence purported to be final determinations by the NJDOL were entitled "field report" or "routine inspection." *Id.* at *16. Given these circumstances, the DOL could not advance any argument or appeal the determination. In addition, the Court found that the determination by the NJDOL did not appear to be a final determination worthy of preclusive effect. *Id.* at *17. The Court agreed with the DOL that, pursuant to the New Jersey Wage & Hour Law and the New Jersey Uniform Administrative Procedure Rules, the judicial procedure through which a final order is produced was not met. *Id.* The NJDOL therefore had not acted in a judicial capacity based on the record before the Court. Accordingly, the Court denied Defendants' motion to dismiss.

***U.S. Department Of Labor v. Saldivar & Associates*, 2017 U.S. Dist. LEXIS 171678 (E.D. Va. Oct. 17, 2017).** The U.S. Department of Labor ("DOL") filed an action against Defendants alleging failure to pay overtime compensation and minimum wages in violation of the FLSA. The DOL filed a motion for default judgment against Defendants. The Magistrate Judge issued a report and recommendation ("Report") recommending that a default judgment be entered against Defendants and that the DOL recover $96,470.43 in back wage compensation and $96,470.43 in liquidated damages. The Court adopted the Report in its entirety. The Court held that the Magistrate Judge correctly determined that the Court had subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 due to the DOL's claims arising under the FLSA, and that the Court had personal jurisdiction over all Defendants because Defendant R&R Catering was a Virginia corporation, and Defendants Saldivar and Bloxton were Virginia residents. *Id.* at *2. The Court further found that the Magistrate Judge properly concluded that Defendants paid their employees less than the federal minimum wage, and that Defendants paid their employees at rates less than the required rate of 1.5 times the federal minimum wage for each hour worked in excess of 40 hours per week. *Id.* The Magistrate Judge also ruled that the FLSA violations were "willful" because Defendants were twice informed of their obligations to pay minimum wages and overtime rates, and the DOL had previously investigated R&R Catering for compliance with the FLSA, revealing multiple violations of §§ 6, 7, and 11 of the FLSA. *Id.* at *3. Therefore, because Defendants did not show they acted in good faith, the Court held that the Magistrate Judge correctly determined that Defendants must also pay liquidated damages in an amount equal to the amount of unpaid wages pursuant to 29 U.S.C. § 216(b). *Id.* The Court opined that the

Magistrate Judge properly calculated the amount of unpaid wages as $96,470.43, and the amount of liquidated damages to be equal to the amount of unpaid wages, $96,470.43. *Id.* Accordingly, the Court granted the DOL motion for default judgment.

***U.S. Department Of Labor, et al. v. Westside Drywall*, 2017 U.S. Dist. LEXIS 37622 (D. Ore. Mar. 14, 2017).** The DOL filed an action against Defendants alleging failure to maintain accurate employment records and to pay overtime compensation to piece-rate employees. The DOL alleged that Defendants failed to pay employees overtime compensation when employees worked more than 40 hours a week and failed to maintain, to keep, make available, and preserve records of employees' hours and wages. *Id.* at *2. The DOL sought back wages on behalf of 100 employees and liquidated damages. Defendants filed a motion for summary judgement as to all of the DOL's claims, which the Court granted in part and denied in part. *Id.* at *2-3. Defendants argued that there was not a genuine dispute of material fact that Defendants paid overtime to their piece-rate employees, and therefore Defendants asserted that the DOL could not establish a *prima facie* case against Defendants on that ground. The DOL contended that there was a genuine dispute of material fact as to whether Defendants failed to pay piece-rate employees overtime compensation. *Id.* at *8. To support this contention, the DOL submitted affidavits from several employees who stated that even though employees regularly worked more than 40 hours a week, they were not paid any additional compensation for those overtime hours, and that Defendants paid employees the same rate regardless of the number of hours they worked. *Id.* The Court held there was a genuine dispute of material fact from which a fact-finder could conclude Defendants violated the requirements of FLSA to pay overtime compensation to their piece-rate employees, and denied Defendants' motion for summary judgement on that issue. *Id.* at *9. Defendants contended there was no genuine dispute of material fact that they maintained employee records, and therefore Defendants asserted that the DOL could not prove Defendants violated §§ 11 and 15(a)(5) of the FLSA. Defendants also argued they produced all records of their employees' wages, hours, and other working conditions as requested by DOL during the course of its investigation. The DOL, however, contended that Defendants failed to maintain accurate records of the hours worked by employees as required under the FLSA. The Court agreed there was not any evidence that Defendants' conduct affirmatively prevented any employee from asserting their rights under the FLSA during the period of their employment. Although the record reflected that Defendants told employees they were not eligible for overtime and instructed them not to put more than 40 hours on their timesheets, the Court determined that this conduct did not prove Defendants made it impossible for employees to assert claims under the FLSA. *Id.* at *12. Indeed, the Court stated that the record reflected that employees knew they were not being paid overtime when their paychecks reflected pay for only 80 hours even when they recorded more hours on their timesheets. *Id.* at *13. Accordingly, the Court granted in part and denied in part Defendants' motion for summary judgment.

(xi) Exemption Issues In FLSA Collective Actions

***Alston, et al. v. DirectTV, Inc.*, 2017 U.S. Dist. LEXIS 80938 (D.S.C. May 26, 2017).** Plaintiffs, a group of cable-provider technicians, filed suit under the FLSA alleging minimum wage and overtime violations. Defendants filed 14 motions for summary judgment. The Court denied the motions in part and reserved decision on the remainder pending a hearing. *Id.* at *2. Defendants asserted that they were entitled to summary judgment on some of Plaintiffs' claims because there was no genuine dispute that: (i) certain Plaintiffs were properly classified as independent contractors and were not jointly employed by Defendants; (ii) Defendants lacked the requisite knowledge of the hours that Plaintiffs worked; (iii) certain Plaintiffs were subject to the retail or service establishment exemption for overtime wages under 29 U.S.C. § 207(i); (iv) certain Plaintiffs were paid at least the minimum wage; (v) certain Plaintiffs were unable to make the requisite showing of damages; (vi) certain Plaintiffs' claims were barred by the two year statute of limitations in 29 U.S.C. § 255(a); and (vii) certain Plaintiffs were properly paid overtime wages during their employment with MasTec. *Id.* at *6. The Court declined to rule on Defendants' motion as to joint employment status until after the hearing, finding that the Court first must determine whether a joint employer arrangement existed before determining whether a worker was an employee of a joint employer. *Id.* at *13. Second, as to Defendants' argument that they lacked actual or constructive knowledge of the Plaintiffs' allegedly uncompensated overtime work, the Court declined to rule until after the hearing. *Id.* at *14. The Court rejected Plaintiffs' argument that the requirement of actual or constructive knowledge of the employee's uncompensated work hours did not apply to an alleged employer who disavowed the employment relationship and made no attempt to monitor or record an employee's work hours. *Id.* at *16. Third, Defendants argued that they were exempt from providing overtime compensation pursuant to the FLSA's

exemption for qualifying employers of certain employees in a retail or service establishment. *Id.* at *20. The Court ruled that Defendants' argument failed at the threshold issue of whether they employed Plaintiffs in a retail or service establishment. As a result, the Court denied this aspect of the motion. *Id.* at *40. Fourth, Defendants argued that they were entitled to summary judgment on all of Plaintiffs' minimum wage claims because, even if Plaintiffs were Defendants' employees, there was no genuine dispute that Plaintiffs were paid more than the minimum wage rate for each of the hours they worked. *Id.* Plaintiffs argued that the average weekly pay that they approximated did not account for chargebacks and expenses that Defendants deducted from their pay. *Id.* at *42. The Court agreed with Plaintiffs that Defendants' failure to account for chargebacks and expenses prevented the Court from concluding that there was no genuine dispute of fact as to this defense and denied Defendants' motion as to the minimum wage claims. Fifth, Defendants argued that they were entitled to summary judgment on all claims asserted by some Plaintiffs because Plaintiffs could not establish the amount and extent of their uncompensated work. The Court disagreed, ruling that Plaintiffs provided sufficient evidence to raise a genuine dispute of material fact as to this issue and denied the motion. Sixth, Defendants argued that portions of some Plaintiffs' FLSA claims were barred by the statute of limitations because Plaintiffs failed to establish that Defendants knew of or recklessly disregarded the alleged violations as required for application of the three year statute of limitations. The Court declined to address this argument until after the hearing on the summary judgment motions. Finally, Defendants argued that they were entitled to summary judgment on the overtime wage claims that some Plaintiffs asserted as to employment with MasTec because there was no genuine dispute that MasTec correctly calculated and paid the correct overtime amount. The Court agreed with Defendants that the Plaintiffs at issue did not premise their overtime claims arising from their employment with MasTec on the allegation that they worked hours that were not recorded or counted, and instead argued that they were improperly compensated for hours that in fact were counted and recorded. *Id.* at *66. However, because there remained a genuine dispute as to what method of calculation should have been applied to Plaintiffs' regular rates and overtime wages, the Court denied Defendants' motions as to Plaintiffs' overtime claims arising from MasTec employment.

***Buglak, et al. v. Wells Fargo Bank, N.A.,* 2017 U.S. Dist. LEXIS 113742 (E.D. Pa. July 21, 2017).** Plaintiffs, a group of mortgage officers, brought a collective action alleging that Defendant failed to pay overtime wages in violation of the FLSA. Defendant asserted that Plaintiffs were exempt from the FLSA's overtime requirements under the "outside sales exemption." *Id.* at *1. Defendant filed a partial motion for summary judgment on Plaintiff's claims, which the Court granted. Plaintiffs did not have fixed work schedules, as their schedules varied from week to week and they were free to come and go from the office as needed. *Id.* at *2. Plaintiffs also consistently spent time outside of the office attending open houses and meeting with realtors in order to generate business. *Id.* At the outset, the Court explained that the FLSA defines an "outside salesman" as an employee whose primary duty is: (i) making sales within the meaning of § 3(k) of the FLSA; or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and (iii) who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty. *Id.* at *5-6. The Court stated that in their depositions, Plaintiffs admitted that their primary responsibility was to sell residential mortgage loans to customers. Based on this, the Court found that Plaintiffs' primary duty was making sales. *Id.* at *6. The Court further noted that the outside sales exemption requires that the employee be "customarily and regularly" engaged away from the employer's office. *Id.* at *7. The U.S. Department of Labor's regulations provide that an employee can satisfy the "customarily and regularly" requirement by performing sales-related activity outside the office "one or two hours a day, one or two times a week." *Id.* The Court opined that Plaintiffs performed sales activity away from the office on more than an occasional basis. The Court noted that Plaintiffs' deposition testimony demonstrated that they regularly worked away from the office, regularly attended open houses, followed up with the realtors, attended closings, and visited customer homes. *Id.* at *8. The Court held that these customary and regular sales activities exceed the threshold of "one or two hours a day, one or two times a week." *Id.* at *9. The Court therefore determined that Plaintiffs customarily and regularly performed sales activities away from Defendant's place of business. Accordingly, the Court found that Plaintiffs were exempt from the FLSA overtime requirement. As a result, the Court granted Defendant's motion for summary judgment.

***Chaplin, et al. v. SSA Cooper,* 2017 U.S. Dist. LEXIS 92741 (D.S.C. June 16, 2017).** Plaintiffs, a group of stevedores, filed a collective action asserting that Defendant violated the FLSA by misclassifying stevedores as

exempt employees. Plaintiffs alleged that Defendant failed to pay overtime compensation by failing to pay "non-discretionary bonuses" as required by Defendant's employment contracts and compensation plans. *Id.* at *2. Defendant filed a motion for summary judgment on all of Plaintiffs' claims, arguing that Plaintiffs were properly classified as executive employees and were therefore exempt from the overtime pay requirements of the FLSA. *Id.* at *4. The Court first noted that the relevant regulation of the U.S. Department of Labor ("DOL") defines an "executive" employee as any employee: (i) compensated on a salary basis at a rate of not less than $455 per week; (ii) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or sub-division thereof; (iii) who customarily and regularly directs the work of two or more other employees; and (iv) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight. *Id.* at *6. The Court analyzed stevedores' status as exempt executive employees under the regulation, and found that Defendant failed to establish by clear and convincing evidence that stevedores qualified for the executive exemption. *Id.* As to the first prong of the test, the Court agreed with Defendant's claim that stevedores earned at least $40,000 per year, significantly exceeding the salary of $455 per week that an employee must receive to qualify as a "*bona fide* executive." *Id.* at *8. As to the second prong, the Court noted that the DOL regulation states that, as a rule of thumb, an employee who spends over 50% of his time in management has management as his primary duty. *Id.* The Court determined that Plaintiff easily met this requirement, as there was plenty of evidence that stevedores spend the majority of their time supervising. *Id.* at *9. As to the third prong, the Court stated that each stevedore was responsible for overseeing the work of a loading gang of 15 workers, a lashing gang of seven workers, or a gang of seven truck drivers. *Id.* The Court determined that although the number and types of gangs varied, stevedores were assigned to oversee at least one gang's work, and therefore this prong was also fulfilled. However, the Court held that that a reasonable juror could conclude that Defendant has not proven by "clear and convincing evidence" that that the stevedores' limited authority in recommending hiring and firing met the requirements of the fourth prong. At the very least, the Court noted that there were genuine issues of material fact on the weight that Defendant's management gave to the stevedores' recommendations as well as competing testimony on the stevedores' influence on the hiring and firing decisions that precluded granting Defendant's motion for summary judgment. Therefore, the Court denied Defendant's motion for summary judgment.

***Clark, et al. v. Royal Transportation,* 2017 U.S. Dist. LEXIS 132804 (E.D. Mich. Aug. 18, 2017).** Plaintiffs, a group of former employees, filed a collective action alleging that Defendant violated the overtime provisions of the FLSA. Defendant asserted that Plaintiffs were exempt from the overtime provisions of the FLSA under the Motor Carrier Act because they were engaged in interstate commerce. Defendant filed a partial motion for summary judgment as to liability, which the Court granted. Defendant provided charter and shuttle passenger service. Although the vast majority of Defendant's routes were intrastate, drivers could be called upon at any time to travel interstate routes. Plaintiff asserted that they were not exempt from the FLSA overtime regulations and that Defendant failed to pay overtime compensation for hours worked over 40 in a workweek. Defendant admitted that Plaintiffs were not compensated for overtime hours worked, but argued that summary judgment was appropriate as to liability because Plaintiffs could have reasonably been called upon to drive in interstate commerce and were therefore exempt from overtime compensation. *Id.* at *9. The Court stated that the Motor Carrier Act exemption has two requirements, including: (i) the employer must be a carrier whose transportation of passengers or property by motor vehicle is subject to jurisdiction under § 204 of the Motor Carrier Act; and (ii) the employee must engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce. *Id.* at *10-11. The Court noted that the parties agreed that Defendant satisfied the exemption's first requirement, as Defendant was a "motor carrier" and operated a passenger transportation service using "motor vehicles" that are "related to the movement of passengers." *Id.* at *11. However, the parties disputed whether Defendant satisfied the second requirement. Specifically at issue was whether Plaintiffs engaged in activities sufficiently related to interstate commerce so as to bring them within the Motor Carrier Act exemption. Defendant attempted to establish a link to interstate commerce by arguing that: (i) Plaintiffs were capable of driving interstate routes; (ii) Defendant retained discretion to assign interstate routes to Plaintiffs; and (iii) that the Secretary of Transportation had already exercised its jurisdiction over all of Defendant's drivers. *Id.* After viewing the evidence in a light most favorable to Plaintiffs, the Court concluded that, throughout the course of their

employment, Plaintiffs could have been called upon to drive interstate routes. *Id.* at *12. The Court further stated that Defendant adhered to federal regulations by requiring drivers to possess valid CDLs, to comply with FMCSA drug testing requirements, to submit DOT physical examinations, to conduct pre-trip and post-trip inspections on vehicles, and to fill out daily driving logs. *Id.* at *13. The Court found that Plaintiffs understood that they these requirements were mandated by federal regulations. Moreover, the Department of Transportation exercised jurisdiction over Defendant's operations as recently as May 2016. Taken together, the Court held that the undisputed facts reinforced a reasonable expectation of traveling in interstate commerce. As such, the Court held that Defendant sufficiently established entitlement to the Motor Carrier Act exemption and granted Defendant's motion for summary judgment.

***Dewan, et al. v. M-I, LLC,* 858 F.3d 331 (5th Cir. 2017).** Plaintiffs, a group of mud engineers, filed suit under the Fair Labor Standards Act ("FLSA") alleging overtime violations. Defendants moved for summary judgment and the trial court granted Defendant's motion on the basis that Plaintiffs were exempt from the FLSA's overtime requirements. *Id.* at 332. On Plaintiffs' appeal, the Fifth Circuit reversed and remanded. *Id.* Plaintiffs worked at oil fields to ensure that drilling mud was performed adequately. Plaintiffs tested the mud either in a lab trailer or on-site and then made their recommendations regarding the mud drilling. *Id.* at 333. The Fifth Circuit noted that for the FLSA's administrative overtime exemption to apply, the employee must be one: (i) who is compensated on a salary or fee basis at a rate of not less than $455 per week; (ii) whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and (iii) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. *Id.* at 334. It was undisputed that Plaintiffs' compensation was sufficient for the exemption to apply. However, the Fifth Circuit concluded that there were genuine issues of material fact relating to Plaintiffs' primary duties and whether they exercised independent judgment that could not be resolved without making inferences from evidence that were subject to genuine dispute. *Id.* at 335. Furthermore, the Fifth Circuit ruled that because Defendant sought summary judgment on an affirmative defense, it had the burden of establishing beyond doubt all the essential elements of the defense. The evidence established that Plaintiffs provided recommendations, anticipated the customer's concerns with the drilling mud, and addressed those concerns on Defendant's behalf. Based on this evidence, the District Court found that Plaintiffs performed work that directly related to the general business operations of Defendant. *Id.* at 336. However, the Fifth Circuit reasoned that that the exemption applies when the employee is involved with administering the business affairs and not with producing the commodity of the business, and supplying the drilling-fluid systems seemed more related to producing the commodities than administering Defendant's business. *Id.* Accordingly, the Fifth Circuit opined that the District Court erred in granting summary judgment on the issue of whether Plaintiffs' work could be classified as office or non-manual work directly related to the Defendant's general business. *Id.* at 338. Secondly, the Fifth Circuit found that the District Court also erred in its determination that there was no dispute as to whether Plaintiffs exercised discretion and independent judgment with respect to matters of significance. The District Court concluded that the matter of significance over which Plaintiffs exercised discretion and independent judgment was the quality control of the condition of the mud. *Id.* at 339. However, the Fifth Circuit noted that there was little evidence that Plaintiffs had authority to formulate, affect, interpret, or implement management policies or operating practices. *Id.* Furthermore, Plaintiffs testified that they lacked such authority. *Id.* As such, the Fifth Circuit reasoned that a reasonable jury could find that Plaintiffs exercised no discretion as mud engineers and merely applied well-established techniques and procedures. *Id.* at 340. Accordingly, the Fifth Circuit reversed and remanded the decision of the District Court on the grounds that Defendant did not establish its affirmative defense as a matter of law. *Id.*

***Dillow, et al. v. Home Care Network,* 2017 U.S. Dist. LEXIS 27133 (S.D. Ohio Feb. 27, 2017).** Plaintiffs, a group of domestic service employees, brought a putative collective action alleging that Defendant violated the overtime provisions of the FLSA. Defendant filed a motion for summary judgment, which the District Court denied. The action arose due to the U.S. Department of Labor's ("DOL") changes in the FLSA overtime exemptions for domestic care providers. The DOL created a final rule amending the regulations as they related to "companionship services" with an effective date of January 1, 2015. *Id.* at *3. The new regulations stated that domestic-service workers, such as the named Plaintiff in this case who were employed by third-party agencies, were no longer exempt from the mandatory overtime rules. *Id.* Subsequently, several third-party employers of domestic workers brought suit against the DOL in District Court, and it concluded that the DOL exceeded its

rule-making authority in eliminating the FLSA exemption for home health workers, and vacated the rule. *Id.* at *3-4. On appeal, the D.C. Court of Appeals reversed the District Court's order. *Id.* at *4. Following that decision, the DOL issued guidance stating that it would not institute enforcement proceedings for violations of the amended rule until 30 days after the Court of Appeals issued a mandate making its opinion effective, which it did on October 13, 2015. *Id.* The DOL subsequently indicated that it would not bring enforcement actions for violations of the rule prior to November 12, 2015. *Id.* The issue now before the District Court was when exactly the regulations became enforceable. Plaintiff contended that the regulations' listed effective date of January 1, 2015, was when they became enforceable, meaning that employers of affected individuals could be liable for all unpaid overtime worked since that date. *Id.* at *4-5. Defendant contended that, because the regulations were invalidated by the District Court's ruling and were not reinstated before the October 13, 2015 mandate issued by the Court of Appeals, the effective date could not be before the issuance of the mandate. *Id.* at *5. The District Court held that the regulations in question that had already been issued were valid and enforceable; thus, it did not find any new interpretation of the law that would only apply toward future DOL regulations. In light of the District Court's ruling's retroactive application, it found that the enforceability of the DOL regulations at issue in this case should be applied retroactively as well, and that their effective date was therefore January 1, 2015. *Id.* at *7-8. Defendant argued that the DOL's decision not to enforce the new regulations until November 12, 2015, should persuade the Court to find that the regulations only applied prospectively from the date of the Court of Appeals' mandate. *Id.* at *11. The District Court noted that although there was a split in authority regarding this issue, it decided with the growing majority of District Courts that have found that the effective date of the regulations at issue was the effective date for purposes of a private lawsuit. *Id.* at *12. The District Court found that the DOL had more discretion in choosing when and how to enforce its regulations than a reviewing District Court does; therefore, there the clear retroactive effect of the Court of Appeals' decision required it to find that the new overtime regulations for companionship services were in effect as of January 1, 2015. *Id.* The District Court thereby denied Defendant's motion for summary judgment.

***Fernandez, et al. v. Zoni Language Centers, Inc.,* 2017 U.S. App. LEXIS 9178 (2d Cir. May 26, 2017).** Plaintiffs, a group of English language teachers, brought an action alleging that Defendant improperly categorized them as exempt employees and failed to pay them overtime and minimum wage in violation of the FLSA and New York Labor Law ("NYLL"). Defendant filed a motion for summary judgment on Plaintiffs' FLSA claims, which the District Court granted, finding that Plaintiffs failed to state a claim. On appeal, the Second Circuit affirmed the District Court's ruling. Defendant was part of a chain of private, for-profit facilities offering English language instruction. Plaintiffs taught at Defendant's centers and were paid at an hourly rate of $16 to $17 per hour, calculated by reference only to their classroom teaching time. *Id.* at *3-4. Plaintiffs alleged that their preparation and grading of student work represented a material part of their worktime and should be compensated in addition to classroom time. Defendant contended that, as "teachers" at an "educational establishment," Plaintiffs were subject to the FLSA's exemption from minimum wage and overtime requirements for persons "employed in a *bona fide* executive, administrative, or professional capacity." *Id.* at *4. Plaintiffs conceded that they were "teachers" under the applicable regulation, but disputed Defendant's status as an "educational establishment." *Id.* The District Court concluded that Defendant was properly characterized as an " educational institution" within the meaning of the U.S. Department of Labor's ("DOL's") exemption regulations. *Id.* at *5. Accordingly, the District Court dismissed Plaintiffs' FLSA claims and declined to exercise supplemental jurisdiction over their state law claims. The Second Circuit noted that the DOL regulations define "educational establishment" as "an elementary or secondary school system, an institution of higher education or other educational institution." *Id.* The Second Circuit stated that, in applying the plain-language considerations of the words, Defendant was an "educational institution." *Id.* Defendant's primary purpose was to provide English-language instruction to students using prescribed books in a traditional classroom environment, and lesson plans included speaking, listening, writing, and reading English, with student progress assessed on mid-term and final examinations. *Id.* at *9. The Second Circuit held that Plaintiffs therefore were engaged in the transmittal of knowledge to students in much the same way as primary and secondary school teachers. *Id.* at *11. Additionally, the Second Circuit ruled that Defendant was an accredited learning institution and its teachers had completed a program in teaching English as a second language or had at least one year's experience teaching English as a second language. *Id.* at *12. The Second Circuit further explained that the DOL's opinion letters confirmed a breadth of subject-matter areas that may be encompassed by an "educational institution," including programs for automobile, diesel, collision repair, motorcycle, and marine technicians, cosmetology schools, and

daycare providers. *Id.* at *14-15. The Second Circuit stated that, although no DOL opinion letters addressed the status of an English language instructor at a stand-alone language instruction facility, it saw no principled ground for differentiating such a facility from those addressed in other DOL opinion letters. *Id.* at *16. Accordingly, the Second Circuit concluded that, because the FLSA *bona fide* professional exemption applied, Plaintiffs could not state plausible FLSA claims for minimum wage and overtime payments. The Second Circuit therefore affirmed the District Court's ruling dismissing Plaintiffs' FLSA claims.

***Guyton, et al. v. Legacy Pressure Control,* 2017 U.S. Dist. LEXIS 7836 (W.D. Tex. Jan. 18, 2017).** Plaintiffs, a group of operators, brought a collective action alleging that Defendant, an oilfield services company, its president, and its vice-president, failed to pay overtime wages in violation of the FLSA. Operators are responsible for maintaining oilfield pressure control. Operators either worked as part of a two man crew and switched shifts every 12 hours, or as part of a four man crew where each operator was accompanied by a helper for 12 hour shifts. *Id.* at *2-3. Defendants moved for summary judgment on the grounds that Plaintiffs were exempt from the FLSA overtime regulations under the highly compensated executive ("HCE") exemption. *Id.* at *3. Plaintiffs moved for summary judgment, arguing that no FLSA exemptions were applicable to Plaintiffs. *Id.* The Court found that genuine disputes of material fact existed with regard to whether Plaintiffs qualified for the HCE exemption. *Id.* at *8. Defendants argued that Plaintiffs met the $100,000 threshold of the HCE exemption. Further, Defendants asserted that Plaintiffs trained helpers to become operators, directed their work, and provided feedback regarding helpers' work and whether they should be promoted, Plaintiffs' suggestions and recommendations as to the promotion of helpers to operators was given particular weight, and Plaintiffs exercised significant discretion and judgment while on-site. *Id.* Plaintiffs contended that the HCE exemption did not apply because they are manual laborers. In addition, Plaintiffs argued that their work was not directly related to the management or general business operations of the company, that they did not exercise discretion and independent judgment with respect to matters of significance, and their recommendations with regard to the promotion of helpers were not given particular weight. *Id.* at *9-10. The Court held that summary judgment was not appropriate for either party as to the HCE exemption defense because genuine disputes of material fact existed with regard to whether Plaintiffs qualified as manual laborers. Defendants maintained that Plaintiffs' primary duty was controlling and maintaining the pressure of grease injected into the wells so as to prevent blowouts, which was accomplished by visually monitoring gauges and turning a knob to adjust grease levels. Defendants argued that other tasks considered manual labor – *i.e.*, connecting hoses to the skid; filling up the grease unit on a tote; tightening nuts with a wrench, torque wrench, or hammer; moving hoses to keep them from getting tangled on the well head; using hand pumps; torque testing; moving grease around with a forklift or bringing it off the truck; opening and closing the tool trap; and going up in a man lift – only constituted 10% of Plaintiffs' job duties. *Id.* at *10. Defendants further stated that the other 90% of Plaintiffs' jobs duties, including visually monitoring the gauges and turning knobs, did not qualify as manual labor. *Id.* The Court opined that Plaintiffs introduced evidence showing that they performed their job duties out in an oilfield, and that their primary duties included operating pressure control equipment, monitoring gauges, supervising the set-up of equipment, and rigging jobs up and down. *Id.* at *11. The Court further stated that Plaintiffs' evidence showed that they worked with boots, hard hats, coveralls, and tools, and their work outdoors was "hot, dangerous, and sweaty." *Id.* at *12. With regard to Defendants' argument that Plaintiffs only spent 10% of their time performing manual labor, Plaintiffs alleged that they spent the rest of their time simply waiting to perform manual tasks, and that waiting cannot be considered a primary duty. *Id.* at *12-13. The Court found that genuine disputes of material fact existed regarding several key issues, including Plaintiffs' primary duties, whether that duty should be considered manual labor, the importance of other tasks performed by Plaintiffs, and how much time was spent performing manual labor. *Id.* at *13-14. Therefore, the Court denied the parties' motions for summary judgment on the exemption issue.

***Jackson, et al. v. Sweet Home Healthcare,* 2017 U.S. Dist. LEXIS 51736 (E.D. Pa. April 5, 2017).** Plaintiffs, a group of home health aides and direct care workers, brought an action alleging that Defendant misclassified them as independent contractors and therefore failed to pay overtime wages in violation of the FLSA and the Pennsylvania Minimum Wage Act ("PMWA"). Defendant argued that under U.S. Department of Labor ("DOL") regulations, Plaintiffs were exempt from the FLSA's protection prior to January 1, 2015. Defendant also asserted that regulations that went into effect on January 1, 2015, that would potentially nullify the prior exemption were invalid and should be struck down. *Id.* at *3. With respect to their first argument, Defendant pointed to 29 U.S.C.

213(a)(15), which excludes from the FLSA overtime protections "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." *Id.* at *4-5. Until the new regulations took effect on January 1, 2015, the DOL interpreted the exclusion to include home care workers employed by third-party care providers. Defendant argued that Plaintiffs fell under the scope of this exemption and that the Court should therefore dismiss all of the FLSA claims to the extent they sought overtime compensation prior to January 1, 2015. Plaintiffs countered that FLSA exemptions are affirmative defenses and they had no obligation to plead around an affirmative defense. They argued that, even so, they had pleaded that the exemptions do not apply and that their duties included "household services." The Court noted that unless it is apparent from the face of the complaint that an FLSA exemption applied, granting a motion to dismiss based on an exemption affirmative defense would be inappropriate. Thus, the Court held that even though it appeared that the exemption ultimately may be the subject of some controversy, because it was not clear from the face of the complaint that the exemption applied and because the application of an exemption was an affirmative defense, the Court declined to grant Defendant's motion to dismiss. The Court stated that even if the exemption did apply prior to January 1, 2015, the DOL's regulations mandating overtime pay for companionship service providers employed by third-party agencies went into effect on January 1, 2015 and eliminated that exemption. *Id.* at *7-8. Defendant also argued that the regulation was invalid, and it asserted that Congress, in 1974, intended the exemptions in the statute to apply to individuals employed by third-party agencies, and that the DOL exceeded its authority in removing that exemption through regulation. *Id.* at *9. The Court opined that Congress left to the DOL the authority to determine that third-party agency employees belonged within the exemption or that that such personnel did not belong in the exemption. *Id.* at *10. The Court also stated that the DOL's new regulations passed muster, as the DOL simply recognized a change in the home care industry that made those workers more like professionals with a vocation than casual babysitters. *Id.* Thus, the Court found that even if Plaintiffs were exempt employees prior to January 1, 2015, Plaintiffs were not exempt employees after January 1, 2015. Accordingly, the Court denied Defendant's motion.

***LaCurtis, et al. v. Express Medical Transporters,* 856 F.3d 571 (8th Cir. 2017).** In this consolidated putative class and collective action, Express Medical Transporters and Hospital Shuttle Service, Inc. ("Defendants") appealed from an order of the District Court denying Defendants' motion for summary judgment and granting partial summary judgment for Plaintiff on the issue of Defendants' liability to pay unpaid overtime under the FLSA. The Eighth Circuit affirmed the District Court's ruling. Defendants were licensed interstate motor carriers regulated by the Federal Motor Carrier Safety Administration ("FMCSA"), a division of the U.S. Department of Transportation ("DOT"). Defendants provided non-emergency medical and student transportation and engaged in interstate commerce. To provide those services, Defendants operated a fleet of vehicles, including several wheelchair-equipped paralift vans. The paralift vans were originally designed and manufactured to carry up to 15 passengers. *Id.* at 573. Before being placed into service, the vans were redesigned and converted by a third-party company into paralift vans by permanently removing some of the seats to allow the installation of up to two wheelchair positions. *Id.* at 574. Defendants asserted that modified paralift vans could transport up to two passengers in wheelchairs and up to five additional passengers. *Id.* The parties filed cross-motions for summary judgment on the issue of whether the paralift vans were "designed or used to transport more than 8 passengers" for purposes of § 306 of the TCA. *Id.* Plaintiff urged the District Court to defer to the U.S. Department of Labor ("DOL") Field Assistance Bulletin No. 2010-2 ("FAB 2010-2"), in which the Deputy Administrator of the Wage & hour Division ("WHD") of the DOL announced that, for enforcement purposes, the WHD would determine whether a vehicle was "designed or used to transport more than 8 passengers" "based on the vehicle's current design and the vehicle capacity as found on the door jamb plate." *Id.* The WHD stated that if the seating capacity was reduced "to accommodate a wheelchair, [the WHD] will count the resulting capacity plus add 1 for each wheelchair placement." *Id.* at 575. Defendants argued that the paralift vans that Plaintiff drove were "designed or used to transport more than 8 passengers" based on their original design and as modified to accommodate two wheelchairs, which Defendants argued counted as four seating positions. *Id.* Defendants alternatively asserted they should not be liable for overtime because they relied in good faith on the results of a 2010 compliance examination conducted by the DOL that indicated Defendants' overtime policies complied with the FLSA. *Id.* at 576. The Eighth Circuit noted that it must determine whether the vans Plaintiff drove, which were originally designed and manufactured to transport up to 15 passengers, were "designed or used to transport more than 8 passengers (including the driver)" for purposes of § 306(c) of the TCA. *Id.* at 577.

Reviewing the statutory language in the TCA and giving "some deference" to the WHD interpretation of § 306 in FAB 2010-2, the District Court determined that the paralift vans that Plaintiff operated were not "designed or used to transport more than 8 passengers." *Id.* at 577-578. As such, the District Court found that Plaintiff was a "covered employee" under the TCA and entitled to overtime pay. *Id.* at 578. Defendants argued that, in reaching that conclusion, the District Court misinterpreted or ignored the clear statutory language of the TCA and erred in giving deference to the WHD's interpretation of the statutory language. *Id.* The Eighth Circuit agreed with the District Court that, although originally designed to carry up to 15 passengers, the vans at issue in this case went from the original manufacturer to a third-party manufacturer who redesigned them and converted them into paralift vans capable of safely transporting up to two wheelchairs. To accommodate the wheelchairs, the third-party manufacturer removed some of the seats, altered the roof and doors, and installed wheelchair anchors, ramps, and lifts in accordance with the redesign. When the conversion process was complete, the third-party manufacturer placed new placards on the door pillars to comply with the labeling requirements in § 571.110 S4.3 for tire and loading information. *Id.* After those substantial modifications, the paralift vans Plaintiff drove could seat no more than seven passengers. In light of the comprehensive redesign and conversion process that the paralift vans underwent before being placed into service, the Eighth Circuit agreed with the District Court that the paralift vans were not "designed or used to transport more than 8 passengers" under TCA § 306(c). *Id.* Accordingly, the Eighth Circuit affirmed the District Court's decision granting Plaintiff's motion for summary judgment on the issue of liability.

***Navarro, et al. v. Encino Motorcars, LLC*, 845 F.3d 925 (9th Cir. 2017).** Plaintiffs, a group of service advisors, brought a collective action alleging that Defendant, an automobile dealership, failed to pay overtime wages in violation of the FLSA. Defendant filed a motion to dismiss contending that the position and duties of a service advisor brought Plaintiffs within § 213(b)(10)(A), which establishes an exemption from the FLSA overtime provisions for a salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles. The District Court agreed and granted the motion to dismiss. The Ninth Circuit reversed, giving deference to the U.S. Department of Labor's ("DOL") interpretation of the FLSA. In 1970, the DOL issued an interpretation regulation in which it concluded that service advisors did not fall within the exemption of the FLSA. *Id.* at 928. Several case law authorities rejected the DOL's interpretation, and in 1978, the DOL issued a new opinion letter interpreting the exemption to include dealership "service advisors" who sell "repair and maintenance services" for vehicles. *Id.* The DOL issued another regulation in 2011 that excluded service advisors from the exemption under § 213(b)(10)(A). *Id.* at 928-29. The Ninth Circuit previously relied on the DOL's 2011 regulation to hold that Plaintiffs were eligible for overtime premium pay. On further appeal, the U.S. Supreme Court reversed the decision, holding that the regulation was arbitrary and capricious for lack of even minimal supporting analysis. The Supreme Court vacated the judgment and remanded the action to the Ninth Circuit to reinterpret the statute without giving deference to the DOL's 2011 regulation. *Id.* at 927. On remand, the Ninth Circuit assumed without deciding that it must give no weight to the agency's interpretation and the regulation, and interpret the statute in the first instance. As a result, the Ninth Circuit determined that under the most natural reading of the FLSA, Congress did not intend to exempt service advisors. The Ninth Circuit noted that, even if the text were ambiguous, the legislative history confirmed that Congress intended to exempt only salesmen selling cars, partsmen servicing cars, and mechanics servicing cars, and did not intend to exempt service advisors. The Ninth Circuit reasoned if it read the exemption's list of job titles more broadly – to encompass all persons whose functional roles meet the dictionary definitions of the terms salesman, partsman, or mechanic – a service advisor could be considered to sell services and would therefore qualify as a "salesman." *Id.* at 930. However, the Ninth Circuit opined that even assuming that Congress intended a broad interpretation of the term "salesman," not every "salesman" was exempt, as the statute covers only those who are "primarily engaged in selling or servicing automobiles." *Id.* at 930-31. The Ninth Circuit concluded that the phrase "primarily engaged in selling . . . automobiles" encompassed only those who are actually and primarily occupied in selling cars, and that the phrase "primarily engaged in . . . servicing automobiles" encompassed only those who are actually and primarily occupied in the repair and maintenance of cars. *Id.* at 933. For these reasons, the Ninth Circuit held that since service advisors met neither definition, they were not exempt under § 213(b)(10)(A) of the FLSA. The Ninth Circuit thereby reversed the order dismissing Plaintiffs' claims for overtime compensation and remanded the action to the District Court for further proceedings.

***Perry, et al. v. Randstad General Partner LLC,* 2017 U.S. App. LEXIS 23297 (6th Cir. Nov. 20, 2017).** Plaintiffs, a group of staffing managers, filed a collective action under the FLSA alleging that they were misclassified as exempt employees and improperly denied overtime pay. *Id.* at *4. The District Court granted summary judgment in favor of Defendant, ruling that the Plaintiffs were exempt from the overtime requirements of the FLSA pursuant to the administrative exemption. On Plaintiffs' appeal, the Sixth Circuit affirmed in part and reversed in part. *Id.* at *57. At the outset, the Sixth Circuit noted that determining an employee's primary duties and whether he or she is covered by the administrative exemption is a fact-intensive inquiry that focuses on the employee's actual day-to-day activities rather than more general job descriptions contained in position descriptions and performance evaluations. *Id.* at *15. The Sixth Circuit ruled that the District Court properly determined that the primary duties that Plaintiffs exercised as account managers and assistant branch managers involved the exercise of sufficient discretion and independent judgment, such that the administrative exemption to the FLSA applied to those employees. Accordingly, the Sixth Circuit affirmed summary judgment in favor of Defendant relative to the time that Plaintiffs worked in such positions. However, the Sixth Circuit determined that the District Court erred in granting summary judgment to Defendant with respect to the time that Plaintiffs worked as staffing consultants and talent acquisition specialists. The Sixth Circuit determined that the record contained evidence showing that, during the time that they held such positions, Plaintiffs performed primary duties that included non-exempt sales activities and routine recruiting tasks. *Id.* at *48. Further, the Sixth Circuit found that, with respect to the time that Plaintiffs worked as staffing consultants, the District Court erred in finding that the good faith defense precluded liability as a matter of law because the U.S. Department of Labor ("DOL") opinion letter upon which Defendant relied for its exempt classification specified circumstances and facts that did not apply to Plaintiffs. *Id.* at *54. The Sixth Circuit held that the DOL opinion letter did not provide a clear answer to Defendant's situation regarding the classification of talent acquisition specialists and staffing consultants. Additionally, Defendant did not show that its reliance was in good faith as a matter of law because Defendant arguably had knowledge that the duties of its employees could vary significantly based on the clients serviced, the market, and the branch manager. *Id.* at *55. Accordingly, the Court affirmed in part and reversed in part.

***Pierce, et al. v. Wyndham Vacation Resorts, Inc*., 2017 U.S. Dist. LEXIS 165819 (E.D. Tenn. Oct. 6, 2017).** Plaintiffs, a group of sales representatives, filed a collective action alleging that Defendant misclassified sales representatives as exempt and thereby failed to pay overtime compensation in violation of the FLSA. Defendant filed a motion for summary judgment on the grounds that Plaintiffs were exempt from the overtime provisions of the FLSA as highly compensated employees. Defendant argued that Plaintiffs fall within the highly compensated employee exemption because they earned more than $100,000.00 annually and they customarily and regularly performed one or more executive or administrative duties. *Id.* at *4. Plaintiffs asserted that Defendant could not claim the exemption pursuant to 29 C.F.R. § 541.601 because no portion of the compensation that Plaintiffs received from Defendant was paid on a salary basis as was required in order for the employer to claim that an employee is an exempt executive. *Id.* at *5. Plaintiffs argued that even if Defendant was permitted to pay executive employees on a fee basis, Defendant could not establish that they paid Plaintiffs on a fee basis because commissions did not constitute payment on a fee basis. *Id.* Further, Plaintiffs contended that even if Defendant could establish the compensation requirements, Defendant could not satisfy the streamlined duties test by which highly compensated employees' exempt status may be determined. *Id.* at *5-6. The Court found that the commissions paid did not constitute a fee basis. The Court held that the FLSA states that the total annual compensation must include at least $455 per week paid on a salary or fee basis and that it may also include commissions. The Court opined that the requirement of $455 per week paid on a salary or fee basis simply meant that at least $23,600 ($455 x 52 weeks) of the $100,000 per year was guaranteed. *Id.* at *12. The Court found that Plaintiffs were paid commissions only when they produced a sale, and were not paid a salary or fee basis in which Defendant could claim the highly compensated employee exemption. *Id.* at *22. Because the Court determined that Defendant failed to show Plaintiffs were paid a total annual compensation, the Court reasoned that it was unnecessary to address whether Defendant established the executive exemption duties test. *Id.* at *23. The Court briefly addressed the issue and determined that Defendant failed to establish that there was no genuine issue of material fact supporting summary judgment on this issue. To the contrary, it appeared to the Court that Defendant did not provide a guaranteed salary and that sales representatives' primary duty was sales, not management. *Id.* at *24. Further, the Court found that Defendant also had not

established that Plaintiffs had the authority to hire or fire or that they "customarily and regularly" directed the work of other employees. *Id.* Accordingly, the Court denied Defendant's motion for summary judgment.

***Ristovski, et al. v. Midfield Concession Enters*, 2017 U.S. Dist. LEXIS 133597 (E.D. Mich. Aug. 22, 2017).** Plaintiffs, a group of five restaurant employees, filed a collective action alleging that Defendant misclassified them as exempt employees under the executive exemption of the FLSA and thereby failed to pay overtime compensation. Defendant filed a motion for summary judgement and the Court denied the motion, finding that genuine issues of material fact existed. At the outset, the Court noted that case law authorities determine whether an employee meets the executive exception by applying the U.S. Department of Labor ("DOL") regulations, which provide various tests, including: (i) the employee is compensated on a salary basis at a rate of not less than $455 per week; (i) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or sub-division thereof; (iii) who customarily and regularly directs the work of two or more other employees; and (iv) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of employees are given particular weight. *Id.* at *16-17. The Court noted that that a fact issue existed as to the fourth element. The Court found that the named Plaintiffs Lewis and Schumacher testified that they had to obtain final approval from their supervisor on hiring and firing decisions, but that their suggestions were given weight. However, the Court opined that there were only two hiring and firing scenarios, and therefore Plaintiffs' input as to the hiring and firing could be characterized either as an "occasional suggestion" or as routine participation. *Id.* at *21. At the summary judgment stage, the Court determined that those two instances were insufficient to conclusively establish that Defendant relied on Plaintiffs' input often enough that the input was given "particular weight." *Id.* The Court thereby found that Defendant failed to meet its burden in establishing that Plaintiffs were subject to the FLSA's executive exemption. Accordingly, the Court denied summary judgment as to this defense.

(xii) FLSA Collective Actions For Donning And Doffing

***Lyons, et al. v. Conagra Foods Packaged Foods, LLC,* Case No. 12-CV-245 (E.D. Ark. Aug. 30, 2017).** Plaintiffs, a group of employees at a food plant, filed a collective action alleging that they and others similarly-situated were not paid for all time worked in violation of the FLSA and the Arkansas Minimum Wage Act ("AMWA"). Plaintiffs specifically alleged they were not paid for time spent changing clothes and walking between the donning and doffing area before and after shifts, and for time spent checking in and checking out box cutters, knives and Kevlar gloves before and after shifts. *Id.* at 1. The Court had previously determined that § 203 of the FLSA would apply to Plaintiffs' claims under the AMWA, and it granted Defendant's motion for summary judgment on Plaintiffs' federal claims for time spent donning, doffing, and walking. *Id.* The Court then set aside the portion of its order finding that § 203 would apply to claims under the AMWA in light of the Arkansas Supreme Court's holding in *Gerber Products Co. v. Hewitt*, 2016 Ark. 222 (2016), which held that the § 203(o) exception to donning and doffing rules for unionized employees did not apply to AMWA claims. *Id.* at 2. Subsequently, the Arkansas General Assembly legislatively overruled *Gerber* on the basis that the Arkansas Supreme Court misinterpreted state law and failed to reflect the legislature's intent. *Id.* The Court had previously determined that the collective bargaining agreements between Defendant and its Unions historically had excluded compensation for donning and doffing activities by longstanding custom and practice. Therefore, in light of the clarification provided by the Arkansas General Assembly, the Court determined that the Arkansas Supreme Court would abandon its decision in *Gerber* and interpret the AMWA to hold that § 11-4-205 would protect the sanctity of the collective bargaining agreement. *Id.* at 4. Accordingly, the Court found that Plaintiffs' state law donning, doffing, and walking claims should be dismissed. *Id.* The Court determined that Plaintiffs' tool time claims also failed as a matter of law because even if the activity of checking the knives in and out from the guard shack was an intrinsic part of Plaintiffs' principal activities, the time spent engaging in these activities was *de minimis*, and took no longer than a few minutes. *Id.* Accordingly, the Court granted Defendant's motion for summary judgement.

(xiii) Foreign Worker Issues In Wage & Hour Class Actions

***Dorseli, et al. v. Gonzalez*, 2017 U.S. Dist. LEXIS 158245 (M.D. Fla. Sept. 27, 2017).** Plaintiffs, a group of migrant and seasonal farm workers, filed an action seeking damages, injunctive relief, and declaratory relief for

Defendants' alleged violations of certain provisions of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). Defendants moved to dismiss for failure to state a claim, arguing the Plaintiffs failed to set forth sufficient allegations to support individual liability that they were "employers" under the AWPA because Plaintiffs failed to allege that Defendants exercised day-to-day control over Plaintiffs' employment. The Court granted the motion in part and denied it in part. The Court noted that the AWPA expressly defines "employ" as synonymous with the term "employ" in the FLSA, and therefore an entity that employs agricultural workers under the FLSA necessarily employs the workers for the purposes of the AWPA. *Id.* at *4. Plaintiffs alleged that Defendants acted as farm labor contractors and that, in exchange for monetary payment, Defendants recruited, transported, and furnished Plaintiffs for employment harvesting corn at various farms, thereby meeting the AWPA definition of employer. *Id.* at *5. Plaintiffs also alleged that Defendants had control over their pay, including tax withholdings. The Court held that Defendants cited no authority holding that they could not be held individually liable if they met the definition of agricultural employer under the AWPA, and therefore Plaintiffs' allegations were sufficient. Defendants argued that Plaintiffs asserted the allegations under each count in their complaint only against "Defendants" and did not allege how each Defendant was involved in the wrongdoing. *Id.* at *6. Plaintiffs responded that Defendants acted in concert to commit the alleged acts, but requested leave to amend if the Court disagreed. *Id.* The Court noted that Plaintiffs identified each Defendant as a farm labor contractor and asserted that, in exchange for monetary payment, each recruited, transported, and furnished Plaintiffs and other migrant and seasonal workers for employment harvesting corn. The Court concluded that these allegations were sufficient. Plaintiffs further alleged that Defendants willfully filed fraudulent information returns in violation of 26 U.S.C. § 74343. Plaintiffs asserted that the W-2 forms filed by Defendants listed only a portion of their actual earnings, which substantially reduced Defendants' obligation for payment of certain taxes and worker's compensation premiums. *Id.* at *7. The Court explained that there are three elements to a § 7434 claim, including: (i) that Defendants issued information returns; (ii) the information returns were fraudulent; and (iii) Defendants willfully issued the returns. *Id.* at *7-8. The parties did not dispute the first element, but Defendants sought dismissal on the grounds that Plaintiffs failed to allege facts to show that Defendants fraudulently filed returns or that they could be held personally liable. *Id.* at *8. In particular, Defendants argued that Plaintiffs failed to identify which of Defendants' names, if any, were on the W-2 forms, who filed them, or what facts supported the allegation that the conduct was willful. The Court agreed with Defendants. The Court ruled that Plaintiffs alleged in a conclusory fashion that Defendants willfully filed W-2 forms containing fraudulent information regarding Plaintiffs' earnings, but offered little other factual detail. The Court, therefore, dismissed the count with leave to amend. Accordingly, the Court granted in part and denied in part Defendants' motion to dismiss.

(xiv) Independent Contractor Issues In Wage & Hour Class Actions

***Battle, et al. v. DirecTV,* 2017 U.S. Dist. LEXIS 148790 (N.D. Ala. Sept. 14, 2017).** Plaintiffs, a group of cable installation technicians, brought a claim alleging overtime violations of the FLSA. Defendant moved for summary judgment on the grounds that: (i) Plaintiffs were independent contractors; (ii) even if Plaintiffs were employees, Defendant was not their joint employer; (iii) even if Plaintiffs were employees, Defendant was not liable based on the *§ 7(i)* exemption of the FLSA; and (iv) Plaintiffs failed to present sufficient evidence of their damages. *Id.* at *6. The Court denied Defendant's motion as to the first three grounds, but granted the motion as to damages, ruling that Plaintiffs failed to present sufficient evidence to support their claim of damages. *Id.* at *25. There were wide-ranging discrepancies between Plaintiffs' estimates of their own damages in their testimony and discovery responses, and some Plaintiffs could not even explain how they came up with their damage numbers. *Id.* at *27. The Court ruled that Plaintiffs could not meet their evidentiary burden with bare assertions that they possessed evidence that supported their damages claim, as they must show documents or identify expert witnesses that would allow a jury to reasonably calculate their damages. *Id.* at *28. Because Plaintiffs failed to establish damages, the Court ruled that summary judgment was appropriate. *Id.* at *25. The Court denied the motion as to independent contractor status, as Plaintiffs alleged that Defendant controlled work hours, the length of the workweek, requests for time off, the types of work assigned to technicians, as well as the manner and method of work. *Id.* at *9-10. Defendant controlled the clothing, grooming, and appearance of technicians, and prohibited technicians from performing cable installations for other companies. *Id.* at *10. The Court ruled that in considering all these factors, it could not find as a matter of law that Plaintiffs were independent contractors. *Id.* at *15. As to joint employer status, the Court found that in utilizing an economic realities test, genuine issues of material fact existed as to whether Plaintiffs were economically dependent on Defendant. Accordingly, the Court

held that summary judgment was not appropriate on the joint employer issue. *Id.* at *21. The Court also ruled that it could not find, as a matter of law, that Defendant qualified for the § 7(i) exemption because under the 29 U.S.C. § 207(i) exemption of the FLSA, the employer has the burden of establishing some proportionality between the compensation to the employees and the amount charged to the customer. The Court opined that because the customers paid nothing for the satellite cable installation that Plaintiffs performed, Defendant could not meet its burden of showing proportionality by clear and affirmative evidence. *Id.* at *25.

***Braxton, et al. v. Eldorado Lounge, Inc.*, 2017 U.S. Dist. LEXIS 178191 (D. Md. Oct. 27, 2017).** Plaintiffs, a group of exotic dancers, filed a collective action alleging that Defendants misclassified dancers as independent contractors and thereby failed to pay minimum wage in violation of the FLSA, the Maryland Wage & Hour Law ("MWHL"), and the Maryland Wage Payment and Collection Law ("MWPCL"). Plaintiffs filed a motion for partial summary judgment as to Defendants' liability and with respect to their affirmative defenses on four issues, including: (i) whether Plaintiffs were employees of Defendants for purposes of the FLSA, MWHL, and MWPCL; (ii) whether Defendants violated the FLSA, MWHL, and MWPCL by failing to pay Plaintiffs a minimum wage; (iii) whether Plaintiffs were entitled to recover damages equal to the minimum wage for each week while employed by Defendants; and (iv) whether Defendants' affirmative defenses could be applied to mitigate or negate the award of wages and damages. *Id.* at *12. As to the first issue, the Court found that analysis of the undisputed facts and application of the six factors of the economic realities test revealed that as a matter of law, Plaintiffs were employees of Defendants. *Id.* at *21-22. The Court therefore granted Plaintiffs' motion as to whether they were employees of Defendants. As to the second issue, since Plaintiffs were employees of Defendants, they were entitled to a minimum wage of at least $7.25 an hour if they were employed in an "enterprise engaged in commerce." *Id.* at *23. However, Defendants argued that they did not meet the $500,000 gross sales threshold required, because although one club exceeded $500,000 in gross sales, the other had not. *Id.* at *24. The Court reasoned that on the evidence presented, which must be construed in the light most favorable to Defendants, it could not conclude as a matter of law that Defendants were either a unified operation or subject to common control. *Id.* at *29. Accordingly, the Court denied the motion as to Defendants' violation of the FLSA, since Plaintiffs failed to demonstrate that the clubs were collectively an enterprise engaged in commerce. *Id.* at *30. As to Plaintiffs' state law claims, the Court noted that Plaintiffs asserted that the definition of "commissioned employee" should be borrowed from the FLSA. Plaintiffs argued that by this standard, Defendants were required to prove that Plaintiffs: (i) were employed by a retail or service establishment; (ii) had a regular rate of pay at least 150% of the minimum wage for each hour worked; and (iii) had more than half of their total compensation composed of commissions. *Id.* at *30-31. The Court disagreed and held that the FLSA's reference to commissions was not equivalent to the MWHL's provision. The Court found that the FLSA only considers commissions in the context of retail and service establishments. *Id.* at *31. Therefore, the Court denied Plaintiffs' motion for summary judgment as to the MWHL claims. In addition, the Court also denied summary judgment as to whether Plaintiffs were entitled to recover wages because it denied the motion with respect to whether Defendants violated the FLSA. Accordingly, the Court granted in part and denied in part Plaintiffs' motion for summary judgment.

***Burrell, et al. v. Toppers International*, 2017 U.S. Dist. LEXIS 58546 (M.D. Ga. April 18, 2017).** Plaintiffs, a group of entertainers, alleged that Defendant improperly classified them as independent contractors and failed to pay them minimum wage in violation of the FLSA. *Id.* at *2. Plaintiffs filed a motion for summary judgment, contending that they were employees within the meaning of the FLSA, not independent contractors. The Court granted the motion. The Court noted that, to determine whether an individual falls into the category of covered "employee" or exempted "independent contractor," it must look to the economic reality of the relationship between the alleged employee and alleged employer and whether that relationship demonstrated dependence. *Id.* at *2. The Court considered six main factors in determining the economic reality of the parties. As to the first factor – the nature and degree of control – the Court determined that Defendant exercised significant control over the manner in which the entertainers' work was performed. Defendant set the entertainers' schedules, fined entertainers if they were late or missed a shift, required mandatory house fees and tip-outs, set minimum prices for dances, and had rules on how entertainers performed on stage. *Id.* at *3. Based on all of the undisputed facts, the Court found that Defendant exercised significant control over the work of its entertainers, which weighed in favor of finding that the entertainers were employees. *Id.* As to the second factor – the opportunity for profit or loss – the Court opined that, although the entertainers could negotiate the rate customers paid them for

dances, they had limited opportunities to increase their profit. Further, other than the mandatory fees they paid to dance, the entertainers had no risk of loss. In contrast, Defendant had extensive control over the entertainers' opportunity for profit because it controlled the location, facilities, marketing, and inventory of beverages for the club and also had a much bigger risk of loss because it was responsible for all rents, utilities, maintenance, insurance, and advertising for the club. *Id.* at *4. Thus, the Court concluded this factor weighed in favor of finding that the entertainers were economically dependent on Defendant and therefore its employees. The third factor was "the alleged employee's investment in equipment or materials required for his task, or his employment of workers." *Id.* Relative to that factor, Defendant was responsible for all investments necessary for the entertainers to do their work, including the facility, stage, marketing, bar, and security, which the Court stated weighed in favor of finding that the entertainers were economically dependent on Defendant and therefore its employees. *Id.* at *5. The fourth factor was "whether the service rendered requires a special skill." *Id.* The Court held that it was undisputed that no prior experience or formal training was required to work as an entertainer and therefore this factor also weighed in favor of finding that the entertainers were employees. The fifth factor was "the degree of permanency and duration of the working relationship." *Id.* The Court reasoned that this factor was neutral because the present record did not indicate whether the entertainers' working relationship with Defendant was exclusive, and it did not establish that the entertainers had a contract with Defendant for a specific term. The sixth factor was "the extent to which the service rendered is an integral part of the alleged employer's business." *Id.* at *6. Defendant agreed that entertainers were integral to its operation, and the Court therefore found that this factor weighed in favor of finding that entertainers were employees. Accordingly, the Court concluded that Plaintiffs were employees within the meaning of the FLSA. The Court, therefore, granted Plaintiffs' motion for summary judgment on the issue that Defendant's entertainers were employees, not independent contractors.

***Carrow, et al. v. Fedex Ground Package Systems,* 2017 U.S. Dist. LEXIS 48536 (D.N.J. Mar. 30, 2017).** Plaintiffs, a group of truck drivers, brought an action alleging that Defendant incorrectly classified them as independent contractors in violation of the New Jersey Wage Payment Law ("NJWPL") and the New Jersey Consumer Fraud Act ("NJCFA"). Defendant filed a motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), which the Court granted in part. Defendant engaged approximately 300 truck and van drivers in New Jersey. The contract between Defendant and drivers, the Operating Agreement ("OA"), classified drivers as independent contractors. For some agreements, Defendant allegedly required the driver to create a limited liability company or corporation and sign the OA through the business entity. Plaintiffs created corporate entities at Defendant's request. Prior to and after entering into the OAs, Defendant allegedly made several representations regarding the nature of the drivers' jobs, including that drivers could "be their own boss," "grow their own business," and "partner" with Defendant. *Id.* at *2. The OA stated that drivers were independent contractors, had sole control over their business, and had a proprietary and entrepreneurial interest in the delivery routes. *Id.* at *2-3. Plaintiffs contended that, in reality, Defendant treated drivers as employees because it regulated or controlled vehicle appearance, vehicle maintenance, liability insurance, driver reports, driver uniforms, and driver service areas; determined the prices charged for services, route schedules, electronic equipment, forms for paperwork, and approval of substitutes and assistants; and actively monitored how drivers operated their vehicles, carried packages, and completed paperwork. *Id.* at *3. The Court found that the thrust of Plaintiffs' case was that they and Defendant had an employment relationship, with arguments centered around Defendant's control over Plaintiffs' jobs. *Id.* at *13-14. The Court noted that the New Jersey appellate case law authorities, however, specifically had held that employment relationships were not governed by the NJCFA. The Court determined that Plaintiffs' fraud allegations were not cognizable under the NJCFA, and must be dismissed. As to Plaintiffs' NJWPL claims, the Court stated that the NJWPL governed "the time and mode of payment of wages due to employees." *Id.* at *14. Defendant argued that Plaintiffs could not bring a claim under the NJWPL because they were not parties to the OAs. The NJWPL defines "employer" as "any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person in this State." *Id.* at *14-15. The Court opined that the provision did not require an entity to render payment directly to a person to qualify as an employer. *Id.* at *15. "Employee" in turn is defined as a "person," but a person similarly need not receive wages directly from the employer to constitute an employee. Rather, the Court reasoned that it was "obliged to look behind contractual language to the actual situation – the status in which parties are placed by relationship that exists between them." *Id.* Thus, the Court determined that it must analyze more than the

contract formed between Defendant and the corporate entities formed by Plaintiffs in order to determine whether Plaintiffs were employees. Therefore, the Court declined to dismiss Plaintiffs' NJWPL claim.

***Derolf, et al. v. Risinger Brothers Transfer, Inc.,* 2017 U.S. Dist. LEXIS 60827 (C.D. Ill. April 21, 2017).** Plaintiffs, a group of truck drivers, filed suit against Defendant alleging violations of the FLSA, Internal Revenue Code ("IRC"), Truth in Leasing Act, ("TILA"), as well as several state laws. Defendant moved to dismiss pursuant to Rule 12(b)(6). The Court granted Defendant's motion as to all federal claims, and therefore did not address the state law claims. *Id.* at *26. First, Plaintiffs claimed that they were improperly misclassified as independent contractors and were owed unpaid wages under the FLSA. *Id.* at *3. The Court employed the FLSA's economic reality test and rejected Plaintiffs' claim that they were employees. *Id.* at *5. The Court determined that the operating agreements indicated that Plaintiffs exercised vast control over how they worked. *Id.* at *6. Plaintiffs were permitted to contract someone else to drive the trucks and controlled the hours, salaries, training, and hiring of drivers. *Id.* Plaintiffs made significant investment in their own equipment, leased trucks that had fixed termination dates, and were responsible for their profitability. *Id.* at *16. Plaintiffs were not exclusively dependent on Defendant since the operating agreement allowed them to work for other carriers and decline work assignments from Defendant. *Id.* at *11. While Plaintiffs were an integral part of Defendant's business, the Court found that this factor alone did not outweigh all the other factors, weighing heavily in favor of a finding that Plaintiffs were independent contractors and not employees. *Id.* at *18. Secondly, because the Court concluded that Plaintiffs were independent contractors, it dismissed Plaintiffs' claims that Defendant willfully violated the IRC by filing fraudulent information returns classifying Plaintiffs as independent contractors. *Id.* The Court noted that regardless, Plaintiffs had not properly pled a violation of the IRC, as the amount of wages stated in the form were correct and it was not a violation of the IRC to improperly classify Plaintiffs' employment status. *Id.* at *19. Lastly, the Court dismissed Plaintiffs' claims of violations of the TILA because Plaintiffs failed to allege that they suffered any damages as a result of any alleged violations. *Id.* at *22. Accordingly, the Court granted Defendant's Rule 12(b)(6) motion to dismiss as to all federal claims.

***Hall, et al. v. DirecTV, LLC,* 2017 U.S. App. LEXIS 1320 *(*4th Cir. Jan. 25, 2017).** Plaintiffs, a group of technicians, filed suit against Defendants alleging wage & hour violations under the FLSA and Maryland law. Plaintiffs alleged that Defendants were their joint employers during the relevant period. Plaintiffs worked as technicians for various Defendants, including an intermediary provider, a sub-contractor, or some combination of those entities. Plaintiffs alleged that they regularly worked over 40 hours a week without being compensated and Defendants' failure to provide overtime pay violated the FLSA's overtime and minimum wage requirements. The District Court granted Defendants' motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) on the basis that Plaintiffs failed to adequately allege that Defendant DirecTV was a joint employer. On Plaintiffs' appeal, the Fourth Circuit reversed and remanded the District Court's decision on the grounds that Plaintiffs' factual allegations were sufficient to state a claim that Defendant DirecTV was a joint employer. The Fourth Circuit determined that the District Court applied an improper legal test for determining whether entities constituted joint employers for purposes of the FLSA. Instead, the Fourth Circuit applied a two-step analysis for determining whether a Defendant may be held liable for an alleged FLSA violation under a joint employment theory. First, the District Court must determine whether Defendant and one or more additional entities shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of Plaintiffs' work. Secondly, the District Court must analyze whether a worker was an employee or independent contractor for purposes of the FLSA and this depended in large part upon the answer to the first step. The Fourth Circuit determined that the District Court in this case erred when it considered whether Plaintiffs qualified as employees without first determining whether a joint employment relationship existed between Defendant DirecTV and the other employers. The Court Circuit opined that focusing on the relationship between the employers was essential to accomplishing the FLSA's "remedial and humanitarian" purpose. The Fourth Circuit framed the "fundamental question" guiding the joint employment analysis as "whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share responsibility for the essential terms and conditions of the worker's employment." *Id.* at *20. Plaintiffs' principal job duties were to install and repair Defendant DirecTV's equipment. Defendant DirecTV primarily directed and controlled Plaintiffs' work. Plaintiffs alleged that Defendant DirecTV was the "primary, if not the only" client of each of the providers who served as Plaintiffs' direct employers and the source of substantially all of income earned. *Id.* at *24. Defendant DirecTV was the principal and, in many cases, the only client of the lower-level sub-contractors. Defendant

DirecTV – through provider agreements with the other employers – had the authority to direct, control, and supervise nearly every aspect of Plaintiffs' job duties. Defendant DirecTV compelled Plaintiffs to obtain their work schedules and job assignments through its centralized system. Defendant DirecTV also controlled nearly every facet of the technicians' work through its provider agreements. Further, Plaintiffs were required to hold themselves out as representatives of Defendant DirecTV by wearing their uniforms and displaying its logo on their vehicles. As a result, the Fourth Circuit determined that Plaintiffs were properly classified as employees under the FLSA, by focusing on the "'economic realities' of the relationship" between Defendants and Plaintiffs. Plaintiffs were not in business for themselves and were economically dependent upon Defendants. Accordingly, the Fourth Circuit reversed and remanded the District Court's decision.

***Iontchev, et al. v. AAA Cab Service, Inc.,* 2017 U.S. App. LEXIS 5326 (9th Cir. Mar. 27, 2017).** Plaintiffs, a group of drivers, brought an action alleging that Defendant failed to pay timely and minimum wages in violation of the FLSA and Arizona law. The District Court granted Defendant's motion for summary judgment on all claims, and on appeal, the Ninth Circuit affirmed. Plaintiffs alleged that they were improperly classified as independent contractors instead of employees. The Ninth Circuit found that clear and convincing evidence proved that Plaintiffs were independent contractors under the FLSA and Arizona law. The Ninth Circuit stated that Plaintiffs' classification was governed by the "economic reality" of their working relationship with Defendant. Thus, to classify Plaintiffs as independent contractors, Defendant must prove that Plaintiffs were not economically dependent on Defendant. The Ninth Circuit determined that the District Court properly applied the six factors of the economic realities test to find: (i) Defendant had relatively little control over the manner in which Plaintiffs performed their work; (ii) Plaintiffs' opportunity for profit or loss depended upon their managerial skill as they paid a flat fee to lease taxicabs, could work as much or as little as they wanted, kept all earnings from passenger fares, were free to provide taxi services away from the airport, could pass out business cards to passengers and develop their own clientele, and could share their taxicabs with authorized relief drivers with whom they personally negotiated the number of hours each driver would use the cab and how they would split up the fuel and lease costs; (iii) Plaintiffs invested in equipment or materials and employed helpers to perform their work; (iv) the services rendered by Plaintiff did not require a special skill; (v) the working relationship was often lengthy; and (vi) the service rendered by Plaintiffs was an integral part of Defendant's business of providing taxicab services at the airport. *Id.* at *3-4. The Ninth Circuit concluded that Plaintiffs were not economically dependent upon Defendant. Rather, the Ninth Circuit found, as a matter of economic reality, Plaintiffs were in business for themselves when they leased their taxicabs from Defendant and utilized them to earn a profit. Accordingly, the Ninth Circuit concluded that the District Court properly held that, as a matter of law, Plaintiffs were not employees under the FLSA and Arizona law.

***Lawson, et al. v. Grubhub, Inc.*, 2017 U.S. Dist. LEXIS 106291 (N.D. Cal. Aug. 25, 2017).** Plaintiff, a former delivery driver, filed a class action alleging that Defendant misclassified drivers as independent contractors and thereby failed to pay their expenses and failed to pay them minimum wage and overtime compensation in violation of the California Labor Code. Defendant filed a motion for summary judgment, which the Court denied. The Court found material issues of disputed fact as to whether Plaintiff should have been treated as an employee and, if he was an employee, whether Defendant violated California law. The Court noted that a Plaintiff can establish a *prima facie* case that a relationship is that of an employer/employee by coming forward with evidence that she provided services for the employer. *Id.* at *7. The Court stated that, because it was undisputed that Plaintiff provided delivery services to Defendant, the burden was on Defendant to prove that Plaintiff was an independent contractor. *Id.* at *8. The Court explained that the ultimate determination of Plaintiff's employment status presented a mixed question of law and fact, and therefore Defendant could obtain summary judgment only if it showed that all facts and evidentiary inferences material to the employee/independent contractor determination were undisputed and that a reasonable trier of fact viewing those undisputed facts and inferences could reach the conclusion that Defendant's drivers were independent contractors. *Id.* at *8-9. First, when evaluating the extent of control, an employer's "right to discharge at will, without cause" is "strong evidence in support of an employment relationship." *Id.* at *9. Defendant's contract contained an automatic renewal clause and could be terminated by either party with 14 days' notice or upon breach of the agreement. The Court held that such an agreement was an indication of an at-will employment relationship. *Id.* at *11. Second, whereas Plaintiff could decide when to make himself available for shifts, Defendant's own manager testified that when drivers want to sign up for deliveries, they signed up for blocks of

time created by managers. The Court therefore determined that Defendant's argument that drivers were "not obligated to accept any given food order they receive, even if they sign up for a delivery block," was unpersuasive. *Id.* at *11-12. The Court held that Defendant failed to meet the difficult burden of proving that, drawing all inferences from the evidence in Plaintiff's favor, every reasonable trier of fact would have to find that Defendant did not have the right to exercise all necessary control over the details of Plaintiff's work. *Id.* at *13. The Court also opined that a reasonable fact-finder could conclude that company oversight as to whether a driver was driving as scheduled and Defendant's complaint feedback system supported a finding of an employment relationship. *Id.* at *14-15. Drawing all reasonable inferences in Plaintiff's favor, the Court also stated that a trier of fact could find that drivers were expected to be available to accept deliveries during their blocks and that Defendant's two-step compensation system more closely resembled an employment relationship than a contractor relationship. *Id.* at *16. Accordingly, the Court denied Defendant's motion for summary judgment.

***Lee, et al. v. www.Urban.com,* 2017 U.S. Dist. LEXIS 134809 (S.D. Tex. Aug. 23, 2017).** Plaintiffs, a group of realtors, filed a complaint alleging that Defendants improperly classified them as independent contractors and failed to pay them minimum wages and overtime compensation in violation of the FLSA. Plaintiffs filed a motion for summary judgment on Defendants' liability under the FLSA and on Defendants' affirmative defenses that Plaintiffs were independent contractors and that the outside sales exemption applied. Defendants filed a motion for summary judgment on the applicability of the outside sales exemption. The Court denied both motions, finding that genuine issues of material fact precluded summary judgment. Plaintiffs were realtors who worked for Urban Living selling houses. Their title at Urban Living was "home consultant." *Id.* at *2. Plaintiffs were paid on a commission basis. Defendants disputed that Plaintiffs worked more than 40 hours per week. Additionally, Defendants argued that Plaintiffs were independent contractors and, alternatively, that Plaintiffs were covered by the outside sales exemption. Plaintiffs asserted that they were employees of Defendant. The Court noted that, to determine if a worker qualifies as an employee for purposes of an FLSA claim, the focus is on the economic realities test, including: (i) the degree of control exercised by the alleged employer; (ii) the extent of the relative investments of the worker and the alleged employer; (iii) the degree to which the worker's opportunity for profit or loss is determined by the alleged employer; (iv) the skill and initiative required in performing the job; and (v) the permanency of the relationship. *Id.* at *4-5. Plaintiffs presented evidence that Defendants exercised substantial control over the manner in which they performed their work and that home consultants invested only $350 per month as a "desk fee." *Id.* at *5. Defendants presented evidence that home consultants made their own decisions regarding which properties to show customers and that home consultants could represent customers who chose to purchase homes from a seller other than Defendant. The Court held that the evidence presented by the parties raised a genuine issue of material fact regarding whether Plaintiffs were employees of Defendants, or, instead, worked for Defendants as independent contractors. *Id.* Further, some Plaintiffs presented evidence that they worked more than 40 hours per week; however, Defendants presented evidence that Plaintiffs did not work in excess of 40 hours per week. *Id.* at *6. The Court determined that the conflicting evidence in the record raised genuine issues of material fact that precluded summary judgment regarding any liability that Defendants might have under the FLSA. *Id.* Accordingly, the Court denied the motions for summary judgment.

***Martinez, et al. v. Citizen's Taxi Dispatch, Inc.*, 2017 U.S. Dist. LEXIS 81344 (N.D. Ill. May 26, 2017).** Plaintiff, a taxi cab driver, brought a putative collective and class action alleging that Defendant violated the Fair Labor and Standards Act ("FLSA"), the Illinois Minimum Wage Law ("IMWL"), and the Illinois Wage Payment and Collection Act ("IWPCA") for failure to pay overtime wages and for taking unlawful deductions. Plaintiff also brought an unjust enrichment claim stemming from Defendant's requirement that drivers pay work-related expenses. *Id.* at *1. Defendant moved to dismiss Plaintiff's complaint under Rules 12(b)(1) and 12(b)(6). *Id.* at *2. The Court granted the motion as to the FLSA and the IWPCA claims, but denied the motion as to the IMWL and unjust enrichment claims. As a condition of employment, Defendant required drivers to sign a contract that characterized them as independent contractors. *Id.* at *2. However, Defendant controlled the way that the drivers performed their jobs by: (i) requiring them to complete a qualification process and random drug testing; (ii) assigning them a set weekly schedule; (iii) denying them authority to refuse or negotiate their route assignments; (iv) disciplining them for not completing scheduled runs; (v) requiring them to pick up and drop off students at precise times; and (vi) fielding client complaints*. Id.* at *3. Defendant also required the drivers to rent

its vehicles used to fulfill contracts with school districts, and deducted the weekly rental fee from drivers' paychecks. *Id.* Defendant moved to dismiss Plaintiff's FLSA claim pursuant to Rule 12(b)(1) on the grounds that the FLSA did not apply to Defendant because it is not an enterprise engaged in commerce and that the Court therefore lacked subject-matter jurisdiction to consider the claim. *Id.* at *4. Defendants also moved to dismiss the FLSA claim under Rule 12(b)(6). The Court treated the motion to dismiss as if it were brought solely under Rule 12(b)(6) because the 12(b)(1) motion indirectly challenged the merits of Plaintiff's FLSA claim. The Court granted the motion to dismiss without prejudice as to the FLSA claim because Plaintiff failed to allege facts in his complaint that supported Plaintiff's claim of enterprise coverage. *Id.* at *16. As to the IWPCA claim, Defendant argued that the claim should be dismissed because Plaintiff did not plead existence of an agreement to pay wages or terms. *Id.* at *17. Accordingly, the Court dismissed the claim because Plaintiff failed to state a claim under the IPWCA. *Id.* at *18. As to Plaintiff's unjust enrichment claim, the Court denied Defendant's motion, as Defendant's only argument with respect to this claim was that an unjust enrichment claim must stand or fall with the related FLSA claim. *Id.* at *18. However, because the facts underlying Plaintiff's unjust enrichment claim pertained to the allegation that Defendant unjustly required Plaintiff to pay aspects of its operating expenses, and did not relate to the unpaid overtime allegations relevant to his FLSA claim, the Court denied the motion to dismiss. Accordingly, the Court denied the Defendant's motion in part and granted it in part.

***Mervyn, et al. v. Atlas Van Lines,* 2017 U.S. Dist. LEXIS 60694 (N.D. Ill. April 20, 2017).** Plaintiff brought a putative class action alleging breach of contract and violations of the Truth in Leasing Regulations ("TLR") under the Motor Carrier Act ("MCA"). Plaintiff leased his truck and driving services to Defendants. Defendants moved for summary judgment, and the Court granted Defendants' motion in its entirety. *Id.* at *22. The TLR required that the parties' lease state the amount to be paid by the authorized carrier for equipment and driver's services and that the amount could be expressed as a percentage of gross revenue or by any other method of compensation mutually agreed upon by the parties to the lease. *Id.* at *2. Plaintiff alleged that Defendants violated the TLR because it failed to disclose in the lease agreements that two separate and different discounts would be applied to determine two separate line haul amounts, one to be charged to the customer, the actual line haul amount, and the other to be used to calculate Plaintiff's compensation. According to Plaintiff, Defendants applied undisclosed additional discounts to its customers, which were not identified in the lease agreements relative to the actual line haul and accessorial service charges upon which his compensation was supposed to be based. Plaintiff alleged breach of the lease based upon the same argument. *Id.* at *13. Plaintiff claimed additional violations of the TLR and breach of the lease and contended that the lease provided that the truck operators were supposed to receive 100% of the fuel surcharge, but that they received less than the designated 100% because of the application of an undisclosed discount to the fuel surcharge amount. The Court granted summary judgment because the lease agreement stated that any financial entries that Defendants made on payment documents shall be presumed correct and final if Plaintiff did not dispute them within 30 days after distribution. *Id.* at *11. Plaintiff did not dispute Defendants' entries within 30 days. Accordingly, the Court ruled that, because Plaintiff did not dispute the entries, they were presumed correct, and Plaintiff could not now challenge their accuracy. The Court also rejected Plaintiff's assertion that the 30-day time period was unreasonably short and unenforceable, opining that it was not the Court's role to make contracts or reform them. *Id.* at *17. Further, the Court opined that, even without the 30-day bar, it would have concluded that Defendants were entitled to summary judgment on all of Plaintiff's claims because the terms of the lease were such that Plaintiff was not paid less than what he was entitled to pursuant to the contract. Accordingly, because Plaintiff's allegations of violations of the TLR were based upon alleged breach of the lease, and the Court found that there was no breach, the Court granted summary judgment in favor of Defendants as to all of Plaintiff's claims.

***Miller, et al. v. Centerfold Entertainment Club,* 2017 U.S. Dist. LEXIS 125945 (W.D. Ark. Aug. 9, 2017).** Plaintiffs, a group of exotic dancers, brought an action under the FLSA and state law alleging that Defendant failed to pay them minimum wages. Plaintiffs claimed that they were improperly classified as independent contractors. After a bench trial, the Court ruled that Plaintiffs were employees entitled to coverage under the FLSA and that Defendant willfully violated the FLSA. *Id.* at 32. The Court applied the economic realities test and found that all the of factors weighed in favor of a determination that Plaintiffs were employees. *Id.* at *18. The Court considered the various factors in rendering its decision, including: (i) the degree of control exercised by Defendant; (ii) the relative investments of the Defendant and Plaintiffs; (iii) the degree to which Plaintiffs had an opportunity for profit and loss; (iv) the skill and initiative required of Plaintiffs; (v) the permanency of the work

relationship; and (vi) the extent to which the work Plaintiffs performed was integral to Defendant's business. *Id.* at *11. The Court found that Defendant exercised significant control over Plaintiffs, such that they were not separate economic entities. *Id.* at *13. Plaintiffs had no authority to hire, fire, discipline, set prices, or create policies, as Defendant retained this authority exclusively. Defendant required Plaintiffs to work a certain amount of nights per week and to adhere to a stage rotation and routine, and Plaintiffs were not allowed to handle money. *Id.* The Court found that Defendant's authority to discipline Plaintiffs if they danced elsewhere, were absent or tardy, or worked private parties was indicative of Defendant's control. *Id.* at *14. The Court also noted that Defendant invested considerably more than Plaintiffs did in the operations of the club. *Id.* at 14-15. Plaintiffs were only responsible for their own costumes and this did not compare to the amount that Defendant expended in operating the club. *Id.* at 15. The Court found that the club was structured in a way that Plaintiffs would never have the same opportunity to profit as Defendant, as Plaintiffs had no ownership interest. *Id.* The Court opined that the degree of skill required of Plaintiffs was minimal, since Plaintiffs received no training and Defendant rarely turned down individuals who applied to be dancers. *Id.* at 16. Because Plaintiffs worked for the club for extended periods of time, the Court found the permanency factor weighed heavily in favor of employee status. *Id.* at 17-18. The Court also ruled that Plaintiffs were an integral part of the business. The Court concluded that Plaintiffs were employees of the club and Defendant willfully violated the FLSA by failing to pay Plaintiffs any wages or other form of compensation for their work at the club. *Id.* at *32. The Court rejected Defendants argument that Plaintiffs' claims were barred by the FLSA's statute of limitations. *Id.* at *22. The Court ruled that Defendant willfully violated the FLSA because it failed to inform Plaintiffs of the minimum wage law and keep any records regarding Plaintiffs' tenure at the club, including the hours that they worked or the amount of money in tips received. *Id. at* *20-22. As a result, the Court ruled that the statute of limitations period for each Plaintiff was three years, and the Court awarded Plaintiffs back wages for a three-year period. *Id.* at *25.

***Saleem, et al. v. Corporate Transportation Group*, 2017 U.S. App. LEXIS 6305 (2d Cir. April 12, 2017).** Plaintiffs, a group of drivers who owned for-hire vehicle franchises, brought a class action against Defendant alleging wage & hour violations under the FLSA and New York Labor Law ("NYLL"). The District Court granted summary judgment in favor of Defendant on the basis that Plaintiffs were independent contractors and not employees under the FLSA and the NYLL. Plaintiffs appealed the District Court's decision as to the FLSA claim. On appeal, the Second Circuit affirmed, holding that under the economic reality test, Plaintiffs were independent contractors under the FLSA as a matter of law. *Id.* at *13. The Second Circuit noted that the District Court properly focused on the totality of the circumstances in determining that Plaintiffs were in business for themselves. *Id.* at *11. The Second Circuit considered several factors in issuing its ruling. First, the franchise agreements classified Plaintiffs as independent contractors and contained provisions indicative of their independence. *Id.* at *15-16. Likewise, Defendant exercised minimal control over Plaintiffs, as evidenced by Plaintiffs' ability to work for competing companies and to transport personal clients to develop their own businesses. *Id.* at *16-17. Further, Plaintiffs invested heavily in their own businesses, and Plaintiffs set their own schedules. *Id.* at *24. The Second Circuit rejected Plaintiffs' arguments that because Defendant provided a dispatch system, negotiated rates with some clients, and engaged in minor monitoring of the drivers, that they were employees. *Id.* at *31-32. The Second Circuit concluded that when considering the totality of the circumstances, the economic reality was that Plaintiffs were in business for themselves. Accordingly, the Second Circuit affirmed the District Court's ruling.

***Schwann, et al. v. FedEx Ground Package Systems*, 2017 U.S. Dist. LEXIS 152601 (D. Mass. Sept. 20, 2017).** Plaintiff, a delivery driver, filed a class action alleging that Defendant violated the Massachusetts Independent Contractor Law. Plaintiff moved for summary judgment and requested that the Court find, as a matter of law, that he was an employee of Defendant because it could not meet the second or third prongs of the three-pronged test within the Independent Contractor Law. The First Circuit previously found that the second prong was preempted by federal law. Plaintiff filed supplemental briefing suggesting that the first and third prongs of the Independent Contractor Law were ripe for review. The Court, however, concluded that only the third prong of the Independent Contractor Law was ripe for review. As a condition for working for Defendant, Plaintiff signed an "Operating Agreement" ("OA"), which laid out various stipulations that governed the working relationship and classified Plaintiff as an independent contractor. Defendant required Plaintiff to use his own vehicle for pick up, transportation, and delivery services; however, Defendant could dictate the "identifying colors, logos, numbers, marks and insignia" of the vehicles. *Id.* at *4-5. Moreover, pursuant to the OA, Plaintiff

was forbidden from using his vehicle for any other purposes other than the carriage of Defendant's packages while acting in the service of Defendant. *Id.* at *5. In structuring the means by which he delivered packages within his route, pursuant to the OA, Plaintiff could deliver his assigned packages himself, hire his own workers to make the deliveries, or structure his delivery system somewhere in between the two. *Id.* at *13. The Court stated that the third prong of § 148B of the statute required the Court to determine whether an individual performing a service "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 *11. Plaintiff asserted that he generally was not capable of maintaining separate businesses in an individual capacity, and if he did not hire additional drivers, he would otherwise have been compelled to rely upon Defendant to make ends meet. Plaintiff further asserted that it was legally impossible for him to deliver for both Defendant and another carrier because 49 C.F.R. § 395.3(b)(1) limited him to working a maximum of 60 hours on-duty in a seven-day period, and the amount of packages he received from Defendant regularly required him to work all 60 hours each week. Defendant contended that it was common practice for drivers to swap packages among themselves to increase or decrease their package volume. *Id.* at *22. Plaintiff also argued that he did not maintain an independent trade or business as required under the third prong because Defendant retained the right to audit and monitor his work performance, such as riding along in his vehicle and performing audits where FedEx personnel would follow him as he performed his work. *Id.* at *26. The Court noted that, while the ability to directly supervise a worker may suggest an employer-employee relationship, especially when coupled with the employer's ability to terminate the worker at will, Defendant submitted declarations that the audits performed via these "ride alongs" were a mere opportunity for managers to field questions, discuss issues that drivers had about servicing their PSAs, and encourage safe driving habits. *Id.* at *25-26. The Court found that these reasons, at a minimum, suggested a factual dispute regarding the third prong, which prevented it from granting summary judgment as to that prong. Accordingly, the Court denied Plaintiff's motion for summary judgment.

***Shaw, et al. v. Set Enterprises,* 2017 U.S. Dist. LEXIS 65540 (S.D. Fla. Mar. 17, 2017).** Plaintiffs, a group of exotic dancers, brought an action alleging that Defendant unlawfully misclassified them as independent contractors and denied them minimum and overtime pay in violation of the FLSA and the Florida Minimum Wage Act ("FMWA"). *Id.* at *2. Defendant required all dancers to sign a Dancer Licensing Agreement (the "Agreement"). *Id.* at *3. Under the Agreement, Plaintiffs were granted a license to "utilize the stage, other entertainment facilities, and the dressing rooms located within the Club for the performance of exotic dance routines." *Id.* Defendant also provided bartenders, waitresses, hostesses, security staff, music played by DJs, food and liquor services, and advertising and promotions. *Id.* at *4. Plaintiffs, in turn, agreed to pay mandatory house fees and tip-outs to Defendant's employees and contractors each shift, as set forth in a schedule attached to the Agreement. The Agreement required Plaintiffs to abide by "Entertainer Rules," which prohibited Plaintiffs from engaging in illegal activity, such as illegal drug use, prostitution, and underage drinking. *Id.* The rules also instructed Plaintiffs not to walk through the clubs wearing "street clothes," chew gum on stage, bring significant others to the clubs, or frequently ask to leave early, arrive late, or miss shifts. *Id.* at *4-5. The Court had previously certified a collective action consisting of all current and former dancers who worked for Defendant during the three years preceding the filing of the action. Defendants subsequently moved for summary judgment on the grounds that, among other things, Plaintiffs were not employees under the FLSA. *Id.* at *6. The Court denied Defendant's motion for summary judgment. The Court found that Defendants exercised significant control over Plaintiffs. The Court opined that Plaintiffs were required to follow rules that regulated their appearance and behavior, to pay escalating house fees based on the time of their arrival, to sign in for shifts, to follow procedures for stage rotations, and charge minimum fees set by Defendants. The Court also noted that Plaintiffs had virtually no control over the customer volume, hours, food and drink, or overall atmosphere at the Clubs. *Id.* at *10. The Court determined that, although Plaintiffs could choose their shifts, clients, and dances to perform, such discretion was typical for an exotic dancer and did not, without more, establish that dancers were independent agents. The Court further held that the clubs were primarily responsible for drawing customers to the club and set minimum fees for services, and thereby exhibited significant control over Plaintiffs' opportunity for profit. *Id.* at *12. The Court found that Defendants' investments in the Clubs clearly and substantially outweighed Plaintiffs' investments. Defendants also did not require Plaintiffs to have the kind of special skill that would bring them outside the FLSA's definition of an employee. Defendants did not require prospective dancers to have any formal training or prior experience. Finally, the Court stated that, without dancers, Defendant's Clubs would be ordinary bars, not strip clubs. The Court held that the totality of the circumstances required a

finding that Plaintiffs and the collective action members were employees as defined by the FLSA. *Id.* at *14. Accordingly, the Court denied Defendants' motion seeking summary judgment on the issue of employee status.

***Sill, et al. v. AVSX Technologies, LLC*, 2017 U.S. Dist. LEXIS 39293 (D.S.C. Mar. 17, 2017).** Plaintiffs, a group of home-security system salespeople, filed suit in state court against Defendant alleging violations of the South Carolina Wage Payment Act ("SCWPA") and the FLSA. *Id.* at *2. Plaintiffs claimed that they suffered damages in the form of loss of benefits and increased taxes due to their misclassification as independent contractors. *Id.* Plaintiffs also claimed that Defendant violated the SCWPA by failing to pay Plaintiffs all wages due. Defendant removed the action and moved for summary judgment. At a hearing on Defendant's motion, Plaintiffs admitted that they were not entitled to bring a claim for loss of benefits or a tax increases under the FLSA or state law. *Id.* at *8. Accordingly, the Court granted summary judgment on those claims. *Id.* As to Plaintiffs' claims that Defendant unlawfully withheld "holdbacks" and "overrides" under state law, the Court denied Defendant's motion for summary judgment, finding that there was a genuine issue of material fact as to whether Plaintiffs were employees entitled to protection under the SCWPA. *Id.* at *14. From August 2012 through May 2014, Plaintiffs' contract stated that they were independent contractors. *Id.* at *3. After that period, Plaintiffs' contract stated that Plaintiffs were employees. Prior to November 2013, Plaintiffs' sales supervisor paid Plaintiffs a bonus from his personal checking account and provided Plaintiffs a 1099 miscellaneous income tax form. After the supervisor left the company in November 2013, Plaintiffs took over as sales team leaders and were given additional supervisory responsibilities. The Court ruled that the language of the contract was not dispositive as to whether Plaintiffs were independent contractors from November 2013 until May 2014. The Court also considered the various factors in determining whether an employer- employee relationship existed, including: (i) direct evidence of the right to, or exercise of, control; (ii) method of payment; (iii) furnishing of equipment; and (iv) right to fire. *Id.* at *11. Defendant asserted that Plaintiffs were independent contractors because they set their own schedules, had no dedicated office space, and determined their own clients and geographic boundaries. *Id.* at *13. Further, the employment contracts stated that they were independent contractors and would pay their own taxes and not receive benefits. Plaintiffs claimed that they were employees because they were given company shirts, identification, vehicles, cell phones, and iPads. *Id.* at *14. The Court found that there was a genuine issue of material fact as to whether Plaintiffs were employees after November 2013, and it denied Defendant's motion for summary judgment as to any claims after November 2013. *Id.* However, the Court granted summary judgment in favor of Defendant as to all claims prior to November 2013 on the grounds that Plaintiffs were independent contractors. *Id.* at *19.

(xv) Individual Executive Liability In FLSA Collective Actions

***Garcia, et al. v. Village Red Restaurant,* 2017 U.S. Dist. LEXIS 75172 (S.D.N.Y. May 8, 2017).** Plaintiff brought a class and a collective action alleging that Defendants Village Red Restaurant Corp., Christine Serafis, and Nicholas Serafis violated the FLSA and New York Labor Law ("NYLL") by failing to pay overtime and minimum wage and violated the NYLL by failing to provide spread-of-hours pay, wage notices, and wage statements. The parties filed cross-motions for summary judgement. Plaintiffs asserted that Ms. Serafis was a joint-employer and Defendant contended that Ms. Serafis was not Plaintiffs' employer. The Court granted Defendants' motion and denied Plaintiffs' motion. Ms. Serafis was the president and sole shareholder of Village Red. Plaintiffs were waiters, servers, countermen, hosts, kitchen helpers, and deliverymen during the relevant period. Defendants contended that Ms. Serafis was not Plaintiffs' employer under the FLSA or the NYLL. *Id.* at *7. Plaintiffs maintained that Village Red, Mr. Serafis, and Ms. Serafis were their employers under the FLSA and the NYLL. The Court found no doubt that Village Red and Mr. Serafis were Plaintiffs' employers, and that Village Red and Mr. Serafis admitted to their employer status. However, Defendants argued that Ms. Serafis was not an employer because she never participated in the operation of the restaurant and was the president and sole shareholder of the corporate entities only for "estate tax purposes." *Id.* at *8. Defendants asserted that there was no evidence showing that Ms. Serafis controlled the terms of Plaintiffs' employment and that, therefore, she was not Plaintiffs' employer. Plaintiffs argued that Ms. Serafis was their employer because she was the president and sole shareholder of Village Red, and they asserted that Ms. Serafis' consent to Mr. Serafis' management of the restaurant constituted operational control of the restaurant. *Id.* at *10. The Court found that although a putative employer need not directly control employees to be liable under the FLSA, some "individual involvement" in a company was generally required, and an individual Defendant must exercise at least "operational control" over the employee's employment. *Id.* at *11. The Court stated that Plaintiffs provided no facts showing that Ms.

Serafis exercised operational authority over the restaurant or indirectly influenced the employees' terms of employment. *Id.* The Court found that there was no evidence that Ms. Serafis instructed Mr. Serafis how to run the restaurant, influenced the employees' wages, work hours, or conditions, or affected who was hired or fired. The Court opined that Plaintiffs' evidence showed only that Ms. Serafis was the sole shareholder and president of Village Red and that she executed agreements to ensure that Mr. Serafis could continue to operate the restaurant. *Id.* at *12. The Court held that the evidence that Plaintiffs offered was insufficient to show a dispute of material fact as to whether Ms. Serafis was Plaintiffs' employer. *Id.* at *13. Accordingly, the Court granted Defendants' motion for summary judgment and denied Plaintiffs' motion for summary judgement on the issue of whether Ms. Serafis was Plaintiffs' joint employer.

***Landaverde, et al. v. Dave Murray Construction & Design, Inc.*, 2017 U.S. Dist. LEXIS 146658 (E.D.N.Y. Sept. 11, 2017).** Plaintiffs, a group of construction workers, filed a collective action alleging that Defendant violated the overtime provisions of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs filed a motion for partial summary judgment, solely with respect to liability. Defendants opposed the motion on the grounds that there were questions of fact that necessitated a jury trial. Defendant Dave Murray was the sole owner of Dave Murray Construction. The Court explained that to be held liable under the FLSA, a person must be an "employer," which § 3(d) of the statute defines broadly as 'any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* at *2. The Second Circuit has instructed that "the determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in economic reality rather than technical concepts." *Id.* The Court noted that in determining the economic reality of an employment relationship, it should consider "whether the alleged employer: (i) had the power to hire and fire the employees; (ii) supervised and controlled employee work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records." *Id.* at *3. The Court noted that it was undisputed that Murray was the sole owner and operator of Dave Murray Construction, and that Murray was responsible for determining Plaintiffs' rate of pay. Since the evidence demonstrates that there were no other individuals who could be responsible for the operational control of Dave Murray Construction, the Court found that there was no genuine issue of material fact with respect to Murray's individual liability. Accordingly, the Court granted Plaintiffs' motion for summary judgment as to liability.

***Perkins, et al. v. S&E Flag Cars, LLC,* 2017 U.S. Dist. LEXIS 41592 (S.D. Ohio Mar. 22, 2017).** Plaintiffs, a group of drivers, alleged that Defendants failed to pay overtime wages in violation of the FLSA, the Ohio Minimum Fair Wage Standards Act, and the Ohio Prompt Pay Act. Defendants Ray Braden and Megan Braden filed a motion to dismiss, which the Court denied. The Bradens asserted that they could not be held liable under the FLSA and the Ohio Wage Act because: (i) Plaintiffs failed to allege sufficient facts to pierce Defendant I & B's corporate veil; and (ii) the Bradens were not Plaintiffs' "employer" under the FLSA and the Ohio Wage Act. *Id.* at *4. The Court noted that the FLSA defines "[e]mployer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* at *5. The Court found no merit in the Bradens' veil piercing argument. Given that the FLSA and the Ohio Wage Act hold certain individuals directly liable as employers, the Court stated that Plaintiffs had no need to pursue the Bradens' liability indirectly through an alter ego or veil piercing theory. *Id.* The Bradens further contended that the complaint contained insufficient allegations for the Court to plausibly infer that the Bradens were Plaintiffs' employer under the FLSA and the Ohio Wage Act. Specifically, the Bradens asserted that there were insufficient allegations for the Court to plausibly infer that the Bradens had control over significant aspects of I & B's day-to-day functions. Plaintiffs alleged that the Bradens were officers of I & B, that the Bradens jointly employed Plaintiffs along with I & B and the other Defendants, and that the Bradens were responsible for I & B's day-to-day operation and management. *Id.* at *6. The Bradens also suggested that the allegations regarding their day-to-day control over I & B's operation and management are false. The Court, however, stated that it would not weigh conflicting factual assertions when deciding a motion to dismiss under Rule 12(b)(6). The Court thereby accepted all of Plaintiffs' factual allegations as true, and plausibly inferred that the Bradens were corporate officers of I & B, had operational control over significant aspects of the corporation's day-to-day functions, and thus were Plaintiffs' employer. *Id.* at *7. The Court opined that Ray Braden's affidavit supported Plaintiffs' allegations and reinforced the its determination. In his affidavit, Ray Braden acknowledged that he assisted his wife, Megan Braden, "in the operation of I & B Flag Cars, Inc.," that he was "responsible for day-to-day operation and management of I & B," and that he was "solely responsible for the engagement of independent contractors who provided driver escort

services to I & B." *Id.* at *7-8. The Court therefore held that Plaintiffs plausibly alleged that the Bradens were their employer. Accordingly, the Court denied the Bradens' motion to dismiss.

(xvi) Issues With Interns, Volunteers, And Students Under The FLSA

***Benjamin, et al. v. B & H Education, Inc*., 2017 U.S. App. LEXIS 25672 (9th Cir. Dec. 19, 2017).** Plaintiffs, a group of cosmetology and hair design students, filed a putative collective action pursuant to the FLSA and a class action under Nevada and California state law, alleging that they were employees of the school and, therefore entitled to compensation. Plaintiffs claimed that Defendant exploited them for their unpaid labor by: (i) not paying them for their work in salons; (ii) leaving them unsupervised in the salon; and (iii) requiring them to perform services that they already could do as opposed to services that they needed to learn for their licensing exams. The District Court granted summary judgment for Defendant on Plaintiffs' FLSA and state law claims. On Plaintiffs' appeal, the Ninth Circuit affirmed. *Id.* at *28. The Ninth Circuit held that under the FLSA's economic reality test, Plaintiffs were not employees for purposes of the FLSA even though they alleged that much of their time was spent on menial and unsupervised work. The Ninth Circuit agreed with case law precedents of other federal circuits that a primary-beneficiary analysis applied in the specific context of student workers because the primary-beneficiary test captured the economic realities concept under the FLSA. In ruling that the Plaintiffs were not employees, the Ninth Circuit applied the test's factors, including the extent to which: (i) the intern and the employer clearly understood that there was no expectation of compensation; (ii) the internship provided training that would be similar to that which would be given in an educational environment, including clinical and other hands-on training; (iii) the internship was tied to the intern's formal educational program by integrated course work or the receipt of academic credit; (iv) the internship accommodated the intern's academic commitments by corresponding to the academic calendar; (v) the internship's duration was limited to the period in which the internship provided the intern with beneficial learning; (vi) the intern's work complemented, rather than displaced, the work of paid employees while providing significant educational benefits to the intern; and (vii) the intern and the employer understood that the internship was conducted without entitlement to a paid job at the conclusion of the internship. *Id.* After weighing these factors, the Ninth Circuit determined that most, if not all the factors weighed in favor of the District Court's finding that Plaintiffs were students, not employees. Accordingly, the Ninth Circuit ruled that Plaintiffs were the primary beneficiaries of their own labors because at the end of their training they would be qualified to practice cosmetology. As a result, it affirmed the District Court's decision granting summary judgment in favor of Defendant on Plaintiffs' FLSA claims. Likewise, the Ninth Circuit also held that Plaintiffs were not employees entitled to be paid under Nevada or California law. Accordingly, the Ninth Circuit affirmed the District Court's decision on the state law claims too. *Id.* at *28.

***Dawson, et al. v. National Collegiate Athletic Association,* 2017 U.S. Dist. LEXIS 64082 (N.D. Cal. April 25, 2017).** Plaintiff brought a putative class and collective action alleging that Defendants failed to pay minimum wages and overtime compensation in violation of the FLSA and the California Labor Code. Defendants moved to dismiss on the grounds that student athletes are not covered under either statute and Plaintiff therefore lacked standing to sue. Plaintiff alleged that Defendants NCAA and the PAC-12 were joint employers of student athletes. The Court stated that as a general matter, it is uncontested that liability in the FLSA context is predicated on the existence of an employer-employee relationship. Defendants argued that Plaintiff was not their "employee" under the FLSA. *Id.* at *6. On this question, the Court referenced a line of case law authority that the "the long tradition of amateurism in college sports, by definition, shows that student athletes – like all amateur athletes – participate in their sports for reasons wholly unrelated to immediate compensation." *Id.* at *7. Moreover, the Court explained that the U.S. Department of Labor has indicated that student athletes are not employees under the FLSA. *Id.* at *10. Section 10b24(a) provides that "students who participate in activities generally recognized as extracurricular are generally not considered to be employees within the meaning of the [FLSA]." *Id.* at *11. The Court also referenced § 10b03(e), which explains that schools may permit or require students to engage in extracurricular activities like "interscholastic athletics," which are "conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school." *Id.* at *12. The Court therefore determined that there was no legal basis for finding student athletes to be "employees" under the FLSA. *Id.* at *13-14. The Court held that Plaintiff's FLSA claim must be dismissed. *Id.* at *15. As to Plaintiff's California Labor Code claims, the Court explained that the California legislature amended § 3352 of the Code to exclude athletic participants as

employees. *Id.* at *16. Because Plaintiff's complaint was based on an untenable legal theory, the Court ruled that any amendment would be futile, and accordingly, granted Defendant's motion to dismiss.

***Wang, et al. v. Hearst Corp*., 2017 U.S. App. LEXIS 24789 (2d Cir. Dec. 8, 2017).** Plaintiffs, a group of unpaid interns, brought an action allegation that Defendant failed to compensate them for their work in violation of the FLSA and the New York Labor Law ("NYLL"). Defendant moved for summary judgment, which the District Court granted on the grounds that Defendant properly classified Plaintiffs as interns. On appeal, the Second Circuit affirmed the District Court's ruling. The Second Circuit determined that at issue was whether the unpaid interns were "employees" of Defendant under the seven factor analysis it set out in *Glatt v. Fox Searchlight Pictures, Inc.,* 811 F.3d 528 (2d Cir. 2016). *Glatt* established various considerations specific to the context of unpaid internships, including: (i) the extent to which the intern and the employer clearly understood that there is no expectation of compensation; (ii) the extent to which the internship provided training that would be similar to that which would be given in an educational environment; (iii) the extent to which the internship was tied to the intern's formal education program by integrated course work or the receipt of academic credit; (iv) the extent to which the internship accommodated the intern's academic commitments by corresponding to the academic calendar; (v) the extent to which the internship's duration was limited to the period in which the internship provided the intern with beneficial learning; (vi) the extent to which the intern's work complemented, rather than displaced, the work of paid employees while providing significant educational benefits to the intern; and (vii) the extent to which the intern and the employer understand that the internship would be conducted without entitlement to a paid job at the conclusion of the internship. *Id.* at *6-7. The Second Circuit noted that Plaintiffs conceded that the first and seventh factors clearly favored Defendant. *Id.* at *7. The Second Circuit found that the second factor regarding training was at the heart of the dispute on appeal. Plaintiffs asserted that the District Court misconstrued this factor by broadening the ambit of "training" to include "practical skills." *Id.* at *8. However, the Second Circuit noted that its instruction in *Glatt* explained that a key element of the intern relationship was "the expectation of receiving educational or vocational benefits." *Id.* at *9. The Second Circuit stated that *Glatt* clearly contemplated that training opportunities offered to the intern include "products of experiences on the job." *Id.* The Second Circuit opined that Plaintiffs' assumption was that professions, trades, and arts are or should be just like school, but many useful internships are designed to correct that impression. *Id.* at *9-10. Plaintiffs argued that the District Court "ignored" evidence that Defendant's internships were a poor substitute for classroom learning. *Id.* at *10. However, the Second Circuit found that the undisputed facts showed the internships did provide beneficial training. The Second Circuit further stated that the closely related fifth *Glatt* factor (*i.e.*, valuable duration) also favored Defendant because practical skill may entail practice, and an intern gains familiarity with an industry by day to day professional experience. *Id.* at *11. The Second Circuit found that the third and fourth factors also favored Defendant. *Id.* at *12-13. The Second Circuit stated that as to the sixth factor, the District Court had found that it favored Plaintiffs because the interns completed some work regularly performed by paid employees. *Id.* at *14. The Second Circuit reasoned that this factor alone was not dispositive, as an intern may perform complementary tasks and in doing so confer tangible benefits on supervisors. The Second Circuit concluded that as determining status as an "employee" for the purposes of the FLSA is a question of law, a District Court can strike a balance on the totality of the circumstances to rule for one side or the other. *Id.* The Second Circuit opined that as the District Court recognized, the internships "involved varying amounts of rote work and could have been more ideally structured to maximize their educational potential," but it concluded that these critiques did not give rise to a material factual dispute. *Id.* at *14-15. Accordingly, the Second Circuit affirmed the District Court's ruling.

(xvii) Issues With Opt-In Rights In Wage & Hour Class Actions

***Hurt, et al. v. Commerce Energy,* 2017 U.S. Dist. LEXIS 127104 (N.D. Ohio Aug. 10, 2017).** Plaintiffs, a group of employees, filed suit claiming that Defendant failed to pay them minimum wage and overtime. Under an agreement that they reached to determine individual damages of opt-ins who joined the case after the Court granted conditional certification, the parties agreed to give collective action members until April 4, 2017, to complete surveys regarding the hours that they had worked during the overtime pay period. *Id.* at *1. Of the surveys sent out, 71 were received or postmarked after April 4, 2017. Defendant moved to exclude any surveys received or postmarked after April 4, 2017. The Court granted in part Defendant's motion. First, the Court explained that, to determine whether to permit the parties to evaluate these late-received surveys, it must consider: (i) whether good cause existed for the untimeliness; (ii) prejudice to Defendant; (iii) how late the

surveys were; (iv) judicial economy; and (v) the remedial purposes of the FLSA. *Id.* at *3. Balancing these factors, the Court found that the parties could consider any surveys that were received or postmarked one month or less from the deadline of April 4, 2017. *Id.* at *4. First, the Court noted that nearly all of the late surveys (64 of 71) were late by less than one month. Further, for 31 of the 71 late surveys, Plaintiffs argued that the recipients could have completed their surveys on time because the surveys did not have postmarks, but were received within one week after the deadline. *Id.* Second, the Court determined that Defendant was unlikely to experience prejudice because there would be no delay to the proceedings as a result, given that the damages calculation process was still on-going and the parties had not yet exchanged damages calculations for any group of individuals. Finally, the Court held that, because Defendant already was aware of the late surveys, it would will not face any "unfair surprise" by having to consider them. *Id.* The Court also held that judicial economy supported permitting parties to evaluate the 64 surveys that were late by one month or less. Finally, the Court noted that the remedial purpose of the FLSA supported consideration of these 64 late-filed surveys. The Court, therefore, ordered that the parties consider the 64 surveys postmarked or received on or before May 4, 2017, for purposes of calculating individual damages; however, any surveys postmarked or received after May 4, 2017, would be excluded from the parties' consideration of individual damages. *Id.* at *5.

***In Re Chipotle Mexican Grill, Inc.,* 2017 U.S. App. LEXIS 8996 (10th Cir. Mar. 27, 2017).** Plaintiffs brought a putative collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. *Id.* at *1. Defendant moved for a writ of mandamus, challenging the District Court's joinder of 10,000 opt-in Plaintiffs. *Id.* The Tenth Circuit denied the petition and ruled that Defendant was not entitled to mandamus on its claims that the District Court improperly analyzed who was similarly-situated for purposes of FLSA. The District Court applied the :spurious standard" that presumptively allowed workers bringing the same claim, and against the same employer, to join the collective action. *Id.* at *5. This was proper, the District Court ruled, because Plaintiffs may be severed from the collective action later if joinder proved erroneous. *Id.* The Tenth Circuit disagreed with Defendant's assertion that the District Court lacked discretion to choose between the various approaches to certification under FLSA. *Id.* at *6. The Tenth Circuit held that the District Court was not prohibited from following the spurious approach it applied, which was consistent with § 216(b). *Id.* Accordingly, the Tenth Circuit denied Defendant's petition, ruling that Defendant did not have a "clear and indisputable" right on which to base a request for mandamus relief. *Id.* Accordingly, the Tenth Circuit denied the Defendant's petition, holding that the District Court's order of joinder of the opt-in Plaintiffs was a not a gross abuse of discretion warranting mandamus.

***Morse, et al. v. Alpine Access, Inc*., 2017 U.S. Dist. LEXIS 160138 (N.D.N.Y. Sept. 26, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendants violated various provisions of the FLSA and the New York Labor Law ("NYLL"). The Court had previously denied Plaintiffs' motion for conditional certification and allowed limited discovery so that Defendants would have a reasonable opportunity to test Plaintiffs' allegations. *Id.* at *2. The parties agreed that Defendants would take the depositions of named Plaintiffs and up to five additional opt-in Plaintiffs. Defendants thereafter sent Plaintiff Sandy Morowitz requests for written discovery and a notice of deposition. Morowitz failed to respond to Defendants' discovery requests, and Plaintiffs' counsel advised that Morowitz would not be available for deposition and intended to withdraw from the litigation. Defendants moved to dismiss Morowitz pursuant to Rule 41(b). After analyzing the factors applicable to sanctions under Rule 41(b), the Magistrate Judge recommended that Morowitz be dismissed from the action. *Id.* at *4. The Magistrate Judge noted that Morowitz's continuing failure to fulfill her discovery obligations prejudiced Defendants in their ability to mount a timely and cost-effective defense and also prejudiced other Plaintiffs in the action. *Id.* at *5. Given the open-ended nature of her recalcitrance and the likelihood of future delays if Morowitz remained a Plaintiff, the Magistrate Judge concluded that no sanction short of dismissal would be appropriate. Accordingly, the Magistrate Judge recommended that Morowitz be dismissed without prejudice.

***Roseman, et al. v. Bloomberg L.P.,* 2017 U.S. Dist. LEXIS 5201 (S.D.N.Y. April 4, 2017)**. Plaintiffs, a group of analytics representatives, brought a putative collective action against Defendant alleging that they were entitled to overtime wages pursuant to the FLSA and state labor laws because they were improperly classified as exempt employees. Defendant moved to dismiss several opt-in Plaintiffs pursuant to Rules 37(b) and 41(b), on the basis that they had ceased to communicate and cooperate with their counsel and failed to comply with a

previous discovery order. *Id.* at *5. The Court denied Defendant's motions. The Court declined to entertain the motion pursuant to Rule 37(b) because the grounds sought for dismissal extended beyond the failure to comply with a discovery order; in addition, it noted that the Second Circuit has endorsed the use of Rule 41(b) where opt-in Plaintiffs have failed to communicate with counsel and comply with discovery. *Id.* at *4-5. In denying Defendant's Rule 41(b) motion, the Court considered five factors, including: (i) the duration of the failure to comply with the Court's order; (ii) whether Plaintiffs were on notice that failure to comply would result in dismissal; (iii) whether Defendant was likely to be prejudiced by further delay; (iv) balancing the Court's interests in managing docket with Plaintiffs' interest in receiving a fair chance to be heard; and (v) whether the judge had adequately considered a sanction less drastic than dismissal. *Id.* at *5-6. The Court noted that four out of the five factors weighed in favor of dismissal. *Id.* at *13. However, the Court declined to dismiss because it was not clear that the Plaintiffs were on notice that dismissal would result if they failed to comply with the discovery order. *Id.* at *14. Therefore, the Court ordered the non-responsive Plaintiffs to respond to Defendant's discovery requests and file affidavits indicating their intent to remain in the litigation or otherwise face dismissal pursuant to Rule 41(b). *Id.*

***Ruder, et al. v. CWL Investments, LLC,* 2017 U.S. Dist. LEXIS 117584 (D. Ariz. July 27, 2017).** Plaintiff, an Assistant Store Manager ("ASM), brought a collective action against Defendant to recover unpaid overtime under the FLSA. Plaintiff was also a member of a conditionally-certified FLSA action pending in Illinois seeking to recover unpaid overtime (the "*Jimmy John's* action"). Defendant was not a party to the *Jimmy John's* action. The Court in the *Jimmy John's* action granted a motion for an anti-suit injunction, barring several of the opt-in Plaintiffs in that case, including Plaintiff, from proceeding with FLSA actions against certain Jimmy John franchisees until otherwise instructed by the Court. *Id.* at *2. Plaintiff did not file a motion for conditional class certification in his case before the anti-suit injunction was issued. Plaintiff subsequently filed a motion for equitable tolling, and requested that the Court toll the statute of limitations for potential opt-in Plaintiffs. Defendant argued that Plaintiff's motion for equitable tolling sought an advisory opinion from the Court and that, regardless, Plaintiff had not shown that equitable tolling is warranted. *Id.* at *3. In this case, a decision to equitably toll the statute of limitations would have no effect on the named Plaintiff and the other Plaintiffs who have joined the case. Plaintiff argued that a decision not to grant the motion would directly affect the scope of conditional certification and prejudice potential opt-in Plaintiffs. The Court, however, stated that Plaintiff had not filed a motion for conditional class certification, and it was not certain that such a motion would be granted. *Id.* at *4. Plaintiff contended that case law authorities had routinely granted motions for equitable tolling to avoid prejudice to potential opt-in members in FLSA cases. The Court noted that although this was true, Plaintiff did not cite a single case that considered whether the Court had jurisdiction to grant equitable tolling to protect potential opt-in Plaintiffs. *Id.* The Court agreed with Defendant that granting equitable tolling for hypothetical opt-in Plaintiffs would constitute an impermissible advisory opinion. Further, the Court determined that in the current circumstances, it was not clear that equitable tolling would ever be necessary, as conditional class certification may never be granted or, even if it was, that no individuals for whom equitable tolling was necessary will ever opt-in. *Id.* at *5. Moreover, future opt-in Plaintiffs must show the diligence and extraordinary circumstances required to obtain equitable tolling. The Court reasoned that until it knew the identities and circumstances of those potential Plaintiffs, the Court was unable to find that equitable tolling was warranted. *Id.* at *6.

(xviii) Joint Employer, Employee Status, And Employer Status Issues In FLSA Collective Actions

***Carollo, et al. v. Federal Debt Assistance Association, LLC*, 2017 U.S. Dist. LEXIS 156074 (D. Md. Sept. 25, 2017).** Plaintiffs, a group of former salespersons of Defendant Federal Debt Assistance Association ("FDAA"), alleged that Defendants failed to pay all wages owed in violation of the Maryland Wage Payment and Collection Law ("MWPCL") and the FLSA. The Individual Defendants filed a motion to dismiss, asserting that Plaintiffs failed to show that they were "employers" subject to claims under either the MWPCL or the FLSA. The Individual Defendants asserted that Plaintiffs' complaint failed to contain sufficient factual allegations to support a cause of action against them as "employers" under the either the MWPCL or the FLSA. The Court stated that the "economic reality" test guides the employer status analysis under both statutes *Id.* at *8. In assessing the economic realities of an employment relationship, the Court considered the totality of the circumstances and four conditions, including whether the employer: (i) had the power to hire and fire the employees; (ii) supervised and controlled employee work schedules or conditions of employment; (iii) determined the rate and method of

payment; and (iv) maintained employment records. *Id.* at *9. Plaintiffs named five individual Defendants and provided varying descriptions of their ownership and control over the employment relationships. Plaintiffs alleged that Defendants David Piccione, Vincent Piccione, and Robert Pantoulis are "owners and operators of FDAA." *Id.* During the Plaintiffs' period of employment, Plaintiffs asserted that these three Defendants had the power to hire, fire, or discipline Plaintiffs; "set the rate and method of compensation;" managed Plaintiffs' work duties and schedules; and "maintained or caused to be maintained all employment records relating to Plaintiffs." *Id.* at *9-10. Additionally, Plaintiffs' allegations detailed multiple occasions on which these three Defendants directly refused to pay wages. *Id.* at *10. The Court found that Plaintiffs alleged facts regarding the three Defendants' ownership and control that addressed each of the factors of the economic realities test. The Court found that Plaintiffs made a plausible claim that Defendants Piccione, Piccione, and Pantoulis were "employers" subject to suit under both the MWPCL and the FLSA. *Id.* at *11. Plaintiffs identified Defendant Nicholas Pantoulis as an "owner and operator" of FDAA, but asserted no facts regarding his control over Plaintiffs' employment. Plaintiffs alleged that Defendant Anne Marie Diaz, FDAA's CFO, refused to pay their wages upon request, but did not allege any facts regarding Diaz's control over hiring, firing, work schedules, or employment records. *Id.* Accordingly, without an alleged ownership interest or control over the employment relationship beyond the payment of wages, the Court concluded that Plaintiffs failed to make out a plausible claim that either Nicholas Pantoulis or Diaz were "employers" subject to suit under either the MWPCL or the FLSA. *Id.* Accordingly, the Court denied Defendant's motion to dismiss with respect to Defendants David Piccione, Vincent Piccione, and Robert Pantoulis and granted it with respect to Defendants Diaz and Nicholas Pantoulis.

Nicks, et al. v. Koch Foods Co., **2017 U.S. Dist. LEXIS 73324 (N.D. Ill. May 15, 2017).** Plaintiffs, a group of chicken catchers, filed a collective action pursuant to the FLSA alleging overtime and minimum wage violations. *Id.* at *18. Defendants moved to dismiss on several grounds. First, Defendants moved to dismiss pursuant to Rule 12(b)(3) for improper venue and, in the alternative, requested transfer to the U.S. District Court for the Southern District of Mississippi pursuant to 28 U.S.C. §§ 1404 or 1406. *Id.* at *2. Second, Defendants moved to dismiss claims against the Alabama, Tennessee, and Georgia Defendants pursuant to Rule 12(b)(6) on the ground that those Defendants did not exercise any control over Plaintiffs and did not qualify as Plaintiffs' employer or joint employer under the FLSA. *Id.* Third, Defendants moved to dismiss all claims against the Alabama, Tennessee, and Georgia Defendants pursuant to Rule 12(b)(1) for lack of standing. *Id.* The Court denied Defendants' motion in its entirety. *Id.* Defendants argued that Plaintiffs failed to allege facts that established that a substantial part of the events giving rise to their claims occurred in Illinois because the case involved chicken catching crews working on farms located outside of Illinois and Plaintiffs were paid by entities located outside of Illinois. The Court determined that venue was proper in the U.S. District Court for the Northern District of Illinois because Plaintiffs alleged that a substantial portion of the activities giving rise to their FLSA claims occurred in the Northern District of Illinois where Defendants allegedly operated and organized their scheme to control their labor force in a uniform manner. *Id.* at *20. In rendering its decision, the Court reasoned that the test is not whether the majority of activities pertaining to the case were performed in a particular district, but whether a substantial portion of the activities giving rise to the claim occurred in a particular district. Plaintiffs raised a reasonable inference that a substantial portion of the activities giving rise to the claim occurred in Illinois because they alleged that Defendants' COO and CEO were based in Illinois. *Id.* at *21. Although the Court noted that venue also would be proper in the Southern District of Mississippi because the live-haul crews worked in Mississippi and were paid in Mississippi, after considering both the public and the private interest factors, the Court decided that transfer did not serve the convenience of the parties and witnesses and promote the interests of justice. *Id.* at *25. The Court, accordingly, denied Defendants' motion to transfer venue. *Id.* at *38. Defendants also argued that the Court should dismiss Plaintiffs' claims against the Alabama, Tennessee, and Georgia Defendants pursuant to Rule 12(b)(6) because Plaintiffs failed to allege that those Defendants exercised any control over Plaintiffs, and they did not qualify under the FLSA as Plaintiffs' employer or joint employer. *Id.* at *38. Plaintiffs asserted that because Defendants were one company with sham subsidiaries, each entity was subject to alter ego liability and that Plaintiffs' work benefitted all Defendants as joint employers. As a result, the Court concluded that Plaintiffs sufficiently alleged alter ego liability. *Id.* at *44. Under Illinois law, to establish alter ego liability: (i) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (ii) circumstances must be such that adherence to the fiction of separate corporate existence would sanction fraud or promote injustice. *Id.* at *39. Plaintiffs alleged that Defendants utilized a fictional corporate structure with multiple subsidiaries to limit their

liability. The Court ruled that allowing Defendants to use a fictional corporate structure to avoid compensating employees fairly under the FLSA would promote injustice, and therefore Plaintiffs satisfied both prongs of the alter ego test. *Id.* at *46. Lastly, Defendants argued that Plaintiffs lacked standing to assert claims against the Alabama, Tennessee, and Georgia Defendants because Plaintiffs did not work in those states and suffered no injuries in those states. The Court held that because Plaintiffs sufficiently alleged that Defendants operated as a single, integrated entity, Plaintiffs had standing to bring suit against the multiple Defendants that formed the single entity. *Id.* at *50. Accordingly, the Court denied Defendants' motion to dismiss in its entirety.

***Parrott, et al. v. Marriott International, Inc.,* 2017 U.S. Dist. LEXIS 144277 (E.D. Mich. Sept. 6, 2017).** Plaintiffs, a group of food managers, brought a collective action alleging that Defendant misclassified them as exempt employees and thereby failed to pay overtime compensation in violation of the FLSA. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6), contending that because the hotels in which Plaintiffs worked were franchised by various companies, it was not Plaintiffs' joint employer. *Id.* at *2. The Court denied Defendant's motion. The Court first explained that the focus in joint employment cases has been on whether Plaintiffs' alleged joint employer: (i) had the power to hire and fire employees; (ii) supervised and controlled employee work schedules or conditions of employment; (iii) determined the rate and method of payment; and (iv) maintained employment records. *Id.* at *4. Plaintiffs alleged that Defendant: (i) treated Plaintiffs like employees by giving all food managers discount room rates at hotels worldwide; (ii) exercised "a substantial degree of supervision over the work of food managers;" (iii) controlled operations through "corporate managers and auditors who review and compel compliance with corporate directives;" (iv) supervised and controlled work schedules for food managers; (v) controlled working conditions by requiring franchises to comply with "workplace rules" and standards by which food and beverage services are to be rendered; (vi) maintained employment records; and (vii) imposed standardized procedures for hiring food managers. *Id.* at *5-6. Plaintiffs also alleged that Defendant maintained the ability to end franchise agreements and thereby terminate Food Managers' employment. The Court held that Plaintiffs' allegations pointed directly toward Defendant's personal supervision and employment of Plaintiffs, making Plaintiffs' allegations of Defendant's joint employment sufficient to state a claim. *Id.* at *9. Accordingly, drawing all reasonable references in Plaintiffs' favor, the Court found they alleged enough facts to support their joint employer theory. The facts alleged suggested that Defendant acted either directly or indirectly in its interest in relation to Plaintiffs, as per the FLSA. *Id.* at *10. Further, the Court held that the facts alleged suggested that Defendant, through the standards and policies it allegedly imposed upon Plaintiffs, maintained a level of control that could ultimately translate into a joint employment arrangement. *Id.* at *11. Accordingly, the Court denied Defendant's motion to dismiss.

***Pope, et al. v. Espeseth Inc.,* 228 F. Supp. 3d 884 (W.D. Wis. 2017).** Plaintiffs, a group of window cleaners, filed a collective action alleging that their former employers paid them using a commission-based method of compensation that failed to pay them minimum wage and overtime pay, in violation of the FLSA and Wisconsin wage & hour laws. Plaintiffs named as Defendants Espeseth, Inc., a franchisee of Defendant Fish Window Cleaning Services, Inc., and Anthony Espeseth, the franchisee's owner. Plaintiffs alleged that Espeseth, Inc. and Fish were joint employers. *Id.* at 886. Fish moved for summary judgment, arguing that that it was not Plaintiffs' employer under the FLSA or Wisconsin wage & hour laws. The Court granted Fish's summary judgment motion and dismissed Fish from the case. Espeseth entered into a franchise agreement with Fish in 2004 to open a window cleaning business under the "Fish Window Cleaning" name. *Id.* at 887. The franchise agreement governing the relationship between Espeseth and Fish stated that Espeseth, as a franchisee, is "an independent business . . . solely responsible for control and management . . . including such matters as hiring and discharging [its] employees" and that Fish, as the franchisor, had "no power, responsibility or liability in respect to employee relations issues including hiring, discharge and discipline, and related matters." *Id.* at 888. The franchise agreement made clear that "no employee of [Espeseth] will be deemed to be an employee of [Fish] for any purpose whatsoever" and that Espeseth must "set and pay wages, commissions and incentives with no liability on" Fish. *Id.* at *8. Fish required Espeseth, as a new franchisee, to review training materials including a proposed, but not required, compensation system for paying window cleaners. *Id.* Espeseth adopted Fish's recommended compensation method with some modifications. Throughout their employment, Plaintiffs received paychecks and tax forms issued by "Espeseth, Inc., d/b/a Fish Window Cleaning." *Id.* at 889. Fish did not retain any employment records concerning Plaintiffs. At the outset, the Court stated that the FLSA defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee."

Id. Plaintiffs contended that Fish supervised and controlled Espeseth's employee work schedules via the employment manual and training materials. Fish asserted that Espeseth did not have to follow the manual as drafted by Fish, and that Espeseth was free to adapt the manual as he wished. *Id.* at 890. The Court determined that the record demonstrated that Fish's policies were only recommended, not required. The Court held that a recommendation regarding the method of employee compensation does not, on its own, amount to control over employees' working conditions. *Id.* at 891. The Court concluded that Plaintiffs failed to adduced evidence that, if presented to a jury, would allow the jury to make a reasoned finding that Fish exercised control over Plaintiffs' working conditions. *Id.* The Court further ruled that Plaintiffs failed to show that Fish was their employer under the language of the Wisconsin statutes, which required at least as much of a showing of control as the FLSA. *Id.* Accordingly, the Court granted Defendant Fish's motion for summary judgment on Plaintiffs' claims under the FLSA and Wisconsin wage & hour laws and dismissed him from the lawsuit.

***Salazar, et al. v. McDonald's Corp.,* 2017 U.S. Dist. LEXIS 34886 (N.D. Cal. Mar. 10, 2017).** Plaintiffs, a group of restaurant crew members at McDonald's franchisees, brought a putative class action alleging that Defendants – both the franchisees and McDonald's Corp., the franchisor ("McDonald's") – failed to pay them wages for all hours worked and denied them overtime wages in violation of the California Labor Code. Previously, McDonald's had moved for summary judgment on the ground that it did not jointly employ Plaintiffs. The Court granted the motion in part, but allowed Plaintiffs to proceed with their claims against McDonald's under an ostensible agency theory. McDonald's argued that ostensible agency was not a viable predicate on which to impute liability for Plaintiffs' Labor Code claims. On this basis, McDonald's moved for summary judgment a second time. The Court granted Defendant's motion. *Id.* at *2-3. The Court stated that case law authorities under the Labor Code define the term "employ" with three alternative definitions, including: "(a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship." *Id.* at *3. The prior order considered McDonald's status under all three tests and determined that McDonald's was not an "employer" under any applicable test. *Id.* The Court had previously considered and rejected the argument that the franchise agreement between McDonald's and Haynes, the franchise owner of the restaurants, established a generic right to control the terms and conditions of Plaintiffs' employment. *Id.* at *3-4. Nevertheless, the Court stated that that, viewing the evidence in the light most favorable to Plaintiffs, a jury could reasonably find McDonald's to be a joint employer by virtue of an ostensible agency relationship. McDonald's argued that it could not be held liable for violations of the California Labor Code because it did not fall within the statutory definition of an "employer." *Id.* at *4. For purposes of Labor Code violations, the California Industrial Welfare Commission's ("IWC") wage orders "define the employment relationship, and thus who may be liable." *Id.* Plaintiffs argued that the IWC permitted a finding of liability for Labor Code violations under an ostensible agency theory because it includes the phrase "through an agent." *Id.* at *6. The Court opined that when read in context, however, that phrase was explicitly limited. The Court noted that the IWC restricted the definition of an "employer" to one who, through an agent, "employs or exercises control over" the workplace environment. *Id.* at *7. The Court found that because Plaintiffs' interpretation would render this added limitation meaningless, it must be rejected. The Court held that the IWC's decision to limit the scope of agency liability in the context of the Labor Code must be credited. *Id.* The Court stated that to ignore the IWC's decision to limit the definition of "employer" to those who, through an agent, control workplace conditions would be to rewrite the law. *Id.* at *10. Moreover, the Court determined that the factual predicate of Plaintiffs' policy argument was that McDonald's could remedy the alleged Labor Code violations, but that argument was previously rejected. *Id.* at *11. The Court concluded that in light of the plain language of the IWC and relevant principles of statutory interpretation, Plaintiffs' efforts to impose liability on McDonald's for Labor Code violations based on ostensible agency principles must be rejected. Accordingly, the Court granted Defendant's motion for summary judgment.

***Salinas, et al. v. Commercial Interiors, Inc.,* 848 F.3d 125 (4th Cir. 2017).** Plaintiffs, a group of drywall installers, filed suit against Defendants alleging violations of the FLSA and Maryland law. Plaintiffs alleged that Defendant Commercial Interiors, Inc. ("Commercial"), a general contractor, and Defendant J.I. General Contractors, Inc. ("J.I."), a sub-contractor, jointly employed Plaintiffs. Therefore, Plaintiffs alleged that the hours that they worked for both Defendants should be aggregated for purposes of determining compliance with the FLSA and Maryland law. The District Court granted summary judgment in favor of Defendant Commercial, holding that Commercial did not jointly employ the Plaintiffs because the relationship between Defendants was a

traditional relationship between a contractor and a sub-contractor and Defendants did not intend to avoid compliance with the FLSA or Maryland law. On Plaintiffs' appeal, the Fourth Circuit reversed the District Court's decision. The Fourth Circuit remarked that the legitimacy of a business relationship between putative joint employers and their good faith were not dispositive of whether the entities were joint employers for purposes of the FLSA. The Fourth Circuit reasoned that, because the FLSA is "remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals." *Id.* at 140. Accordingly, the Fourth Circuit adopted a new two-factor test for determining whether joint employment exists. The Fourth Circuit emphasized that the relationship between the putative joint employers was critical to determining if joint employment existed and that the ultimate determination of joint employment must be based upon all of the facts of a case. The first factor to consider was whether the entities agreed to share responsibility for the essential terms and conditions of a worker's employment. The Fourth Circuit determined that both Defendants shared responsibility for the terms and conditions of Plaintiffs' employment. In reaching its conclusion, the Fourth Circuit considered that Defendant Commercial actively supervised Plaintiffs daily, provided feedback on their work, and often directed Plaintiffs to supplement their work. Defendant Commercial communicated problems to Defendant J.I.'s supervisors who then translated the information to Plaintiffs. Further, nearly all of Plaintiffs' work was on Defendant Commercial's jobsites, and Commercial provided the tools, materials, and equipment necessary for the work. Commercial communicated its staffing needs to J.I. and then J.I. assigned Plaintiffs to specific jobs. Plaintiffs and J.I.'s supervisors wore equipment and clothing with Commercial's logo while working on Commercial jobsites. Further, J.I.'s supervisors instructed Plaintiffs to tell others that they worked for Commercial. Further, the Fourth Circuit opined that the second factor to be considered was whether the combined influence of the entities over the terms and conditions of the worker's employment rendered the worker an employee and not an independent contractor. The Fourth Circuit found, based upon the undisputed facts, that Plaintiffs were employees and not independent contractors. Accordingly, the Fourth Circuit ruled that Defendant Commercial jointly employed Plaintiffs for purposes of the FLSA and Maryland law. Accordingly, the Fourth Circuit reversed the District Court's decision.

***Sutton, et al. v. Community Health Systems,* 2017 U.S. Dist. LEXIS 133712 (W.D. Tenn. Aug. 22, 2017).** Plaintiff, a paramedic, brought an action on behalf of himself and others similarly-situated, under the Fair Labor Standards Act ("FLSA") against several Defendants alleging minimum wage and overtime violations. *Id.* at *3. Four Defendants brought a motion to dismiss pursuant to Rule 12(b)(6) on the basis that they were not Plaintiff's employers for purposes of the FLSA. Plaintiff asserted that they were all joint employers. *Id.* at *4. The Court granted the motion in part and denied it in part. *Id.* at *19. The Court dismissed Dysenburg Ambulatory and Community Health Systems, Inc. ("CHSI") from the suit, but denied the motion as to CHSPSC and Knoxville HMA. At the outset, the Court noted that the Sixth Circuit has not formulated a specific test for a joint employment relationship in the context of the FLSA. *Id.* at *8. The Court evaluated joint employment status under the FLSA using three factors from Sixth Circuit labor cases, including: (i) an entity's authority to hire, fire, and discipline; (ii) control of payment; and (iii) supervision of employees. *Id.* at *12. The Court ruled that Plaintiff's complaint satisfied the factors as to CHSPSC and Knoxville HMA and denied their motions to dismiss. The complaint alleged that Defendants CHSPSC and Knoxville HMA, had the power to hire and fire Plaintiff and supervised Plaintiff by indicating the work assignments to complete and the manner and time in which the work should be performed. *Id.* at *14. Furthermore, Plaintiff alleged that Defendants controlled the method and rate of pay as well as the number of hours that Plaintiff worked. *Id.* As to CHSI, because Plaintiff's complaint contained no specific allegations alleging that it was a joint employer, the Court granted the motion to dismiss. *Id.* at *17. As to Dyersburg Ambulatory, the Court granted its motion to dismiss because it did not exist as a legally incorporated entity. *Id.* at *19.

***Williams, et al. v. Spartan Technologies,* 2017 U.S. Dist. LEXIS 115838 (S.D. Miss. July 25, 2017).** Plaintiff, a cable technician, brought an action alleging that Defendant violated the overtime and minimum wage requirements of the FLSA. Defendant contracted with Intec Communications, a cable provider, to provide cable installation and repair services for its Mississippi customers. Plaintiff alleged that Defendant hired him to perform these services and that he was "jointly employed" by Defendant and Intec. *Id.* at *1. Intec asserted that the complaint failed to allege an employer-employee relationship between Plaintiff and Intec, and it filed a motion dismiss for failure to state a claim, or alternatively, for a more definite statement. Plaintiff sought leave to amend the complaint by adding more detailed facts. Plaintiff's allegations indicated that Intec supervised him,

determined his pay rate, and was responsible for maintaining his employment records. Plaintiff asserted that: (i) Intec monitored and critiqued the work of Plaintiff and other similarly-situated employees; (ii) a manager for Intec supervised Plaintiff's work and the work of other cable technicians; (iii) Plaintiff and other similarly-situated cable technicians needed permission from Intec in order to take time off from work; and (iv) Plaintiff and other similarly-situated cable technicians also had to call Intec after completing their last scheduled job for the day to determine if there were any additional jobs that needed to be performed that day. *Id.* at *4-5. Taken as a whole, the Court found that Plaintiff's allegations posited that Intec was a joint employer with Defendant. Accordingly, the Court denied Intec's motion to dismiss.

***Valencia, et al. v. North Star Gas, LTD,* 2017 U.S. Dist. LEXIS 74721 (S.D. Cal. May 16, 2017).** Plaintiffs, a group of employee, filed a putative class and collective action against Defendants North Star Gas and Peoplease LLC alleging violations of the FLSA and California state law. Plaintiffs allege that Peoplease was "Plaintiffs' co-employer responsible for paying wages, payroll, and employment law compliance," and that Peoplease worked "with North Star to administer human resource services." *Id.* at *2. Defendants employed Plaintiffs and others to transport propane by driving various routes to and from Defendants' propane supply. Plaintiffs' core contention was that although employees often worked well in excess of eight hours per day and 40 hours per week, due to the length of time necessary to transport propane along certain routes, Defendants failed to pay Plaintiffs any overtime compensation. *Id.* .at *3. Plaintiffs also alleged that Defendants did not adequately compensate drivers for non-productive time and did not provide adequate wage statements. Peoplease filed motion to dismiss, asserting that it was not in an employment relationship with Plaintiffs and thus could not be held liable for violations of the California Labor Code or the FLSA. The Court found that Plaintiffs had not alleged any facts showing that Peoplease had the power or authority to negotiate and set their rates of pay, beyond the mere responsibility to provide Plaintiffs with payment. *Id.* at *6. Further, the Court stated that Plaintiffs had not alleged any facts showing that Peoplease suffered or permitted them to work. Finally, the Court determined Plaintiffs have not alleged any facts showing that Peoplease created a common law employment relationship with Plaintiffs. *Id.* at *8. The Court explained that while Plaintiffs' burden at the pleading stage was light, Plaintiffs' allegations did not give rise to a plausible inference that Peoplease had the power to hire and fire Plaintiffs, that Peoplease supervised and controlled Plaintiffs' work schedules or conditions of employment, that Peoplease determined the rate and method of payment, or that Peoplease maintained employment records. *Id.* at *14. Therefore, the Court found that the totality of the circumstances did not suggest that Peoplease was a joint employer of Plaintiffs in "economic reality." *Id.* Accordingly, the Court granted Peoplease's motion to dismiss.

(xix) Liquidated Damages In FLSA Collective Actions

***Rojas, et al. v. Splendor Landscape Designs Ltd.,* 2017 U.S. Dist. LEXIS 119882 (E.D.N.Y. July 31, 2017).** Plaintiffs, a group of current and former employees, brought an action asserting that Defendants violated various provisions of the FLSA and the New York Labor Law ("NYLL"). The U.S. Department of Labor ("DOL") formally advised Defendants that it had initiated an investigation (the "DOL Investigation") into Defendants' pay practices for the period of 2012 through 2015. *Id.* at *2. The DOL Investigation concluded that all of Defendants' employees were paid straight time for all hours worked, including those worked over 40 in a workweek. During his deposition, Defendant Hirsch, owner of Defendant Splendor, confirmed that Defendants paid employees at their regular rate of pay for all hours worked and did not pay employees overtime wages for hours worked in excess of 40 in a given week. *Id.* The DOL Investigation further concluded that Splendor falsified its time and payroll records to make it appear as if employees were paid overtime wages. Plaintiffs moved for partial summary judgment, solely with respect to liability. Defendants opposed the motion on the grounds that there were alleged questions of fact concerning Plaintiffs' credibility. The Court noted that there was no question that Defendants violated the FLSA and the NYLL by failing to pay Plaintiffs overtime compensation for hours worked in excess of 40 per workweek. *Id.* at *4. Accordingly, the Court found there was no genuine issue of material fact concerning Plaintiffs' claims for failure to pay overtime wages under both the FLSA and the NYLL and granted summary judgment for those claims. The Court further stated that it was undisputed that Defendant Hirsch was the sole owner and operator of Splendor. Since the evidence demonstrated that there were no other individuals who could possibly be responsible for the operational control of Splendor – and since Defendants did not oppose the motion with respect to this claim – the Court found that there was no genuine issue of material fact with respect to Defendant Hirsch's individual liability. *Id.* at *6. Accordingly, the Court granted Plaintiffs' motion

for summary judgment as to that claim. The Court also determined that it was undisputed that Defendants had been the subject of a DOL investigation on two separate occasions and were found to have violated the FLSA by failing to pay overtime wages. *Id.* at *7. Hence, the Court ruled that there was no genuine issue of fact here with respect to Defendants' willfulness. The Court also granted Plaintiffs' motion for partial summary judgment with respect to Defendants' willfulness and extended the statute of limitations for the FLSA claims from two years to three. *Id.* at *8. The Court further held that Plaintiffs were entitled to summary judgment on their liquidated damages claim. Defendants were unable to demonstrate that they acted in good faith to overcome the presumption of liquidated damages based on the fact that they were the subject of a prior DOL investigation, in which they were advised of their violation of the FLSA and directed to pay back wages. Accordingly, the Court found that there was no genuine issue of material fact with respect to Plaintiffs' claim for liquidated damages and granted Plaintiffs' motion for summary judgment is granted with respect to that claim as well.

(xx) Mootness In FLSA Collective Actions

***Sanchez, et al. v. Burgers & Cupcakes LLC*, 2017 U.S. Dist. LEXIS 38292 (S.D.N.Y. Mar. 16, 2017).** Plaintiffs, a group of restaurant workers, brought a putative collective and class action alleging that Defendant violated the overtime and minimum wage requirements of the FLSA and the New York Labor Law ("NYLL"). Defendant made a Rule 68 offer of judgment to the four remaining Plaintiffs in the case to settle all claims against it for $19,200. *Id.* at *2. Plaintiffs accepted the offer, and submitted notice to the Court regarding the decision to accept Defendant's offer. *Id.* The Court then solicited the U.S. Department of Labor's ("DOL") view on the application of Rule 68 to putative collective action claims under the FLSA. *Id.* at *3. The Court opined that ordinarily, FLSA claims only may be settled with the approval of the DOL or after a fairness determination by the Court. The Court noted that FLSA claimants are no more able to "accept" a settlement offer via Rule 68 than they are validly to accept an offer of a private settlement pursuant to Rule 41. *Id.* at *4. The Court reasoned that the FLSA is a uniquely protective statute intended to "extend the frontiers of social progress by insuring to all able-bodied working men and women a fair day's pay for a fair day's work." *Id.* at *5. The Court determined that the Second Circuit case law authority requires judicial oversight of FLSA settlements to protect the possible lopsided relationship between employers and employees and the potential for collusive settlements. The Court thereby held that Plaintiffs did not have authority to compromise their claims without judicial oversight or approval of the DOL. *Id.* at *6. Additionally, in contractual terms, Plaintiffs lacked capacity to enter into a binding agreement with Defendant that was not conditioned on the Court's approval or approval of the DOL. Therefore, the Court directed the Clerk of Court not to enter judgment in the matter and concluded that the parties could submit their settlement for the Court's approval. *Id.*

(xxi) Motor Carrier Act Issues In FLSA Collective Actions

***Connelly, et al. v. Dan Lepke Trucking LLC,* 2017 U.S. Dist. LEXIS 2027 (W.D. Wis. Jan. 6, 2017).** Plaintiffs brought a collective action alleging that Defendants failed to pay them overtime wages in violation of the FLSA and Wisconsin's prevailing wage law. *Id.* at *2. Specifically, Plaintiffs alleged that Defendants failed to compensate them for work performed before they loaded their trucks for the first time each day and after they unloaded their trucks for the last time each day, and failed to compensate them for overtime work. *Id.* at *2-3. The Court previously granted the parties' joint motion for conditional certification of a collective action. Defendants filed a motion for summary judgement asserting that Plaintiffs were exempt from FLSA overtime pay based on the motor carrier exemption, which the Court denied. At the outset, the Court noted that the Motor Carrier Act ("MCA") exempts from the FLSA "employees of a motor carrier if "property is transported by the motor carrier between a place in a State and a place in another State." *Id.* at *3. Defendants employed Plaintiffs as dump truck drivers between 2012 and 2015. Defendants contended that between 2012 and 2015, Plaintiffs transported hundreds of shipments in interstate commerce. Defendants argued that because Plaintiffs were engaged in interstate commerce, the motor carrier exemption applied. *Id.* at *5. The Court noted that the parties disputed the locations of several of Plaintiffs' key pick up and delivery points. The Court stated that whether these stops fell within one state or another determined whether certain routes were intrastate or interstate. *Id.* at *6. For example, drivers picked up river sand from a sand pit across the final stretch of the Mississippi River from Lansing, Iowa. Plaintiffs contended that this pit was in Wisconsin, making the trip intrastate and not interstate. Additionally, drivers delivered materials to a dam on the Mississippi River, which Defendants argued was in Minnesota. However, Plaintiffs disagreed and asserted that the dam was on the Wisconsin side of the

Mississippi River. *Id.* at *7. Drivers also delivered materials to two barges on the Mississippi River. Neither party offered any evidence that identified whether the islands were on the Wisconsin or the Iowa side of the river. *Id.* at *7-8. Further, drivers delivered sand from pick up points in Wisconsin to a facility in Wisconsin, which was an intrastate trip. However, Defendants contended that the sand shipments were immediately carted off to North Dakota and Texas following drop-off and that, as a result, the entire route was one big interstate shipment. *Id.* at *8. The Court found that Defendants' motion relied on the contention that Plaintiffs transported shipments in interstate commerce during the relevant time period. The Court determined that Defendants relied on "thousands of shipping documents and other records" to support this contention, but did not offer or cite the documents themselves in the motion for summary judgement. *Id.* at *12. The record included several reports that allegedly documented Defendants' projects and affiliated travel. However, the Court opined that the reports did not explicitly state where employees traveled for a given assignment; instead, the reports merely logged the job number or delivery locations by name. *Id.* at *14. The Court held that Defendants did not demonstrate that they were entitled to judgment as a matter of law because the record contained genuine disputes of material fact. *Id.* at *16. The Court found that the parties debated whether certain trips qualified as interstate travel and Plaintiffs adduced evidence that called into question the nature of their alleged "interstate" trips. *Id.* at *17. The Court therefore concluded that Defendants failed to provide evidence sufficient to establish that Plaintiffs had a more-than-remote chance of being assigned interstate work during the relevant time period. *Id.* Accordingly, the Court denied Defendants' motion for summary judgement based on motor carrier exemption.

***Laura, et al. v. J.D. Parker & Sons Co.,* 2017 U.S. Dist. LEXIS 14829 (M.D. Fla. Feb. 2, 2017).** Plaintiffs, a group of garbage truck drivers, brought an action alleging that they often worked more than 40 hours in a week but were not paid overtime in violation of the FLSA. Defendant moved for summary judgment and argued that it was exempt under the Motor Carrier Act ("MCA"). Plaintiffs cross-moved for summary judgment on the MCA defense and for partial summary judgment on all elements of their claim except for the number of overtime hours, whether Defendant willfully violated the FLSA, and whether Defendant could prove a good faith defense. The Court granted Plaintiffs' motion and denied Defendant's motion. Defendant argued that the MCA exemption exempted it from the overtime provision of the FLSA as a matter of law. Plaintiffs disputed whether the Secretary of Transportation had jurisdiction over Defendant because it is only engaged in local, intrastate commerce. *Id.* at *4-5. The Court stated that it was undisputed that Plaintiffs did not perform services outside Florida and did not transport goods across state lines. Defendant argued, however, that its intrastate transportation constituted a part of interstate commerce because the garbage was taken to a facility that produced clean, renewable energy through the combustion of municipal solid waste, which was then sold to millions of customers in multiple states. *Id.* at *5. The Court determined that when the continuity of transit of a product or good between its origin and the ultimate destination ceases or is interrupted, the interstate commerce element is not satisfied. *Id.* at *6. The Court held that the transformation of the garbage into renewable energy substantially changed the form of the garbage before the energy was sold to and used by any out of state consumers. The Court therefore concluded that Defendant's intrastate transportation of garbage did not constitute a "continuous stream of interstate travel" and therefore was not a part of interstate commerce for purposes of the MCA exemption. *Id.* at *7. Accordingly, the Court found that Defendant was not exempt from the FLSA under the MCA and denied its motion for summary judgement and granted Plaintiffs' motion as to the applicability of the exemption. The Court also granted Plaintiffs' motion to the extent that Defendant was covered by the FLSA, Plaintiffs were employees of Defendant under the FLSA, and Plaintiffs were entitled to time and a half of their day rate for any overtime hours they prove they worked.

***Mozingo, et al. v. Oil States Energy Services,* LLC, 2017 U.S. Dist. LEXIS 165195 (W.D. Pa. Oct. 5, 2017).** Plaintiffs, a group of drivers, filed an action alleging that Defendant violated various provisions of the Pennsylvania Minimum Wage Act ("PMWA"). Defendant filed a motion to dismiss, contending that Plaintiffs were subject to the Motor Carrier Act exception. The Court granted the motion. Plaintiffs argued that Pennsylvania's Motor Carrier Act exception applies only to "motor carriers," but not "motor private carriers" because the Pennsylvania General Assembly did not use the same language for its exception as Congress used for the analogous federal exception. *Id.* at *4. Plaintiffs argued that the General Assembly "intentionally" included "employee of motor carrier" as opposed to its federal counterpart's "any employee" to narrow the exception. *Id.* The Court noted that the crux of the issue was whether the PMWA's use of "any employee of a motor carrier" trumped the statute's further description of those employees as both employees of a motor carrier and

employees of a motor private carrier. *Id.* at *5. The Court reasoned that the statute's reference to "employee of a motor carrier" is governed by its specific reference describing those same employees as employees under the control of the U.S. Secretary of Transportation "under 49 U.S.C. § 3102(b)(1) and (2). *Id.* The Court found that the General Assembly's choice to specifically identify the provisions for both motor carrier and motor private carrier governed its general use of "any employee of a motor carrier." *Id.* The Court noted that a "cardinal principle of statutory construction" is "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Id.* at *6-7. The Court opined that focusing only on the statute's phrase "any employee of motor carrier" ignored the further description of employees under the control of the U.S. Secretary of Transportation "under 49 U.S.C. § 3102(b)(1) and (2)," which cover both motor carriers and motor private carriers. *Id.* at *7. Accordingly, the Court found that Pennsylvania's Motor Carrier Act exception applied as a matter of law to employees of motor carriers and employees of motor private carriers exempting them from coverage under the PMWA. *Id.* at *7. The Court stated that the federal Motor Carrier exception also exempted the Fair Labor Standards Act based on the U.S. Secretary of Transportation's jurisdiction under § 31502. *Id.* at *7-8. Since 2008, the federal Motor Carrier exception allows the Fair Labor Standards Act to cover employees employed by a motor carrier or motor private carrier who works in part as a driver and drives vehicles weighing 10,000 pounds or less. *Id.* at *8. Plaintiffs argued that this same federal carve out – for those who, in part, drive vehicles weighing less than 10,000 pounds – applied to Pennsylvania's Motor Carrier Exception, meaning that the PMWA applied to Plaintiffs. The Court disagreed and determined that Pennsylvania's Motor Carrier Act exception unambiguously exempts employees under the control of the U.S. Secretary of Transportation as described in § 31502, and it refused to rewrite unambiguous Pennsylvania law to match federal law. Accordingly, the Court granted Defendant's motion to dismiss.

***Schilling, et al. v. Schmidt Baking Co*., 2017 U.S. App. LEXIS 23257 (4th Cir. Nov. 17, 2017).** Plaintiffs, a group of sales managers, filed a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA and the Maryland Wage Payment & Collection Law ("MWPCL"). Defendants filed a motion to dismiss pursuant to Rule 12(b)(6), contending that Plaintiffs were exempt from the FLSA due to the Motor Carrier Act exemption ("MCA"). The District Court granted the motion, and on appeal, the Fourth Circuit reversed and remanded. Plaintiffs were non-exempt salaried employees and frequently worked more than 40 hours in a given week, and were not paid overtime wages for hours worked in excess of 40 hours per week. *Id.* at *2. Plaintiffs were often expected to deliver items in trucks weighing over 10,000 pounds to grocery stores. Because of the quantity of deliveries and the limited number of drivers, Plaintiffs spent between 65% and 85% of their time each week making deliveries. The type of vehicles Plaintiffs used to make the deliveries varied according to the delivery requirements of a given day, but Plaintiffs used their personal vehicles for between 70% and 90% of the deliveries they made. Each Plaintiffs' personal vehicles weighed less than 10,000 pounds. *Id.* at *3. The Fourth Circuit first explained that the MCA was amended by the SAFETEALU Technical Corrections Act of 2008 ("TCA"), which, in relevant part, defined a "covered employee" as "an individual:" (i) who is employed by a motor carrier or motor private carrier; (ii) whose work, in whole or in part, is defined, as that of a driver, driver's helper, loader, or mechanic, and affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways in interstate or foreign commerce; and (iii) who performs duties on motor vehicles weighing 10,000 pounds or less. *Id.* at *6-7. The Fourth Circuit found the central issue on appeal was whether Plaintiffs were "covered employees" under the TCA, thereby entitling them to overtime compensation under the FLSA. *Id.* at *7. Defendant argued that because Plaintiffs worked on a mixed fleet, or a fleet consisting of vehicles weighing both more and less than 10,000 pounds, Plaintiffs were subject to the MCA exemption, and therefore were not entitled to overtime compensation. *Id.* Plaintiffs contended that they qualified for the TCA exception to the MCA exemption because a "covered employee" is an employee who drives small vehicles "in whole or in part," and because Plaintiffs spent 70% to 90% of the time they spent making deliveries driving small vehicles. *Id.* at *8. The Fourth Circuit agreed with Plaintiffs. The Fourth Circuit stated that the text of the TCA plainly provides that employees working on mixed fleet vehicles are covered by the TCA exception. *Id.* at *9. Section 306 of the TCA expressly amended the FLSA by providing that overtime compensation would be available to "covered employees" even when the MCA exemption ordinarily would exempt those employees from the FLSA's overtime requirements. *Id.* at *9-10. The Fourth Circuit further opined that the structure of the TCA exception makes clear that an employee need only work on smaller vehicles "in part" to qualify for overtime compensation, thereby placing drivers of mixed fleets within the FLSA's

requirements. The Fourth Circuit found that Plaintiffs easily satisfied the requirements of § 306(c)(2), as they spent the majority of their working hours making deliveries, between 70% and 90% of their delivery trips were made on vehicles indisputably weighing less than 10,000 pounds, the delivery routes included interstate trips on public highways, and none of the vehicles were designed to transport eight or more passengers or were used to transport hazardous materials. *Id.* at *12-13. Therefore, the Fourth Circuit held that Plaintiffs were "covered employees" under the FLSA during their employment with Defendant, and it reversed and remanded the District Court's ruling dismissing Plaintiffs' FLSA claims.

***Underwood, et al. v. KC Transportation, Inc.*, 2017 U.S. Dist. LEXIS 165449 (S.D.W.Va. Oct. 4, 2017).** Plaintiff, a truck driver, filed a collective action alleging that Defendant misclassified her and others similarly-situated as exempt and thereby failed to pay overtime in violation of the FLSA. Defendant filed a motion to dismiss for failure to state a claim, which the Court denied. Plaintiff alleged that she often worked more than 60 hours per week and was treated as an exempt employee and not paid overtime compensation. *Id.* at *3. Plaintiff did not drive across state lines, nor did her job duties incorporate an expectation for her to do so. Defendant argued that the complaint should be dismissed because Plaintiff was exempt from the overtime-pay provisions of the FLSA pursuant to the Motor Carrier Act ("MCA") exemption. The Court noted that the MCA exemption covers employees whose activities "affect safety of operation" and who work for a private motor carrier engaged in interstate commerce. *Id.* The parties disagreed on whether Plaintiff satisfied the interstate-commerce prong of the analysis and, therefore, whether the exemption applied to her, thereby barring her FLSA claim. *Id.* The Court stated that if it were to consider the affidavit attached to Defendant's motion to dismiss, it would have to convert it to a motion for summary judgment. *Id.* Given the early stage of the litigation and the probability that discovery would bring out further relevant information, the Court declined to do so. The Court reasoned that Defendant's argument for dismissal rested on its affirmative defense, and it could only dismiss a complaint for failure to state a claim on an affirmative defense if "facts sufficient to rule on an affirmative defense are alleged in the complaint." *Id.* at *4. In this case, the complaint specifically alleged that Plaintiff was not covered by the MCA exemption. The Court therefore found that it could not grant Defendant's motion to dismiss at this stage of the proceedings. *Id.* at *5. Accordingly, the Court denied Defendant's motion.

(xxii) Pay Policies And Bonuses In FLSA Collective Actions

***Adams, et al. v. Nature's Expressions Landscaping Inc.*, 2017 U.S. Dist. LEXIS 176427 (E.D. Ky. Oct. 25, 2017).** Plaintiffs brought a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Defendant filed a motion for summary judgment, which the Court granted in part and denied in part. Defendant paid employees a set rate per day, and Plaintiffs alleged that this compensation scheme violated the FLSA because it did not account for overtime hours. Plaintiffs asserted that Defendant assigned each employee a daily wage based on his position and duties, and that each employee was required to work a certain number of hours per day, which was divided into "quarter days." *Id.* at *3. Defendant then rounded the number of hours worked to the nearest quarter day. The Court previously had granted Plaintiffs' motion for conditional certification of a collective action for all individuals currently or formerly employed by Defendant who were compensated under the day-rate scheme and who worked in excess of 40 hours during any week throughout the course of their employment. *Id.* at *4. Defendant filed a motion for summary judgment and argued that several opt-in Plaintiffs did not meet the criteria to join the collective action or did not have a viable case. Defendant's motion addressed only opt-in Plaintiffs in four categories, including: (i) persons who never worked for Defendant; (ii) persons who opted-in to the lawsuit after the expiration of the opt-in period; (iii) persons who never worked more than 40 hours in any given week for Defendant; and (iv) persons whose employment agreements stated Defendant's policy of straight time and overtime pay. *Id.* at *6. As to the first group, the Court noted that William "Chad" Austin signed a consent form without a legible printed name. The Court stated that even if it granted Defendant's motion for judgment on Austin's claim, doing so would have no effect, and allowing Austin to join the collective action would not prejudice Defendant since Austin could file a new lawsuit himself. Accordingly, the Court denied Defendant's motion as to Austin's claim. As to the second group, the Court stated that the statute of limitations was not at issue and therefore it denied Defendant's motion as to opt-ins it claimed were untimely. As to the third group, the Court granted Defendant's motion as to the three employees for whom it submitted evidence that they did not ever work overtime. *Id.* at *17. Finally, as to group four, the Court found Defendant claimed it paid a regular rate for the first eight hours, and an overtime rate for hours in excess of eight each day; as such the Court noted that the FLSA and its regulations expressly

permit this arrangement. *Id.* at *26. Although the Court held that NEL's payment scheme did not amount to a "day rate" or "split day," it determined that genuine issues of material fact existed as to whether Plaintiffs in group four received proper overtime. *Id.* at *27. The Court stated that, if Defendant did, in fact, pay employees a premium for hours worked in excess of eight hours per day, then that amount was not a part of the regular rate calculation and Defendant had already paid time-and-a-half creditable as overtime. *Id.* at *37. However, if Defendant simply pro-rated daily sums and paid the same rate even for hours worked in excess of eight per day, then the total sum of the employees' weekly paychecks was included in the regular rate determination, the employees were entitled to a higher overtime rate, and Defendant did not comply with the overtime requirements. Accordingly, the Court denied Defendant's motion as to group four because a genuine issue of material fact existed as to this claim. The Court thereby granted in part and denied in part Defendant's motion.

***Blakeley, et al. v. Celadon Trucking Services, Inc.*, 2017 U.S. Dist. LEXIS 84738 (S.D. Ind. June 2, 2017).** Plaintiffs, a group of truck drivers, alleged that Defendant violated the Indiana Small Loans Act ("ISLA"), the Indiana Consumer Loan Act ("ICLA"), and the Indiana Wage Assignment Act ("IWAA") by providing advances that constituted loans, including transaction fees in excess of 8%, and by securing agreements for assignments exceeding 30 days. *Id.* at *6. Defendant filed a motion for summary judgment, which the Court granted. Plaintiffs regularly requested and received advances from Defendant for personal use and for costs associated with operating their vehicles, in exchange for one-time service fees ranging from $3.50 to $7.50 for each advance. Defendant typically provided the requested advances to its drivers by either loading the funds onto the drivers' fuel cards or by issuing an "express code" that would allow the drivers to obtain cash at truck stations. *Id.* at *4-5. When the total amount due to a driver for a particular paycheck did not cover the entire amount already advanced to that driver, the remaining amount was reflected as a reduction on the driver's subsequent paychecks until the entire advanced amount could be accounted for based on the policy. *Id.* at *5. Plaintiffs asserted that the advances provided by Defendant constitute "loans" that violate the ISLA and the ICLA. The ICLA defines a "loan" to include: (i) a debt created "by the lender's payment of or agreement to pay money to the debtor" or to a third-party on the debtor's behalf; (ii) a debt created "by a credit to an account with the lender upon which the debtor is entitled to draw immediately;" (iii) a debt created "pursuant to a lender credit card or similar arrangement," and (iv) "the forbearance of debt arising from a loan." *Id.* at *6. The Court found that this statutory definition implied that a debt must be created in order for a loan to exist. *Id.* at *10. The Court held that the advances constituted early payments of wages either earned or to be earned by Plaintiffs for their services rendered to Defendant. *Id.* The Court further opined that the reductions reflected on Plaintiffs' paychecks for the advances merely acted as an accounting measure for Celadon to ensure that it is not overpaying Plaintiffs for their services. *Id.* The Court thereby concluded that the advances paid by Celadon to Plaintiffs constituted early payment of compensation, rather than loans that created debts that Plaintiffs must repay; accordingly, the advances were not subject to either the ISLA or the ICLA. *Id.* at *12. For these reasons, the Court granted Defendant's motion for summary judgment as to Plaintiffs' ISLA and ICLA claims. However, after consideration of Plaintiffs' IWAA claims, the Court raised, *sua sponte*, the following questions for briefing: (i) whether any private right of action exists under § 2 of the IWAA; (ii) if so, whether Plaintiffs suffered any harm from Defendant's possible violations of § 2; (iii) whether any private right of action exists under the Indiana Wage Deduction Act; and (iv) if so, whether Plaintiffs suffered any harm from Defendant's possible violations of the IWWA. Therefore, the Court denied Defendant's motion for summary judgment of Plaintiff's IWAA claims.

***Brunozzi, et al. v. Cable Communications, Inc.*, 2017 U.S. App. LEXIS 4997 (9th Cir. Mar. 21, 2017).** Plaintiffs, a group of cable technicians, filed suit against Defendant alleging that it violated the overtime provisions of the FLSA and Oregon's statutory requirement that an employer pay all wages earned and unpaid after terminating an employee. Plaintiff Brunozzi additionally alleged that Defendant violated Oregon's laws prohibiting discrimination against an employee who engaged in whistleblowing and wage-claim discussions. The District Court granted summary judgment in favor of Defendant. On Plaintiffs' appeal, the Ninth Circuit reversed and remanded. First, the Ninth Circuit held that Defendant's diminishing bonus device in its compensation plan violated the FLSA's overtime provision because it miscalculated the regular hourly rate during weeks when the technicians worked overtime and allowed the employer to pay less during those weeks. The effect of the pay plan was that technicians were paid at a reduced hourly rate during weeks when they worked overtime. The Ninth Circuit reversed on the basis that Defendant's practice – that lowered the hourly rate during statutory overtime hours or weeks when statutory overtime was worked – was prohibited under the FLSA. *Id.* at *12.

Second, the Ninth Circuit reversed the District Court's decision granting summary judgment in favor of Defendant as to Plaintiffs' claims that Defendant failed to pay all wages earned and unpaid at the time of discharge. *Id.* at *12. Because the pay plan violated the FLSA, the District Court erred when it ruled that these claims failed. *Id.* Finally, as to Plaintiff Brunozzi's retaliation claim, the Ninth Circuit held that Brunozzi stated a claim because prior to his termination, he complained to his supervisor that Defendant failed to properly compensate him for overtime. The Ninth Circuit held that based on the text, context, and legislative history of Oregon law, the Oregon legislature intended the term "reported" to mean a report of information to either an external or internal authority, and the District Court erred when it interpreted "reported" in the state statute to include reports only to external authorities. Accordingly, the Ninth Circuit reversed and remanded the District Court's order. *Id.* at *25.

***Chavez, et al. v. Converse, Inc.*, 2017 U.S. Dist. LEXIS 169167 (N.D. Cal. Oct. 11, 2017).** Plaintiff, a retail sales employee, brought a collective action alleging that Defendant's policy requiring employees to undergo exit inspections prior to leaving the store led employees to be under-paid in violation of the California Labor Code. The Court had previously granted class certification, and the parties subsequently cross-filed motions for summary judgment. Defendant moved for summary judgment on the basis that the *de minimis* doctrine applied to Plaintiff's claims. Plaintiff moved for partial summary judgment on the issue that by requiring all class members to undergo exit inspections before leaving the premises, the class members were under Defendant's control and should be paid for that time. The Court granted Defendant's motion, finding that the *de minimis* doctrine applied to Plaintiff's claims and that Defendant met its burden in proving there was no genuine dispute of material fact as to the durations of the exit inspections being *de minimis.* The Court therefore denied as moot Plaintiff's motion for summary judgment. Defendant submitted a time and motion study by its expert Robert W. Crandall, which considered 436 exit inspections The Crandall Study found that 95.9% of exit inspections took one minute or less, and 99.5% of exit inspections had a wait time of 2 minutes or less. *Id.* at *6-7. The average time to complete an exit inspection was 7.2 to 11.2 seconds. *Id.* at *7. The Court stated that this evidence was sufficient to shift the burden to Plaintiff to show that there was a genuine dispute of material fact that the aggregate amount of time is not *de minimis*. *Id.* at *30. The Court noted that in response to Defendant's expert report, Plaintiff submitted a report rebutting the Crandall Study and stating that the average time for exit inspections was 144 seconds, or 2 minutes and 24 seconds. *Id.* at *29. The Court stated that even taking Plaintiff's expert report as true, it would take five daily exits by class members to exceed the aggregate 10-minute mark required for the time to not be considered *de minimis*. *Id.* at *30. The Court found that neither party briefed the issue of how often class members exited the premises during rest and meal breaks. However, based on Plaintiff's declarations submitted in support of his claims, the maximum number of times a class member working a full-time shift would have exited in one day was four times, including two rest breaks, one meal break, and at the end of their shift. *Id.* at *30-31. Employees working part-time shifts would exit twice, both during a rest break and at the end of their shift. *Id.* at *31. The Court further stated that of Plaintiff's submitted declarations, only 3 out of 24 class members arguably testified that their exit inspection took greater than one minute with regularity. This Court found that this testimony was insufficient to rebut the Crandall Study's finding that the overwhelming majority of exit inspections took less than one minute. Accordingly, the Court granted Defendant's motion for summary judgment.

***Darden, et al. v. Southwest Arkansas Development, Inc.*, 2017 U.S. Dist. LEXIS 74963 (W.D. Ark. May 17, 2017).** Plaintiffs, a group of patient-transportation providers, filed a collective action alleging violations of the Fair Labor and Standards Act ("FLSA") and state law. Plaintiffs claimed that they were required to include a one-hour uncompensated lunch break in their daily timesheets, but they were not relieved of their work duties for that time. *Id.* at *5. Plaintiffs asserted that they were required to monitor their work cell phones during meal breaks and were required to pick up clients if a dispatcher called during their breaks. *Id.* at *3. Plaintiffs also claimed that Defendant maintained a policy that Plaintiffs remain nearby the clients after delivering them to appointment destinations, and they were restricted geographically in where they could take their breaks. *Id.* at *13. Plaintiffs also alleged that Defendant required Plaintiffs to contact clients while off-duty to confirm the next day's appointments. *Id.* at *6. Defendant moved for summary judgment. At the outset, the Court noted that the Eighth Circuit has adopted the "predominately-for-the-benefit-of-the-employer" standard to determine whether meal periods are compensable under the FLSA. *Id.* at *9. The Court denied Defendant's motion and ruled that there was a genuine issue of material fact as to whether the lunch breaks were for the benefit of the employer. *Id.* at

*30. Defendant asserted that Plaintiffs utilized their breaks in any way that they chose and, if they were unable to take a break, they were required to report the failed opportunity to their supervisor so that they could be compensated. *Id.* at *5. Defendant admitted that Plaintiffs were required to monitor their cell phones during lunch. The Court opined that the fact that Plaintiffs were required to monitor their cell phones during lunch did not necessarily make that time compensable. *Id.* at *18. However, it was undisputed that dispatchers called Plaintiffs during lunch, and the unknown frequency of the calls created a genuine issue of material fact. *Id.* Defendant also maintained that Plaintiffs were not required to discontinue lunch breaks to pick up clients. Defendant asserted that Plaintiffs were never instructed to contact clients off-duty; however, any off-duty phone calls were *de minimis,* and therefore non-compensable. *Id.* at *5. Defendant offered the results of the U.S. Department of Labor's ("DOL") investigation of Defendant's overtime policies that found no overtime violations to establish that there was no genuine issue of material fact. *Id.* at *29. The Court found the DOL's documents were non-binding and not helpful for purposes summary judgment because they were significantly redacted*. Id.* Accordingly, the Court denied Defendant's motion for summary judgment.

***Douglas, et al. v. Xerox Business Services, LLC*, 2017 U.S. App. LEXIS 22967 (9th Cir. Nov. 15, 2017).** Plaintiffs, a group of call center employees, brought a collective action alleging that Defendant violated the FLSA's minimum wage and overtime provisions by paying above minimum wage for some hours and below minimum wage for other hours. The District Court granted Defendant's motion for summary judgment. On appeal, the Ninth Circuit affirmed the District Court's ruling. Plaintiffs claimed that Defendant's pay system, under which Defendant paid workers variable rates for different tasks, violated the FLSA. Although Defendant made up the difference to workers whose weekly per-hour average pay fell below the minimum wage, Plaintiffs contended that the FLSA barred Defendant from paying below minimum wage for a single hour. Plaintiffs asserted that the FLSA measures compliance on an hour-by-hour basis and does not allow averaging over a longer period. *Id.* at *4. The Ninth Circuit noted that, although the FLSA states that "every employer shall pay to each of his employees who in any workweek is engaged in commerce . . . not less than" the current federal minimum of $7.25, whether Congress meant this to apply to per-hour pay or average hourly pay was unclear. *Id.* at *5. The Ninth Circuit held that "Congress' use of the per-workweek measure in the overtime provision but not the minimum-wage provision could be read as exclusive," but "it is equally logical to conclude that inclusion of the per-workweek measure in the overtime provision means that the workweek is an acceptable compliance measure for FLSA provisions worded broadly enough to embrace it." *Id.* at *6. The Ninth Circuit found the U.S. Department of Labor's interpretation of the FLSA instructive, noting that it stated that "the workweek is the standard period of time over which wages may be averaged to determine whether the employer has paid" workers minimum wage. *Id.* at *8. The Ninth Circuit further noted that the Second, Fourth, Eighth, and D.C. Circuits have adopted the same standard, and no circuits have disagreed. *Id.* at *9. Accordingly, the Ninth Circuit concluded that Defendant's payment plan compensated employees for all hours worked by using a workweek average to arrive at the appropriate wage, and the District Court did not err in granting Defendant's motion for summary judgment.

***Hall, et al. v. Plastipak Holdings, Inc.*, 2017 U.S. Dist. LEXIS 80580 (E.D. Mich. May 25, 2017).** Plaintiffs, a group of non-exempt employees, allege that Defendant violated the FLSA by failing to pay them sufficiently for those hours worked above the 40-hour weekly threshold. Defendants filed a motion for summary judgement, asserting that Plaintiffs admitted during their deposition testimony that the four requirements to allow the use of the fluctuating workweek method of overtime calculation were satisfied. Defendant also argued that Plaintiffs' allegations that their employer would reduce their vacation pay whenever they worked less than 40 hours per week was belied by Plaintiffs' deposition testimony that it only reduced their bank of vacation pay for time that they had requested to take off. *Id.* at *2. Plaintiffs contended that genuine issues of material fact existed as to whether Defendant's pay practices as implemented actually conformed to the fluctuating workweek overtime calculation method, because Plaintiffs were not paid time-and-a-half for overtime hours, and Plaintiffs had to consume vacation or paid-time off during weeks when they worked less than 40 hours. The Court found that Plaintiffs provided no evidence that Defendant paid less than a 0.5 hourly premium for overtime hours. In fact, the Court stated that the undisputed facts were that Defendant greatly exceeded this premium, because it established an employee's "base rate" for calculating the overtime pay base rate by simply dividing the normal weekly salary by 40 hours rather than the larger, total number of hours worked. *Id.* at *8-9. Defendants therefore paid 1.0 times the calculated hourly base rate. The Court thus determined, since no genuine issue of material

fact existed as to whether Defendant's hourly overtime pay practices satisfied the requirements of the FLSA, summary judgment on this claim must be granted. The Court further found that Plaintiffs did not present any evidence for their contention that Defendant impermissibly deducted their vacation time and otherwise did not dispute that, setting aside overtime, they were paid the same amount every week regardless of the hours worked. *Id.* at *13. As a result, the Court also granted Defendant's motion for summary judgment on Plaintiff's vacation time claim.

***Hills, et al. v. Entergy Operations*, 2017 U.S. App. LEXIS 14387 (5th Cir. Aug. 9, 2017).** Plaintiffs, a group of security shift supervisors, alleged that Defendant misclassified them as exempt employees and thereby denied them overtime wages in violation of the FLSA. The District Court entered summary judgment that, assuming that Plaintiffs were misclassified, their regular rate of pay would be calculated pursuant to the fluctuating workweek method for the purpose of determining the back pay owed to them. *Id.* at *1-2. On appeal, the Fifth Circuit found that the District Court's judgment was premature and reversed the order. The Fifth Circuit reviewed two partial summary judgment rulings of the District Court relating to the calculation of back pay if Plaintiffs were ultimately found misclassified at trial. First, the District Court entered summary judgment that the fluctuating workweek method would apply to calculate Plaintiffs' regular rate of pay for the purpose of determining their proper overtime rate of pay. *Id.* at *4. Second, the District Court entered summary judgment that any back pay awarded to each Plaintiff would be off-set by the amount of discretionary bonuses each was paid. *Id.* Even though the case was still pending, since the two remedy-related rulings had the combined effect of reducing below zero the maximum possible recovery of Plaintiffs, the Fifth Circuit permitted the appeal. The District Court dismissed the two Plaintiffs as presenting no justiciable case or controversy and entered final judgment against them. Plaintiffs appealed that final judgment. The District Court stayed proceedings as to the remaining Plaintiffs pending the outcome of the appeal. Plaintiffs requested that the Fifth Circuit reverse the fluctuating-workweek-method and bonus off-set summary judgment orders, reverse the final dismissals as to them, and remand their revived claims to be reinstated in the lawsuit. The Fifth Circuit determined that the District Court focused on Plaintiffs' admission that their weekly schedule was to alternate between 36 hours and 48 hours. *Id.* at *10. The District Court opined that the bi-weekly alternation was "fluctuating" within the meaning of the fluctuating workweek method, and granted of summary judgment that the method applied. *Id.* at *11. The Fifth Circuit disagreed and concluded that the interpretation was too literal a conception of "fluctuating." *Id.* The Fifth Circuit stated that a fluctuating workweek method may be applied only where the employee "clearly understands" that her salary is intended to compensate any unlimited amount of hours she might be expected to work in any given week. *Id.* The Fifth Circuit stated that Plaintiffs here claimed that they agreed only to a weekly work schedule that alternated between two fixed amounts of hours. *Id.* This bi-weekly alternating, but fixed, schedule was not necessarily "fluctuating" as that term is used in the fluctuating workweek method. *Id.* The Fifth Circuit found that due to the disputed record of whether Plaintiffs understood themselves to be receiving overtime compensation, the District Court's ruling was premature. The Fifth Circuit determined that the eventual trier of fact would be entitled to review each parties' evidence and determine whether the fluctuating workweek method applied. The Fifth Circuit stated that since it was reversing the District Court's decision, Plaintiffs' claims were viable once more because their base recoveries may be high enough to withstand the bonus off-sets with a net-positive value. Accordingly, the Fifth Circuit reversed the District Court's decision granting summary judgment that the fluctuating workweek method applied as a matter of law.

***In Re Amazon.com, Inc., Fulfillment Center FLSA Wage & Hour*, 2017 U.S. App. LEXIS 5622 (6th Cir. Mar. 31, 2017)**. Plaintiffs, a group of workers at on-line retail fulfillment center warehouses, filed wage & hour claims alleging overtime violations of the FLSA and Kentucky Wages and Hour Act ("KWHA"). Plaintiffs were required to go through a theft-prevention security screening that took anywhere from 10 to 30 minutes after they "clocked out" and were not paid overtime for time spent undergoing the security checks. *Id.* at *2-3. Multiple lawsuits alleging the same claims in different districts were consolidated in the District Court and were stayed pending the decision in U.S. Supreme Court in *Integrity Staffing Solutions, Inc. v. Busk,* 135 S. Ct. 513 (2014). *Id.* at *4. In *Integrity,* the Supreme Court held that a security screening after a worker's shift was not compensable under FLSA because it was neither the "principal activity," nor was it "integral and indispensable" to that activity, pursuant to the Portal-to-Portal Act. *Id.* at *10. Accordingly, Plaintiffs' withdrew their FLSA claim, but maintained that *Integrity* did not control their KWHA claims because it was a Portal-to-Portal decision and the KWHA did not have a comparable exclusion. *Id.* at *4. The District Court rejected Plaintiffs' argument,

dismissing the KWHA claims pursuant to Rule 12(c). If reasoned that the Portal-to-Portal Act merely amended the FLSA by clarifying what counted as work. *Id.* at *5. Furthermore, the District Court ruled that the Kentucky Supreme Court would apply *Integrity* to the KWHA because it referred to federal law when construing KWHA. *Id.* at *9. On Plaintiffs' appeal, the Sixth Circuit affirmed. In its ruling, the Sixth Circuit reasoned that the KWHA was considered Kentucky's analogue to the FLSA. *Id.* Furthermore, because the KWHA differed affirmatively from the FLSA in some parts, it was reasonable to assume if the state legislature had intended to exclude the Portal-to-Portal Act, it would have explicitly stated as such. The Sixth Circuit ruled that absent an express departure from the Portal-to Portal Act, the Kentucky Supreme Court would apply federal law. *Id.* at *16. Accordingly, the Sixth Circuit affirmed the District Court's decision.

***Manigo, et al. v. Time Warner Cable*, 2017 U.S. Dist. LEXIS 184046 (C.D. Cal. Oct. 17, 2017).** Plaintiffs, a group of cable dispatchers, filed a class action alleging that Defendant failed to pay for meal and rest breaks in violation of California Labor Code. The Court denied class certification. Defendant then filed a motion for summary judgment, which the Court granted. Plaintiffs contended that, although Defendant had specific policies in place allowing breaks, the policies were overridden by a *de facto* policy discouraging timely meal breaks that caused Plaintiffs to miss meal breaks altogether. *Id.* at *10. The Court found that Plaintiffs' allegations were insufficient because, to support their argument that Defendant failed to relieve them of work duties, Plaintiffs relied heavily on time records, which reflected that Plaintiffs did not take meal breaks within the first five hours of their respective shifts on certain days. *Id.* at *11. The Court concluded that the records, without more, were insufficient to create a genuine dispute of material fact because they did not indicate why Plaintiffs took breaks late. *Id.* Accordingly, the Court concluded that Plaintiffs failed to create a triable issue of material fact as to whether Defendant violated the Labor Code by depriving Plaintiffs of an opportunity to take meal breaks or not compensating them for missed meal periods. *Id.* at *12. The Court further held that Plaintiffs provided only vague and conclusory testimony asserting missed meal breaks, failed to identity any "specific instance" when they did not receive a chance for a break, and failed to demonstrate that they did not take a meal break and were denied compensation. *Id.* The Court stated that Plaintiffs "uniformly testified" regarding instructions to comply with break schedules and, despite their contentions of "mixed messages" from supervisors, Plaintiffs failed to sufficiently allege they were specifically told to skip breaks. *Id.* at *13. The Court concluded that the evidence submitted by Plaintiffs demonstrated that dispatchers frequently made subjective personal decisions about when to take breaks based on their perceptions of coverage rather than their schedules despite the fact that they never had responsibility for determining coverage needs. *Id.* at *14. As for Plaintiffs' overtime claims, the Court found that, based on the evidence submitted, Plaintiffs failed to identify a single specific instance in which they purportedly performed off-the-clock work during a meal or rest break or missed a meal or rest break altogether for which they were not compensated. *Id.* at *16. Accordingly, the Court also granted summary judgment on Plaintiffs' overtime claims. Finally, the Court concluded that the remainder of Plaintiffs' claims were derivative of the meal and rest break claims and, therefore, granted Defendant's motion for summary judgment with respect to the remaining claims. Accordingly, the Court granted Defendant's motion for summary judgment.

***Milien, et al. v. McClure Properties, LTD,* 2017 U.S. Dist. LEXIS 50321 (M.D. Fla. April 3, 2017).** Plaintiffs, a group of current and former employees, brought an action alleging that Defendants' wage payment practices violated state and federal laws. Defendants owned and operated a commercial tomato farm. Plaintiffs alleged that Defendants provided them payroll debit cards through a third-party vendor. Once payments were distributed, Plaintiffs accessed their wages from an automatic teller machine ("ATM"), resulting in the assessment of numerous administrative fees. *Id.* at *2. Plaintiffs contended that the ATM only dispensed certain denominations of currency, often limiting Plaintiffs to disbursements in specific increments. *Id.* In addition, due to ATM withdrawal limits, Plaintiffs alleged that to receive the full amount of their wages, they were forced to make several withdrawals, and, in turn, to incur more administrative fees. *Id.* Plaintiff brought five causes of action, including: (i) violation of Fla. Const. § 24, Art. X for unpaid minimum wages; (ii) violation of the Migrant and Season Agricultural Worker Protection Act, 29 U.S.C. §§ 1801; (iii) violation of Fla. Stat. §§ 532.01-532.02; (iv) violation of Electronic Funds Transfer Act, 15 U.S.C. §§ 1693; and (v) for unjust enrichment. *Id.* at *2-3. Defendant filed a motion to dismiss, which the Court granted. Defendants argued that Plaintiffs merely filed a shotgun complaint and that they failed to state a claim upon which relief can be granted. *Id.* at *4. In response, Plaintiffs contended that the complaint was not a shotgun pleading because each cause of action was pled in a separate count and arose from the same factual circumstances. *Id.* The Court stated that pursuant to Rule 8, a

party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. *Id.* at *5. The Court noted that a complaint is considered a shotgun pleading where "it is virtually impossible to know which allegations of fact are intended to support which claims for relief." *Id.* The Court held that Plaintiffs' complaint plainly constituted a "proverbial shotgun pleading," as it merely incorporated the preceding paragraphs into each subsequent count, and therefore intermingled its claims. *Id.* at *6. Accordingly, the Court stated that Plaintiffs' complaint must be dismissed, and granted Defendants' motion.

***Murphy, et al. v. First Student Management LLC,* 2017 U.S. Dist. LEXIS 9624 (N.D. Ohio Jan. 24, 2017).** Plaintiffs, a group of bus drivers and driver assistants, brought a class action alleging that Defendants' wage payment practices violated state and federal laws. Defendants used an Electronic Vehicle Inspection Records ("EVIR") system to maintain inspection records. *Id.* at *2. Defendants also used EVIR to calculate time "on-the-clock" by recording when bus drivers and assistants clocked-in and clocked-out of the EVIR program at the beginning and end of their routes. However, the EVIR system did not track the time that drivers and assistants worked before or after they logged-in to the EVIR system, and therefore Defendants did not compensate employees for that time. Plaintiffs claimed that Defendants violated both the FLSA and Ohio law by failing to pay them for all hours worked and for failing to pay them for overtime. *Id.* at *4. Defendants filed a motion to dismiss, which the Court granted in part. Plaintiffs alleged an FLSA claim for unpaid time at their regular rate of pay. The Court noted that there was a split of authority regarding whether a claim for unpaid straight time during weeks in which an employee worked overtime was cognizable under the FLSA, and the Sixth Circuit had yet to address the issue. *Id.* at *6. The Court stated that the FLSA does not make illegal a failure to pay straight or gap time wages or the overall compensation anticipated by an employee agreement. *Id.* at *8-9. In addition, the Court found that the relief afforded employees aggrieved by violations of § 206 or § 207 of the FLSA was limited to "the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." *Id.* at *9. The Court opined that the statute made no mention of relief in the form of unpaid regular wages for a violation of the maximum hours provision. *Id.* Stated simply, the Court held that the FLSA provides no avenue for the recovery of straight-time pay. *Id.* Moreover, the Court determined that, although the regulations provided an interpretation of the overtime and minimum wage requirements, they could not create new causes of action for uncompensated straight-time. Accordingly, the Court held that recovery of gap time was not conferred by the FLSA, regardless of whether overtime work is alleged. *Id.* at *10. Therefore, the Court concluded that Plaintiffs' claim for gap time failed as a matter of law and must be dismissed. Accordingly, the Court granted Defendants' motion to dismiss Plaintiffs' FLSA gap time claim.

***Nance, et al. v. May Trucking Co.,* 2017 U.S. App. LEXIS 5463 (9th Cir. Mar. 29, 2017).** Plaintiffs, a group of drivers, alleged that Defendant violated the FLSA and Oregon wage & hour laws by instituting: (i) a policy of not paying job applicants for their time during a mandatory, three-day orientation program; (ii) a pay policy during the first few weeks of employment for entry-level drivers; and (ii) a policy to make deductions from drivers' paychecks for fuel costs from excess engine idling. *Id.* at *1-2. The District Court certified class claims for the first two policies, but not the third, which the named Plaintiff Freeman then continued to challenge individually. On cross-motions for summary judgment, the District Court granted Defendant's motion on the certified claims. After a one-day bench trial, the District Court awarded $200 in damages to Freedman on his individual claim, refused to impose a statutory penalty for willful withholding of wages, denied reconsideration of its decision on class certification, and entered judgment. On appeal, the Ninth Circuit remanded one claim for the District Court to address and affirmed the dismissal of all other claims. The District Court held that drivers who attended orientation were not "employees" under the FLSA and Oregon law, so Defendant was not required to pay them for attending the orientation. The Ninth Circuit agreed, finding that the orientation was Defendant's method for ascertaining its drivers' training and abilities, and not all participants were hired upon the orientation's completion. Therefore, the Ninth Circuit stated that orientation attendees should not be considered "employees" under the FLSA or Oregon law. *Id.* at *4 Relevant to the pay plan claims, Defendant required entry-level drivers to ride along with experienced drivers for the first few weeks of their employment. Some of the entry-level drivers' time was spent in the sleeper berth of a moving truck, and the drivers argued they were entitled to compensation for this time. The District Court granted summary judgment to Defendant on the claim. The Ninth Circuit affirmed because the District Court properly relied on the authority of federal and state regulations saying drivers are not entitled to compensation for time they are permitted to sleep in the berths of moving trucks. *Id.*

The Ninth Circuit, however, found that it was unclear whether the District Court considered Plaintiffs' claim that Defendant paid entry-level drivers less than a minimum wage before April 2011. *Id.* at *5. The Ninth Circuit therefore vacated the judgment in part and remanded to the District Court. As to the idling claims, Defendant charged drivers extra if their trucks idled less than required limits and made deductions if idling times exceeded the limits. The District Court denied class certification of a claim that this policy violated Oregon laws against wage deductions and denied a motion to reconsider. The Ninth Circuit affirmed these decisions as well, finding that to establish liability, each driver would need to show that any deductions were not for his own benefit, and no evidence contradicted the District Court's finding that drivers sometimes idled trucks for their own benefit. *Id.* at *6. The Ninth Circuit held the District Court's conclusion – that that if class certification were granted, it "would need to examine why each driver incurred charges for additional idling time" – would defeat Plaintiffs' argument that a common question predominated. *Id.* at *7. Accordingly, the Ninth Circuit affirmed the District Court's ruling granting summary judgment in part and remanded to the District Court on the issue of whether Defendant paid entry-level drivers minimum wages prior to April 2011.

***Rodriquez, et al. v. Nike Retail Services, Inc.*, 2017 U.S. Dist. LEXIS 147762 (N.D. Cal. Sept. 12, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant failed to pay for all time spent waiting while for security inspections after they had clocked-out of work and were exiting Defendant's stores in violation of the FLSA. Defendant filed a motion for summary judgment, arguing that the time spent checking bags was *de minimis. Id.* at *2. The Court granted Defendant's motion. Defendant hired an expert to conduct a study of exit inspections, which showed that the average inspection took no more than 18.5 seconds and that 60.5% of all exits required zero wait time. *Id.* at *9. Rather than submit contradictory evidence in response to Nike's 700 hours of video, which the Court found to be representative of the class period, Plaintiffs relied on an expert declaration to support his allegations. The Court found that Plaintiffs' strategy was "misguided," and it rejected Plaintiffs' "attempt to equate this situation to a battle of experts sufficient to deny summary judgment." *Id.* at *27. The Court held that "pointing out flaws in the other side's evidence," was not the same as "offering any conflicting evidence for the jury to consider at trial on the relevant claim or defense." *Id.* Evaluating Defendant's evidence under the *de minimis* defense, and recognizing that daily periods of up to 10 minutes have been found to be *de minimis,* the Court ruled that Plaintiffs failed to show that their off-the-clock exit time was close to meeting that threshold. *Id.* at *33. Although Plaintiffs pointed to testimony from three store managers who estimated that some employees may have had a few inspections with higher wait-times, the Court found that wait-times of two or five minutes were too trivial, irregular, and administratively difficult to capture. *Id.* at *41. The Court also agreed that repositioning time clocks to the front of the store so that employees could clock-out after the check was not required. Accordingly, the Court granted Defendant's motion for summary judgment.

***Stein, et al. v. hhgregg, Inc.*, 2017 U.S. App. LEXIS 19908 (6th Cir. Oct. 12, 2017).** Plaintiffs, a group of sales employees, brought a collective action alleging that Defendant, a retail furniture store, utilized a commission-only structure that led to them being pay less than the minimum wage in violation of the FLSA. Plaintiffs alleged that Defendant paid a recoverable draw against future commissions in any workweek in which their commission earnings fell short of minimum wage, which was recovered from later paychecks when the commissions were high enough to exceed the minimum wage. The commission policy also required that any "unearned" draw balance be repaid at the time of termination, although the employer never actually sought repayment. Plaintiffs argued that recovery of the draw was actually an unlawful "kick-back" of wages in violation of the FLSA's requirement that minimum wages be paid "free and clear" without condition. *Id.* at *12. Plaintiffs also alleged that the draw policy led to pressure to work off-the-clock so as to minimize the minimum wage obligations and draw payments. *Id.* at *27. The District Court granted Defendant's motion to dismiss. On appeal, the Sixth Circuit reversed and remanded in part. First, adopting the long-standing position of the U.S. Department of Labor, the Sixth Circuit rejected Plaintiffs' contention that the draw structure violated the FLSA when advanced amounts were recovered during employment. However, the Sixth Circuit stated that with regard to the provision in Defendant's compensation plan requiring that terminated employees repay "unearned" draw balances after termination, Plaintiffs alleged sufficient facts to support a claim that the policy, as written, violated the FLSA by continuing to hold employees liable for draw payments even after termination. *Id.* at *26. Accordingly, the Sixth Circuit reversed the District Court's dismissal of Plaintiff's claims insofar as they alleged that Defendants' policy of holding employees liable upon termination violated the FLSA. *Id.* at *27. The Sixth Circuit also held that Plaintiffs could bring their off-the-clock and overtime claims based on their theory that Defendant's managers

encouraged employees to work off-the-clock in order to reduce or eliminate their commission draw by reducing their reported hours worked and increasing their earned commissions for the workweek. *Id.* at *32. Accordingly, the Sixth Circuit reversed and remanded the District Court's ruling on Defendant's motion to dismiss in part.

***Serrano, et al. v. Republic Services*, 227 F. Supp. 3d 768 (S.D. Tex. 2017).** Plaintiffs, a group of waste services employees, brought a collective action asserting claims under the FLSA for unpaid overtime wages. Plaintiffs specifically alleged that Defendant failed to pay them overtime compensation of one and one-half of their regular rate for all hours in a workweek exceeding 40 hours. Defendants computed employees' regular rate by dividing total compensation for the week by total hours worked in the week. Plaintiffs contended that their total wages must be divided by 40 hours to arrive at the regular rate, rather than divided by total hours worked, which would increase the base rate that Defendants used for overtime calculations. *Id.* at 769-70. Plaintiffs were paid with a combination of a job per day rate, a piece-rate, and hourly rates throughout the workweek. Plaintiffs asserted that Defendants' calculation were erroneous for two reasons, including: (i) the regulations prohibit combining a day rate with other forms of compensation as a matter of law; and (ii) the remuneration paid was not intended to compensate for all hours worked as a matter of fact. *Id.* Defendant filed a motion for summary judgment on Plaintiffs' claims, which the Court granted in part. The Court found that that the default methodology of 29 U.S.C. § 778.109 was appropriate for calculating overtime owed by applying the "all hours worked" denominator as the number of hours "for which such compensation was paid." *Id.* at 770. Plaintiffs argued that the flat, day rate component of their pay triggered the application of § 778.112 as the governing regulation. Plaintiffs contended therefore that Defendants' pay scheme was unlawful because § 778.112 does not allow other forms of compensation to be blended with the job or day rate. The Court opined that according to the plain language of § 778.112, it applied only when a pay structure – such as a day rate alone – compensated the employee for all hours worked, but if the employer paid other monetary forms of compensation, then § 778.112 would not apply. The Court determined that Plaintiffs received a combination of methods of monetary compensation as part of their wages in addition to any flat sums, and that § 778.112 therefore would not apply because the flat rate was not the only part of compensation. *Id.* at 771. The Court reasoned that the FLSA does not prohibit particular pay structures; instead, it merely requires that pay structures be properly interpreted for minimum wage and overtime calculations. The Court held that nothing in the language of the FLSA supported a construction that it intended to limit employers' manner of payment, and therefore it granted Defendant's motion for summary judgment as to Plaintiffs' claims for an unlawful combined rate pay. *Id.* The Court further found that Plaintiffs presented deposition testimony in which Defendants admitted that they did not build into the day rate downtime and landfill time. *Id.* at 772. Thus, the Court held that there was a disputed issue of material fact that precluded summary judgment on that issue. The Court thereby granted in part and denied in part Defendant's motion for summary judgment.

***Taylor, et al. v. AmSpec, LLC*, 2017 U.S. Dist. LEXIS 87212 (S.D. Tex. June 7, 2017).** Plaintiffs, a group of inspectors, filed a collective action for overtime pay alleging that Defendant improperly calculated their regular rate of pay by excluding payments for work performed on scheduled days off in violation of the FLSA. Plaintiffs worked as inspectors whose job duties included sampling and measuring fuel shipments. Their duties required them to drive their personal vehicles from one work location to another during the workday. Because Plaintiffs' work hours varied from week to week, depending on when cargo ships came and went, Defendant paid Plaintiffs using the fluctuating workweek method under 29 C.F.R. § 778.114. Plaintiffs regularly worked on scheduled days off and received payments for such work in amounts that varied from $100 to $200, usually in checks separate from their regular paychecks. *Id.* at *3. The parties disagreed as to whether Defendant properly excluded these payments from Plaintiffs' regular hourly rate in calculating overtime under the fluctuating workweek method. Defendant contended that the payments were reimbursements for mileage and other work-related expenses, and therefore properly excluded. *Id.* at *3-4. Plaintiffs contended that the payments were compensation for work they performed and therefore improperly excluded. *Id.* at *4. Defendant moved for summary judgment on the basis that it properly calculated Plaintiffs' overtime pay by excluding reimbursements for mileage and other work-related expenses from its calculation of the regular rate of pay. *Id.* at *2. The Court denied the motion. The Court stated that, under the fluctuating workweek payment method, if an employer properly characterizes payments as reasonable reimbursements for expenses, it may properly exclude them from the regular rate of pay in calculating overtime. *Id.* at *7. If, however, an employer makes payments for work performed on scheduled days off, the employer must include the payments in calculating the regular rate of pay.

Id. Defendant reimbursed inspectors at a rate of $0.30 during normal workdays, before switching to a fixed $36 per diem rate. Defendant contended that, because it reimbursed inspectors at a rate far lower than the IRS standard business mileage rate, it paid the additional amounts that Plaintiffs called "day-off pay" as reasonable travel reimbursements added to the travel reimbursement paid for regular workdays. *Id.* at *12. The Court concluded that the evidence failed to show, as a matter of law, that Defendant made the payments as a reasonable approximation of work-related expenses. *Id.* at *12-13. Plaintiffs relied on their deposition testimony and text messages that, if believed, showed that Defendant offered them compensation for working on their days off and that the amounts varied depending on the length of time they worked or the number of tanks they inspected. *Id.* at *13. Because it found a genuine dispute of material fact regarding whether Defendant made "day-off payments" as a reasonable approximation of work-related expenses, or as payment for Plaintiffs' working on their scheduled days off, the Court concluded that summary judgment was not appropriate and denied Defendant's motion.

***Zhang, et al. v. Akami Inc.,* 2017 U.S. Dist. LEXIS 158112 (S.D.N.Y. Sept. 26, 2017).** Plaintiff, a deliveryman, brought a putative class and collective action alleging violations of the FLSA and the New York Labor Law ("NYLL"), breach of implied contract, fraudulent filing of Internal Revenue Service ("IRS") returns, and deceptive acts and practices in violation of New York General Business Law ("GBL"). Plaintiff alleged a systemic practice of Defendants' failure to: (i) pay minimum wages and overtime compensation; (ii) properly record time spent by employees working; (iii) provide time of hire notices, and (iv) provide employees with accurate pay stubs. Plaintiff asserted that Defendants did not maintain, establish, or preserve weekly payroll records, and required Plaintiff to sign papers affirming false hours worked. Plaintiff also contended that Defendants required deliverymen to bear all out-of-pocket costs with respect to their delivery vehicles. Defendants asserted counterclaims for intentional infliction of emotional distress, sexual harassment, and torts on the basis that Plaintiff sent Defendants inappropriate, vulgar, sexual, and harassing messages. *Id.* at *4. Defendants moved pursuant to Rule 12(b)(6) to dismiss several counts of Plaintiff's complaint. Defendants further moved to dismiss Plaintiff's breach of implied contract claims for lack of supplemental jurisdiction. Defendants also moved to dismiss the NYLL claims for lack of supplemental jurisdiction if the Court dismissed the FLSA claims. With respect to Defendant's motion to dismiss Plaintiff's GBL claim, the Court ruled that none of the allegations in the complaint supported an assertion that Defendants participated in consumer-oriented conduct and as such, the Court dismissed the GBL claim. The Court also granted Defendants' motion to dismiss Plaintiff's claim of fraudulent filing of Internal Revenue Service ("IRS") returns, and ruled that the complaint did not allege that Defendants willfully filed a fraudulent information return, as the complaint merely parroted the statutory requirements. The Court also denied Defendants' motion to dismiss the claims of violations of the FLSA and rejected Defendant's argument that Plaintiffs failed to allege that Defendants were an enterprise engaged in commerce and therefore not subject to liability under the FLSA. The Court rejected Defendants' claim that it did not gross $500,000 annually as they did not raise it in their pleadings and the Court would not consider matters outside the pleadings for purposes of the motion. *Id.* at 15. The Court likewise denied Defendants motion to dismiss Plaintiff's claims of breach of an implied contract for lack of supplemental jurisdiction. *Id.* at *21. Plaintiff sought reimbursement of all costs and expenses of bicycles or electric delivery vehicles and alleged that an implied contract that Defendants would compensate Plaintiffs for the costs associated with their delivery vehicles. Defendant asserted that the Court lacked subject-matter jurisdiction because the underlying facts were insufficiently related to the FLSA claims. *Id.* at *17. The Court ruled that the FLSA claims and implied contract claims shared a common nucleus of operative facts that warranted the Court's exercise of supplemental jurisdiction. In addition, the Court granted Plaintiff's motion to dismiss Defendants' counterclaims and declined to exercise supplemental jurisdiction as to Defendant's counterclaims. *Id.* at *22. The gist of Defendants' counterclaims was that Plaintiff sent inappropriate, vulgar, sexual, and improper messages via telephone or electronic messenger service. Defendants attempted to link the inappropriate messages to the alleged minimum wage and overtime violations, asserting that the messages casted doubt on the hours that Plaintiff worked. The Court rejected this argument and found that the facts underlying the FLSA claims and Defendants' counterclaims did not substantially overlap and dismissed the counterclaims without prejudice pursuant to Rule 12(b)(1). *Id.* at *29. The Court also denied both parties' request to amend their pleadings on the basis that any amendment would be futile.

(xxiii) Preemption And Immunity Issues In FLSA Collective Actions

***Azpeitia, et al. v. Tesoro Refining,* 2017 U.S. Dist. LEXIS 114210 (N.D. Cal. July 21, 2017).** Plaintiffs, a group of oil refinery operators, brought a putative class action alleging violations of California labor law for failure to provide rest breaks, failure to provide accurate wage statements, and alleged violations of the California Private Attorney General Act ("PAGA") and the California Unfair Competition Law ("UCL"). *Id.* at *3. Defendants moved to dismiss on the basis that Plaintiffs' state law claims were preempted by the Labor-Management Relations Act ("LMRA") because they required interpretation of a collective bargaining agreement ("CBA") and that the derivative claims failed to state a viable claim for relief. *Id.* at *10. The Court granted the motion to dismiss as to Plaintiffs' UCL claim and Plaintiffs' claim for disgorgement, but denied the motion in all other respects. *Id.* at *32. The Court found that Plaintiffs' claims of off-duty rest breaks and improper wage statements implicated rights mandated by state law and not the CBA. The Court concluded that, because the rights existed independently of a CBA and were not substantially dependent on the analysis of a CBA, the claims were not preempted by the LMRA. *Id.* at *13. Defendants also argued that Plaintiffs' claims violated the terms of a collectively bargained class settlement. The Court rejected this defense, ruling that the settlement agreement did not have any terms that needed to be interpreted to resolve Plaintiffs' state law claims. *Id.* at *16. Defendants also asserted that Plaintiffs failed to exhaust arbitration procedures before filing suit. However, the Court held that the existence of an arbitration clause in a CBA did not necessarily implicate LMRA preemption and, because the claims were based upon rights guaranteed by California law, they did not require interpretation of the CBA. *Id.* at *20. Defendants also argued that Plaintiffs' derivative claims failed to state a viable claim for relief. Specifically, Defendants asserted that: (i) the wage statements did not need to include the missed rest periods as unearned wages; (ii) the UCL claims could not be predicated on rest break penalties or wage statement violations; (iii) Plaintiffs could not seek disgorgement of profits under the UCL; and (iv) Plaintiffs' PAGA claims failed to state a claim for relief. The Court determined that payments required for missed rest periods should be considered wages and that the UCL claim may be predicated on missed rest periods. *Id.* at *26. Because Plaintiffs did not object to Defendant's argument that Plaintiffs could not predicate the UCL claims on failure to provide accurate wage statements, the Court considered that claim abandoned and dismissed it. The Court agreed with Defendants that the UCL claim seeking an order of disgorgement of all profits gained by operation of the unfair business practices was improper and dismissed that claim. *Id.* at *27. Defendants also asserted that Plaintiffs' PAGA claims must be dismissed because Plaintiffs failed to fulfill PAGA's mandatory exhaustion requirements and Plaintiffs were not able to recover additional penalties under PAGA for alleged violations of the California Labor Code. *Id.* at *28. The Court rejected both arguments and denied the motion to dismiss as to the PAGA claims. *Id.* at *32. The Court therefore granted the motion to dismiss as to Plaintiffs' UCL claim and disgorgement claim, but denied the motion in all other respects. *Id.*

***DaSilva, et al. v. Border Transfer Of MA,* 277 F. Supp. 3d 154 (D. Mass. 2017).** Plaintiffs, a group of former delivery drivers, alleged that Defendant improperly classified them as independent contractors instead of employees, and therefore unlawfully deducted certain business expenses from their pay. Defendant filed a motion to dismiss on the basis that Plaintiffs' claims were preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1). Defendant provided delivery services for large retail stores such as Sears. Plaintiffs delivered merchandise and their relationship with Defendant was governed by a "Contract Carrier Agreement," which stated that Plaintiffs were independent contractors. *Id.* at 155. Plaintiffs alleged that they should have been classified as employees because Defendant exercised substantial control over drivers, and drivers did not have the ability to maintain an independently established business. Certain expenses were deducted directly from drivers' compensation, including when Defendant determined that a delivery had been made in an unsatisfactory manner, *i.e.*, when goods or consumer property were damaged. The cost of uniforms was also deducted, as was the cost of paying for a replacement driver when a driver could not complete a delivery. Worker's compensation coverage, cargo insurance, fuel costs, and vehicle maintenance costs were also taken from drivers' compensation. *Id.* at 156. At the outset, the Court stated that the term "employee" in the Massachusetts wage law is defined by the Massachusetts Independent Contractor Statute as any individual performing any service 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, occupation, profession, or business of the same nature as that involved in the service performed. *Id.* at 157. All three prongs must be met for a worker to be an independent contractor rather than an employee. *Id.* The FAAAA

expressly preempts any state law "related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property." *Id.* The Court opined that under the broad FAAAA preemption standard, a state law is preempted "if it expressly references, or has a significant impact on, carriers' prices, routes, or services." *Id.* at 158. The Court found that the question before it was whether the Massachusetts wage law claim and the Massachusetts Independent Contractor Statute have a significant impermissible effect on carriers' prices, routes, and services. *Id.* at 159. The Court determined that Defendant failed to allege any facts that Massachusetts law has a significant impact on the services that Defendant provided to its customers. The Court thus held that the FAAAA did not preempt Plaintiffs' claims under the Massachusetts wage law, and denied Defendant's motion for summary judgement on those claims. *Id.* at 160. The Court further opined that a party with an adequate remedy at law cannot claim unjust enrichment, and since the Massachusetts wage law claims were available as a statutory remedy that was sufficient to bar unjust enrichment. *Id.* Accordingly, the Court granted Defendant's motion to dismiss as to Plaintiffs' unjust enrichment claim only.

***McKinley, et al. v. Southwest Airlines,* 2017 U.S. App. LEXIS 2962 (9th Cir. Feb. 21, 2017).** Plaintiff, a former employee, alleged that Defendant failed to pay overtime wages as required under §§ 510 and 1194 of the California Labor Code. *Id.* at *2. Defendant filed a Rule 12(b)(1) motion to dismiss and argued that Plaintiff's claims were preempted by the Railway Labor Act ("RLA"). The District Court granted Defendant's motion On appeal, the Ninth Circuit affirmed the District Court's decision. The Ninth Circuit stated that a two-step inquiry was appropriate to analyze RLA preemption of state law claims, including: (i) if the asserted cause of action involves a right conferred upon an employee by virtue of state law and not by a collective bargaining agreement ("CBA") then the claim is preempted; however (ii) if the right underlying Plaintiff's state law claims exists independently of the CBA, the District Court must determine if the right is nevertheless substantially dependent on analysis of a collective-bargaining agreement. The Ninth Circuit explained that if there is substantial dependence, the state law claim is preempted by the RLA. *Id.* The Ninth Circuit found that Plaintiff's complaint referenced multiple provisions of the CBA, including references to "regular rate of pay," "non-discretionary incentive pay," and "shift differential pay." *Id.* at *3. The Ninth Circuit further stated that the complaint referenced "all remuneration," implicating shift-trade pay, holiday pay, inconvenience shift premiums, and multiple starting time premiums, all of which were matters covered by the CBA. *Id.* at *3. The Ninth Circuit held that the District Court therefore correctly determined that in order to assess Plaintiff's claim, it would have to examine each form of pay provided by the CBA, determine when that pay was due, and then decide whether the pay should have been included in Plaintiff's regular rate. *Id.* The Ninth Circuit concluded that the District Court also properly held that since the resolution of the claim required interpretation of the CBA, Plaintiff's claims were preempted. *Id.* at *3-4.

***O'Connor, et al. v. Oakhurst Dairy,* 2017 U.S. App. LEXIS 4392 (1st Cir. Mar. 13, 2017).** Plaintiffs, a group of dairy delivery drivers, alleged that Defendant failed to pay overtime compensation in violation of Maine's wage & hour laws. *Id.* at *2. Defendant argued that dairy delivery drivers were overtime-exempt under Maine's "Exemption F." *Id.* at *3. Under Exemption F, Maine's overtime law does not apply to the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of: (i) agricultural produce; (ii) meat and fish products; and (iii) perishable foods. *Id.* The parties agreed that the drivers were not involved in canning, processing, preserving, freezing, drying, marketing, storing, or packing any food. The issue was whether drivers were engaged in "packing for shipment or distribution." *Id.* at *4. Plaintiffs argued that this phrase referred to a single activity of "packing," whether the packing be for shipment or for distribution. *Id.* Plaintiffs asserted that since they did not pack food, Exemption F did not apply to them. Defendant argued that the phrase referred to two different activities, including "packing for shipment" and "distribution." *Id.* Therefore Defendant contended that since Plaintiffs engaged in the distribution of food, Exemption F applied to them. *Id.* The District Court ruled that "packing for shipment" and "distribution" were each stand-alone exempt activities under the Maine statute and it granted summary judgment in favor of Defendant. On appeal, the First Circuit reversed and remanded. The First Circuit set out to determine for itself what the contested phrase meant. Because case law authority in Maine had not interpreted Exemption F, the First Circuit looked to the plain language of the statute. The First Circuit found the statute ambiguous, no matter what rules or conventions it applied. *Id.* at *7-15. The First Circuit therefore turned to the legislative history and statutory purpose to guide its interpretation of the statute. *Id.* at *18. After providing thorough analysis, the First Circuit concluded that these

too were unhelpful in resolving the ambiguity. *Id.* at *19-24. Finding no other way to resolve the ambiguity, the First Circuit reverted to the default rule of construction under Maine law for ambiguous wage & hour laws, *i.e.,* liberally construe the statute to further the purpose for which it was enacted. *Id.* at *24. In doing so, the First Circuit stated that it must accept Plaintiffs' narrower construction of the exemption. Therefore, the First Circuit held that the District Court erred in granted Defendant's motion for summary judgement and reversed the ruling.

***Oddo, et al. v. Bimbo Bakeries USA, Inc.*, 2017 U.S. Dist. LEXIS 75172 (D.N.J. May 17, 2017).** Plaintiffs, a group of route sales representatives, filed suit under the Fair Labor Standards Act ("FLSA") and the New Jersey Wage & Hour Law ("NJWHL") alleging overtime violations. *Id.* at *1. Defendant moved to dismiss, asserting that Plaintiffs' claims were preempted by § 301 of the Labor-Management Relations Act ("LMRA") and that they failed to state a claim. *Id.* at *2. The Court denied Defendant's motion. First, Defendant asserted that a series of collective bargaining agreements ("CBAs") preempted Plaintiffs' NJWHL and FLSA claims. Defendant argued that the NJWHL claim arose from the CBA, or alternatively, depended upon the Court's interpretation of the CBA. The Court rejected this argument on the basis that merely considering the terms of a collective bargaining agreement to determine rate of pay or damages did not warrant preemption. *Id.* at *14. Accordingly, the LMRA did not preempt the NJWHL claim. Second, Defendant argued that the FLSA claim was also preempted by the LMRA. *Id.* at *26. The Court rejected Defendants argument because Plaintiffs' overtime claim rested independently on FLSA statutory rights, as opposed to their contractual rights under the CBA. Accordingly, the Court ruled that no interpretation of the CBA was necessary to adjudicate the FLSA claim, and Plaintiffs could proceed on their FLSA claim without exhausting the administrative and grievance procedures in the CBA. *Id.* at *31. The Court also denied the motion to dismiss to the extent that it was based upon Defendants' affirmative defense that Plaintiffs were exempt from overtime. *Id.* at *35. Whether the Plaintiffs fell within an exemption must be determined by the facts brought out in discovery and the issue of exemption did not turn the Court's interpretation of the CBA. The Court also ruled that Plaintiffs stated viable claims for NJWHL and FLSA overtime violations as they pled that they worked compensable overtime in a workweek longer than 40 hours. *Id.* at *36. Accordingly, the Court denied Defendant's motion to dismiss.

***Ortega, et al. v. J. B. Hunt Transportation, Inc.,* 2017 U.S. App. LEXIS 13864 (9th Cir. July 31, 2017).** Plaintiffs, a group of employees, filed a class action alleging that Defendant's compensation system violated California's minimum wage, meal break, and rest break laws. The District Court found that the Federal Aviation Administration Authorization Act ("FAAAA") preempted Plaintiffs' claims. The District Court granted Defendant's motion for judgment on the pleadings regarding Plaintiffs' meal and rest break claims, and subsequently granted Defendant's motion for summary judgment on Plaintiffs' minimum wage claims. The District Court determined that these laws significantly impacted Defendant's prices, routes, and services, and thus were preempted by the FAAAA. Plaintiff appealed, and the Ninth Circuit vacated and remanded the District Court's ruling. The Ninth Circuit noted that while this case was pending on appeal, it had decided *Dilts v. Penske Logistics, LLC*, 769 F.3d 637 (9th Cir. 2014), and found that California's meal and rest break laws are not "related to" prices, routes, or services, and therefore are not as a matter of law preempted by the FAAAA. *Id.* *2-3. The Ninth Circuit held that the *Dilts* decision thus compelled the conclusion that the District Court erred in granting Defendant's motion for judgment on the pleadings on Plaintiffs' meal and rest break claims.

***Reagan, et al. v. City Of Hanahan,* 2017 U.S. Dist. LEXIS 50111 (D.S.C. April 3, 2017).** Plaintiffs, a group of firefighters, alleged that Defendant violated the overtime provisions of the FLSA and the South Carolina Payment of Wages Act ("SCPWA"). Defendant filed a motion to dismiss on the basis that Plaintiffs' SCPWA claims were preempted by the FLSA and should therefore be dismissed. Defendant relied on previous Fourth Circuit precedent that even though the North Carolina state law provided more generous remedies than the FLSA (*e.g.*, a 3-year instead of a 2-year limitations period), the state claims were preempted because Plaintiffs would have to rely on proof of an FLSA violation to prevail on their state law claims. *Id.* at *4-5. Defendants argued that was the same issue here, because the SCPWA provides more generous recoveries than the FLSA. *Id.* at *5. Plaintiffs agreed that they could not rely on the SCPWA to seek minimum wages or overtime pay because such claims were preempted by the FLSA, but argued that their SCPWA claims for "unpaid, prevailing wages, over and above the minimum wage" as well as their claims connected to Defendant's "failure to pay those wages when they were due" were not preempted because those state law claims were not duplicative of their FLSA claims. *Id.* at *6. The Court agreed with Plaintiffs and denied Defendant's motion. The Court stated

that applicable case law authorities have frequently found that Plaintiffs' state law wage claims were not preempted by the FLSA when they sought redress for unpaid wages that were above the federal minimum wage. The Court further determined that Plaintiffs' state law claims were not duplicative of their FLSA claims. Accordingly, the Court denied Defendant's motion to dismiss Plaintiffs' state law claims.

***Reagan, et al. v. City Of Hanahan,* 2017 U.S. Dist. LEXIS 81108 (D.S.C. May 26, 2017).** Plaintiffs, a group of firefighters, alleged that Defendant violated the overtime provisions of the FLSA and the South Carolina Payment of Wages Act ("SCPWA"). Plaintiffs previously sought conditional certification of two sub-classes, including: (i) all individuals employed by Defendant in its Fire Department, who were non-exempt employees and who did not receive overtime compensation of at least one and one-half times their regular hourly wage for all overtime hours from three years prior to their joining the lawsuit through July 1, 2015; and (ii) all individuals employed by Defendant in its Fire Department, but were assigned to EMS, who were non-exempt employees and who worked over 40 hours in any given workweek, but who did not receive overtime compensation of at least one and one-half times their regular hourly wage for all overtime hours from July 1, 2015 to the present. *Id.* at *2-3. The Court granted the motion with respect to the first sub-class and denied as to sub-class two. Plaintiffs now filed a motion for reconsideration following discovery, requesting that the Court conditionally certify sub-class two. Defendant objected to conditional certification of sub-class two on the grounds that the pay plan in place from July 2015 to the present did not violate the law. Defendant argued that Plaintiffs' allegations were not sufficient to demonstrate that they were subject to an illegal policy or plan because they are subject to the increased overtime threshold under 29 U.S.C. § 207(k), which applies to employees "in fire protection activities." *Id.* at *4. Because most Plaintiffs indicated that their duties include(d) fire suppression, Defendant asserted that they are subject to the overtime exemption in § 207(k). Plaintiffs conceded that potential members of sub-class two were, at various times, assigned to a fire truck but that they were also assigned to work on ambulances. *Id.* at *6. Plaintiffs also conceded that when they were assigned to the fire truck, they had the responsibility to engage in fire suppression. *Id.* at *7. Plaintiffs argued that potential members of sub-class two only fall under the § 207(k) exemption during the times they were assigned to the fire truck but not during the times they were assigned to the ambulance. *Id.* at *7-8. The Court stated that allowing potential members of sub-class two to proceed on claims limited to the period of time when they were assigned to the ambulance would defeat the purpose of the § 207(k) exemption, which is to allow employers to adopt work periods longer than seven days for employees, like Plaintiffs, who are responsible for fire suppression. *Id.* at *8. As the exemption applies an increased overtime threshold to work periods between seven and twenty-eight days, it would not be feasible to calculate an employee's overtime entitlement under the standard 40-hour workweek for the few shifts per month he was assigned to the ambulance and to simultaneously calculate overtime entitlement under the § 207(k) exemption. Accordingly, the Court denied Plaintiffs' motion for reconsideration.

***Vidrio, et al. v. United Airlines, Inc.,* 2017 U.S. Dist. LEXIS 40609 (C.D. Cal. Mar. 15, 2017).** Plaintiffs, a group of flights attendants in two consolidated actions, alleged that Defendant provided them with illegal wage statements under § 226 of the California Labor Code. *Id.* at *2. The parties filed cross-motions for summary judgement. Defendant moved for summary judgment on the grounds that § 226 did not apply to Plaintiffs' claims because Plaintiffs and the class members performed the majority of their work outside of California. *Id.* at *6. Defendant argued that § 226 only governs work performed exclusively or principally in California and, therefore, applying § 226 to the class members' claims would violate the presumption against extraterritorial application of California law. *Id.* at *6-7. At the outset, the Court noted that, as to California's wage & hour laws, the California Supreme Court has not expressly decided whether the language or purpose of the California Labor Code impliedly suggests an intent to apply those laws to conduct occurring outside the state. *Id.* at *7. However, the Court stated that the few decisions that have analyzed the extraterritorial application of California's wage & hour laws have tended to focus on the "job situs," *i.e.*, the location where the work is principally performed. *Id.* at *8. Plaintiffs asked the Court to reject the job situs test and adopt a multi-factor approach based on their interpretation of California Supreme Court precedent. *Id.* at *10. Specifically, the Court concluded that the California Supreme Court left open the possibility that California employment laws might apply in a situation where California residents working for a California employer temporarily leave "the state during the course of the normal workday, but return to California at the end of the day." *Id.* at *12-13. Plaintiffs pointed to the facts that Defendant received substantial state subsidies to train flight attendants in California, many of its daily flights departed from or arrived at a California airport, and the wrongful conduct giving rise to liability – *i.e.,* the

decisions regarding employee compensation policies – occurred in California. *Id.* at *13. Nevertheless, the Court found Plaintiffs' argument unpersuasive. The Court determined that Defendant was neither based nor had its headquarters in California. It was also undisputed that United was headquartered in Chicago, Illinois, and had management and administrative offices in Houston, Texas. Thus, the Court held that any potential liability arising from decisions regarding compensation policies, including the format and content of wage statements, could not be said to have "emanated" from California. *Id.* at *16. Moreover, the Court held that only 18.34% of Defendant's domestic flights and 15.96% of its total flights actually operated in and out of California. *Id.* The Court concluded that Plaintiffs, therefore, could not assert their claim for improper wage statements under § 226 because, whether it applied the job situs test or a multi-factor approach, the outcome remained the same. *Id.* at *17. Accordingly, the Court granted Defendant's motion for summary judgment and denied Plaintiffs' motion.

(xxiv) Procedural And Notice Issues In FLSA Collective Actions

***Beauregard, et al. v. Hunter*, 2017 U.S. Dist. LEXIS 38407 (D.N.J. Mar. 16, 2017).** Plaintiffs, a group of former employees, brought a collective action alleging that their former employer, RRC Consultants, Inc. ("RCC"), failed to pay them wages during multiple pay periods. Defendant Sivertsen was the Executive Vice President, Secretary, Treasurer, and a director of RCC. Defendant Smith was a director of RCC. *Id.* at *2. Due to financial difficulties, RCC failed to pay Plaintiffs during multiple pay periods in 2014 and 2015. Defendants all were involved in making the decisions about whether to continue Plaintiffs' employment and whether to use RCC's funds to pay the wages of Plaintiffs. *Id.* at *2-3. Plaintiffs claimed that Defendants violated the FLSA, the New Jersey Wage & Hour Law ("NJWHL"), and the New Jersey Wage Payment Law ("NJWPL") by making these decisions and by requiring or permitting Plaintiffs to work without pay. *Id.* at *3. Plaintiffs asserted claims on behalf of: (i) members of a putative collective action under the FLSA; and (ii) members of a putative class action brought pursuant to the NJWHL and the NJWPL. Defendants filed a motion to dismiss and to deny class certification, which the Court denied. Defendants asserted that Plaintiffs' FLSA claim must be dismissed. Defendants argued that Plaintiffs failed to allege a common policy or scheme that violated the FLSA and also failed to allege a plausible claim against Smith and Sivertsen. Defendants further contended that Plaintiffs were not similarly-situated, so certification of Plaintiffs' proposed FLSA collective must be denied and Plaintiffs' FLSA claim must be dismissed. *Id.* at *4. The Court found that Plaintiffs alleged in the complaint that RCC failed to pay Plaintiffs during multiple pay periods in 2014 and 2015 and that all Defendants were involved in making the decisions about whether to continue Plaintiffs' employment and whether to use RCC's funds to pay the wages of Plaintiffs. *Id.* at *5-6. The Court ruled that, viewing the allegations through the lens of a Rule 12(b)(6) motion, it was persuaded that Plaintiffs stated a plausible claim for relief. *Id.* at *6. Defendants further argued that the Court should not exercise supplemental jurisdiction over Plaintiffs' state law claims. The Court stated that three requirements must be met before it may exercise supplemental jurisdiction, including: (i) the federal claim must have substance sufficient to confer subject-matter jurisdiction on the Court; (ii) the state and federal claims must derive from a common nucleus of operative facts; and (iii) the state and federal claims must be such that they would ordinarily be expected to be tried in one judicial proceeding. *Id.* The Court found that Plaintiffs' FLSA claims and state law claims brought pursuant to the NJWHL and the NJWPL all derived from Defendants' alleged failure to compensate Plaintiffs. *Id.* at *7. Finally, Defendants argued that Plaintiffs failed to satisfy the requirements of Rule 23 for class certification on their state law claims. The Court noted Defendants had yet to answer Plaintiffs' complaint, and Plaintiffs had not yet moved for class certification. The Court held that it could not conduct a rigorous analysis of issues raised by Defendants, such as potential conflicts of interest between the named Plaintiffs or potential individualized defenses. Therefore, the Court declined to dismiss Plaintiffs' class action claims. *Id.* at *8. Accordingly, the Court denied Defendants' motion to dismiss.

***Benson, et al. v. HG Staffing, LLC*, 2017 U.S. Dist. LEXIS 177159 (D. Nev. Mar. 2, 2017).** Plaintiffs, a group of room attendants formerly employed by Defendants, brought a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. Specifically, Plaintiffs alleged that Defendants required them to arrive 20 minutes or more prior to their regularly scheduled start time to present themselves to their shift supervisors for room/floor assignments, a uniform inspection, and to retrieve tools necessary to complete their work tasks. *Id.* at *2. Two related suits preceded the action, including *Sargent v. HG Staffing*, Case No. 13-CV-453, alleging failure to pay overtime wages for time spending engaging in off-the-clock activities, and *Benson v. HG Staffing,* Case No. 16-CV-191 ("*Benson I*"), alleging state law claims, which were premised on many of the same factual allegations as the *Sargent* action. In *Sargent*, the Court found that Plaintiffs were not similarly-

situated as required under the FLSA, decertified the collective action, and the action was still on-going. *Id.* at *5. In *Benson I,* the named Plaintiffs eventually accepted offers of judgment from Defendants and the clerk entered final judgment and closed the matter. Plaintiffs in *Benson I* then filed five separate actions, including the instant action. Defendants moved to dismiss, arguing that because Plaintiffs accepted an offer of judgment in *Benson I*, the doctrine of *res judicata* barred the instant claim. *Id.* at *6. Defendants also contended that all other Plaintiffs' claims should be dismissed because: (i) Plaintiffs failed to sufficiently state a claim for failure to pay overtime; and (ii) issue preclusion barred the collective action due to the decertification of the *Sargent* collective action. Because Benson was a Plaintiff in both cases and Defendants were the same, the Court stated that the interests were identical between the two cases. *Id.* at *9. Moreover, the Court explained that it was undisputed that Benson's acceptance of Defendants' offer of judgment resulted in final judgment on the merits. *Id.* at *10. Finally, the Court held that there was an identity of claims because Benson asserted a claim of failure to pay overtime in violation of Nevada law based in part on the same employer conduct alleged in this action. Accordingly, the Court granted Defendants' motion to dismiss with regarding to Plaintiff Benson. Defendants also argued that Plaintiffs failed to sufficiently state a claim for failure to pay overtime because Plaintiffs had not identified "any one week in which any one Plaintiff was paid less than [the] wage required by the FLSA." *Id.* at *11. Plaintiffs countered that they had alleged that they all regularly worked 40 hours each week and that Defendants required them to participate in at least 20 minutes of uncompensated work-related activities each and every shift. The Court found that Plaintiffs' details sufficiently stated an FLSA overtime claim. Defendants further argued that issue preclusion barred Plaintiffs from bringing an FLSA collective action because the Court decertified the collective action in *Sargent*. The Court found that Plaintiffs attempted to form a narrower collective action composed solely of room attendants who all based their overtime claims on the same alleged policy of being required to present themselves to their shift supervisors 20 minutes before their shifts began. *Id.* at *17. Therefore, the Court held that its decision to decertify the collective action in *Sargent* action presented the same issue as the prospective certification of this proposed collective action. Moreover, Defendants' argument would result in automatically barring Plaintiffs who opt-in to a collective action that is later decertified from attempting to litigate their claims in the future as a properly-constructed collective action. Accordingly, the Court denied Defendants' motion to dismiss with respect to all remaining Plaintiffs' claims.

***Bonke, et al. v. Uber Technologies*, 2017 U.S. Dist. LEXIS 189388 (D. Ariz. May 25, 2017).** Plaintiff, a driver, brought an action on behalf of himself and all others similarly-situated, alleging that Defendant misclassified drivers as independent contractors in violation of the FLSA and state wage & hour laws. Prior to Plaintiff filing his lawsuit, a criminal complaint was filed against Plaintiff where a jury returned a verdict of guilty on three counts of trafficking in stolen property and he was sentenced to 3.25 years of incarceration. *Id.* at *2. After learning of Plaintiff's conviction, Defendant moved to strike the Rule 23 class allegations due to Plaintiff's inadequacy to serve as a class representative. Plaintiff agreed that he was not an adequate class representative and moved for an order permitting his counsel to substitute a new class representative and leave to file an amended complaint. *Id.* at *3. Plaintiff's counsel stated that they located "a Plaintiff who has opted-out of arbitration and is interested in joining the action. But he will not do so unless the Court allows him to file his own complaint and resets the discovery deadlines. Otherwise, it makes sense for him to file his own action." *Id.* at *4. Plaintiff argued that striking the class claims without allowing for substitution was inefficient. The Court disagreed and found that the prospective class representative's demands that the Court allow him to file his own complaint and reset all case management deadlines if substitution was allowed was not more efficient than filing a new complaint. *Id.* The Court noted that Plaintiff's counsel had over two months to find a substitute class representative, and the availability of substitution of a class representative depended upon the status of the case. The Court stated that Plaintiff had not moved for class certification under Rule 23 or conditional certification under the FLSA, and therefore no class yet existed. The Court concluded that Plaintiff could not simply be a placeholder for months while Plaintiff's counsel tried to find a substitute. *Id.* at *5. Defendant also moved to dismiss the action because Plaintiff did not intend to proceed. However, the Court held that Plaintiff did not contend that he did not wish to proceed and inappropriateness as a class representative did not make him ineligible to maintain a lawsuit on his own behalf. *Id.* at *6. The Court thereby granted Defendant's motion to strike the class allegations and denied Plaintiff's motion to substitute class representative.

***Cabrera, et al. v. CMG Development LLC*, 2017 U.S. App. LEXIS 22788 (11th Cir. Nov. 14, 2017).** Plaintiff, a construction worker, filed a collective action alleging that Defendant failed to pay overtime compensation in

violation of the FLSA. The District Court ordered Plaintiff to file a short statement of the claim, setting forth the total amount of alleged unpaid wages, the calculation of such wages, and the nature of the wages, which Plaintiff did within the deadline. Defendant filed a notice of appearance. The District Court then entered an order *sua sponte* dismissing the action without prejudice stating that Plaintiff "had not filed a return of service." *Id.* at *3. The District Court dismissed the case *sua sponte* without prejudice "for failure to serve the complaint in compliance with Rule 4(m)." *Id.* at *4. Plaintiff subsequently moved to reopen the case and explained that service was effected on February 22, 2016, and he attached supporting documentation to that effect. In addition, Plaintiff noted that counsel for Defendant had filed a notice of appearance on behalf of Defendant within two weeks of the date of the complaint, indicating that Defendant was aware of the lawsuit and that discovery already was underway. *Id.* The District Court denied the motion. Plaintiff then filed a motion for reconsideration, which the District Court also denied. On appeal, Plaintiff contended the District Court abused its discretion by dismissing the case *sua sponte* without first notifying him. The Eleventh Circuit agreed and reversed the District Court's ruling. Plaintiff submitted that service was effected and that his only error was failing to file proof of service with the District Court. The Eleventh Circuit stated that the District Court would have learned of this fact, instead of laboring under the misconception that Defendant had not been served, if it had followed the strictures of Rule 4(m), which provide that the District Court may dismiss the action on its own but only after notice to Plaintiff. *Id.* at *6. Finally, Plaintiff contended that Defendant failed to file an answer or a motion under Rule 12 within the prescribed time limits, and therefore waived the defense of insufficient service of process. Defendant contended there was no error because Plaintiff could not show good cause in failing to file proof of service with the Court. The Eleventh Circuit concluded that the District Court abused its discretion and, by failing to adhere to the procedure set forth in Rule 4(m), deprived Plaintiff of the opportunity to show good cause and sidestepped its duty to consider whether to exercise its discretion to order that service be made within a specified time. *Id.* at *8-9. Further, the Eleventh Circuit determined that Plaintiff was correct that Defendant never filed an answer or a Rule 12 motion within the specified time limits. The Eleventh Circuit, therefore, held that Defendant failed to timely raise the defense of insufficient service of process and, as a result, waived it. The Eleventh Circuit concluded that the District Court was without discretion to dismiss the action in any event because, as it had previously held, "once a Defendant has waived any objection to insufficient service of process, the District Court may not, either upon Defendant's motion or its own initiative, dismiss on that ground." *Id.* at *10. As such, the Eleventh Circuit stated the District Court need not consider on remand whether Plaintiff's neglect was excusable or constituted good cause because it was precluded from dismissing the action for insufficient service of process. *Id.*

***Chen, et al. v. Wai ? Café Inc.*, 2017 U.S. Dist. LEXIS 121635 (S.D.N.Y. Aug. 2, 2017)**. Plaintiff, a delivery driver, brought a class and collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). The case proceeded to a jury trial, during which Defendants sought to introduce documents into evidence to which Plaintiffs objected, including a purported contract between the parties and records indicating additional payments to Plaintiffs. *Id.* at *3. The District Court deemed the documents to be precluded from admission at trial because Plaintiffs argued they had not been turned over in discovery. *Id.* The District Court dismissed the FLSA claims because Plaintiffs failed to show that Defendant had gross receipts exceeding $500,000. The District Court retained supplemental jurisdiction over the Plaintiffs' NYLL claims because the case had already been tried and substantial resources had been expended in preparation of trial. *Id.* at *4. The jury found Defendants liable for minimum wage, overtime, and spread of hours pay. On appeal, the Second Circuit affirmed the judgment in part and vacated it in part. The Second Circuit found that documents may have been improperly excluded at trial. Plaintiff also argued on appeal that he was entitled to tip and meal allowances in any damage calculations because the NYLL, unlike the FLSA, "imposed no notice requirements before letting an employer take advantage of either allowance" for the relevant time period. *Id.* at *5. The Second Circuit noted that it was an unsettled question of law whether notices were required, so instructed the District Court to consider those arguments on remand. On remand, the District Court found that Plaintiff had in fact received the documents in question, and Defendant moved for sanctions against Plaintiff based on the allegedly fraudulent representations that Plaintiffs' counsel made to the District Court. The District Court denied the motion, but found that a new trial was warranted based on the documents being barred from the first trial. *Id.* at *6. Defendant also requested the District Court to decline to exercise supplemental jurisdiction over Plaintiff's claims and dismiss the case. The District Court found that all of the original jurisdiction claims had been dismissed, and the state law claims raised a novel or complex issue of law. *Id.* at *9. The

District Court held that all factors did not weigh heavily in favor of maintaining jurisdiction. *Id.* at *11. The District Court stated that neither party would be significantly inconvenienced or prejudiced if Plaintiff re-filed in state court. The District Court further determined that while by proceeding in state court, the parties will all benefit from "a surer-footed reading of applicable law." *Id.* at *12 Accordingly, the District Court declined to exercise supplemental jurisdiction, and granted Defendants' motion to dismiss without prejudice to refiling in state court.

***Delaney, et al. v. FTS International Services, Inc.*, 2017 U.S. Dist. LEXIS 8144 (M.D. Pa. Jan. 20, 2017).** Plaintiff, a supervisor, brought a putative collective action alleging that Defendant failed to pay him and similarly-situated individuals overtime compensation in violation of the FLSA, the Pennsylvania Minimum Wage Act ("PMWA"), and the Pennsylvania Wage Payment and Collection Law ("PWPCL"). *Id.* at *2. Plaintiff asserted that he regularly worked at least 60 hours per week and that his primary duties consisted of performing manual labor tasks, not office or non-manual work directly related to management or general business operations. Plaintiff further alleged that, after January 24, 2016, Defendants reclassified Plaintiff as a non-exempt employee and Defendants began paying Plaintiff an hourly rate plus a weekly, non-discretionary bonus, but failed to use a weighted average incorporating the bonus payments when calculating his overtime rate, which resulted in Defendant paying him less than one and one-half times his regular rate for all hours worked in excess of 40 hours in a workweek. *Id.* at *3-4. Plaintiff sought conditional certification of a FLSA collective action of all similarly-situated individuals who were allegedly misclassified as exempt from overtime requirements and were subject to Defendants' failure to pay overtime wages, and a class action pursuant to Rule 23 for violations of the Pennsylvania wage laws on behalf of similarly-situated individuals. *Id.* at *4. Defendant filed a motion to dismiss or strike Plaintiff's collective action allegations or in the alternative, for partial summary judgment with respect to Plaintiff's collective action claims, which the Court granted. Defendant argued that Plaintiff's collective action claims should be dismissed because Plaintiff waived his right to litigate collectively against Defendant when he signed a class and collective action waiver as part of his employee handbook acknowledgement receipt. *Id.* at *11. Defendant argued that Plaintiff executed a valid waiver of his right to litigate collectively under the FLSA and Pennsylvania wage laws, as the right to litigate collectively is a procedural right subject to waiver. *Id.* at *14-15. Plaintiff relied on cases from the Ninth and Seventh Circuit, which held that a collective action waiver violates an employee's substantive, statutory right to engage in concerted activity under § 7 of the National Labor Relations Act ("NLRA"). *Id.* at *16. The Court opined that in the absence of explicit guidance from the Third Circuit on this issue, the Court declined to find that the right to litigate collectively under the FLSA was a substantive right guaranteed by the NLRA and not subject to waiver. *Id.* at *22. The Court held that the right to proceed collectively under the FLSA is a procedural right subject to waiver, as long as individual employees retained the individual capacity to vindicate their rights. *Id.* at *22-23. The Court stated that since Plaintiff did not challenge the validity or enforceability of the waiver signed by him on any other basis, the collective action waiver at issue was valid and enforceable. The Court thereby granted Defendant motion for partial summary judgment, and dismissed Plaintiff's class action and collective action allegations.

***Fries, et al. v. Residential Home Health, LLC,* Case No. 16-CV-3727 (N.D. Ill. Aug. 23, 2017).** Plaintiff, a home health aide, filed a collective action alleging that Defendant misclassified her and other similarly-situated workers as exempt employees and thereby failed to pay overtime compensation in violation of the FLSA and the Illinois Minimum Wage Law ("IMWL"). The Court granted Plaintiff's motion for conditional certification under FLSA, but ordered her to filed a second proposed notice. Plaintiff sought to have Defendant produce an importable electronic list of all persons who: (i) worked as home health clinicians in Illinois and Michigan at any point up to three years prior to the entry of the Court's order and who were classified as exempt; (ii) were paid on a hybrid per visit and hourly basis; and (iii) were not paid overtime compensation for time worked over 40 hours per week. *Id.* at 2. Plaintiffs sought first and last names, last known addresses, email addresses, phone numbers, dates of employment, social security numbers, and dates of birth. *Id.* Plaintiffs also proposed that notice be sent by first class mail and email and that Defendant post notices in its offices. *Id.* Finally, Plaintiffs requested a 60-day terms for potential Plaintiffs to opt-in and wished to send a reminder notice 15-days prior to the end of the opt-in period. Defendant argued with several aspects of the proposed noticed. *Id.* at 3. First, the Court agreed that the scope of the notice should be limited to the period before Defendant began utilizing a new compensation system and not the hybrid approach at issue. *Id.* As to Defendant's contention that the notice was the deficient because it failed to explain to the putative members of the collective action that they may be responsible for litigation costs should Defendant prevail, the Court agreed and stated that notifying opt-in

Plaintiffs of the potential costs would allow them to make a fully informed decision. *Id.* The Court also agreed with Defendant's contention that the notice should be sent by mail only. The Court further stated that posting notice in Defendant's offices was an unnecessary burden. *Id.* at 4. Finally, Defendant requested that email addresses, social security numbers, and phone numbers be kept confidential. *Id.* The Court agreed that email addresses were unnecessary since notice was only being sent via regular mail. However, the Court stated that phone numbers and social security numbers were useful to Plaintiff's counsel, and allowed Plaintiff to obtain this information. Accordingly, the Court requested that Plaintiff filed a second notice consistent with the Court's order.

***Hughes, et al. v. Gulf Interstate Field Services,* 2017 U.S. Dist. LEXIS 1088 (S.D. Ohio Jan. 4, 2017).** Plaintiffs, a group of employees, filed a motion to sever the claims of named Plaintiffs Thomas Hughes and Desmond McDonald and to stay current proceedings pending appeal of the Court's previous ruling denying conditional certification of a collective action under the FLSA and class certification under Rule 23. The Court had previously granted Defendant's motion for summary judgment on Hughes and McDonald's individual claims and denied the motions for decertification and renewed class certification as moot. The Court notified the parties that it would rule on the motions for decertification and class certification with respect to the remaining class members, and ordered supplemental briefing in light of the named Plaintiffs' dismissal. *Id.* at *2. Plaintiffs subsequently moved to sever the individual claims of Hughes and McDonald to make the summary judgment against them final and appealable and stay the current proceedings pending such appeal. Plaintiffs argued that severing the individual claims of Hughes and McDonald to allow their appeal of the summary judgment decision was the most efficient method to resolve the claims and issues in this case. The Court determined that the questions in the case concerned whether Defendant met the requirement for Plaintiffs to be considered "highly compensated employees" and therefore that they were exempt from the FLSA overtime provisions. *Id.* at *3. The Court found that because each Plaintiff earned more than $100,000 annually, they both qualified as highly compensated employees and were exempt. Plaintiffs, however, had argued that Defendant paid them on a day rate basis. The Court stated that the salary basis issue was relevant to its resolution of the decertification and class certification motions. Thus, to the extent that the Court's rulings on decertification and class certification would inevitably rely on its prior determination of the salary basis issue, Plaintiffs argued that an immediate appeal of that issue would more efficiently resolve the issue as to the remaining parties. *Id.* at *4. The Court found that the resolution of the decertification and class certification motions would likely require the Court to depend on its earlier ruling regarding the salary basis issue. The Court further opined that Plaintiffs would face greater prejudice should the Sixth Circuit reach a different conclusion on the salary basis issue after an appeal. *Id.* at *7. If such a scenario arose, Plaintiffs would have the difficult task of putting the dispersed FLSA collective action back together again. The Court therefore held that there was no just reason for delay in allowing the grant of summary judgment on the individual claims of Plaintiffs Hughes and McDonald to become final and appealable. *Id.* The Court thereby granted Plaintiffs' motion to sever the claims of Hughes and McDonald and stay the present proceedings pending a final ruling from the Sixth Circuit upon Plaintiffs' appeal.

***Johnson, et al. v. C.H. Robinson International, Inc.*, 2017 U.S. Dist. LEXIS 140660 (W.D. Mo. May 9, 2017).** Plaintiffs, a group of exempt employees, brought a collective action asserting that Defendant illegally misclassified exempt employees and denied them overtime compensation in violation of the FLSA and the Missouri Minimum Wage Law ("MMWL"). The parties filed five motions, including: (i) Plaintiffs' motion for conditional certification, (ii) Defendant's motion to compel arbitration and stay the action pending arbitration; (iii) Defendant's motion to strike Plaintiffs' collective action allegations; (iv) Defendant's motion to stay consideration of Plaintiffs' motion for conditional certification; and (v) Plaintiffs' motion to stay consideration of Defendant's motion to compel arbitration pending a ruling on the motion for conditional certification. *Id.* at *2. Defendant argued that in the interest of judicial economy, the Court should decide the pending motion to dismiss before the motion for conditional certification. Defendants further argued that a stay was appropriate because the collective action definition included employees that were subject to arbitration agreements. Thus, Defendants argued that if the Court granted the motion to compel arbitration, the Court could stay the litigation pending arbitration, and therefore it would make sense to rule on the arbitration motion first. *Id.* at *6-7. Plaintiffs objected to a stay of the conditional certification motion, and asserted that such a delay would prejudice the claims of collective action members. Plaintiffs asserted that a stay should be entered relative to Defendant's motion to compel arbitration and that motion should be decided after the motion for conditional certification. The Court found that because

the conditional certification stage of litigation merely involves notice, there was no reason to stay the motion for certification pending the motion to dismiss. *Id.* at *8. The Court reasoned that judges routinely grant conditional certification motions despite the existence of arbitration issues. *Id.* at *9. The Court held that once the identity of the collective action members was determined, it then would consider whether to compel arbitration of certain claims. Accordingly, the Court denied Defendant's motion to stay consideration of Plaintiffs' motion for conditional certification and granted Plaintiffs' motion to stay consideration of Defendant's motion to compel pending a ruling on conditional certification.

***Johnson, et al. v. Serenity Transport, Inc.,* 2017 U.S. Dist. LEXIS 156804 (N.D. Cal. Sept. 25, 2017).** Plaintiff, a labor contractor, brought a class and collective action alleging that Defendant Serenity Transportation ("Serenity") misclassified him as an independent contractor rather than an employee and therefore denied him the benefits of the FLSA and California law. *Id.* at *1-2. Plaintiff also sued Defendants SCI and the County of Santa Clara under a joint employer theory, arguing that both entities were jointly and severally liable for Serenity's wage & hour violations. *Id.* at *2. Plaintiffs filed a motion to invalidate releases signed by former and current Serenity drivers and to issue a corrective notice to the FLSA collective action members. The Court granted Plaintiffs' motion, finding that Serenity discouraged drivers from participating in the lawsuit, and that the releases contained misleading and inaccurate information. Approximately 30 days into the collective action opt-in period, Serenity began contacting putative class and collective action members in an attempt to secure their exclusion from the litigation. Among other things, Serenity sent its drivers a letter concerning the lawsuit and a "Settlement and Release Agreement" ("Release"). *Id.* at *4. The Court found that Serenity engaged in *ex parte* communications that discouraged drivers from participating in the lawsuit and provided the drivers with a misleading and inaccurate release; thus, the Court opined that invalidation of the Releases and curative notice was warranted. The Court noted that the Release encompassed all claims in the lawsuit, including the FLSA claims, but neither the Release nor the letter told the drivers that the settlement of FLSA claims required the Court's approval. *Id.* at *19. The Court noted that the Release incorrectly stated on whose behalf the claims in this litigation were being brought. *Id.* at *20. Further, the Court found that the Release told a driver that by signing the Release he agreed to opt-out of the "the on-going Litigation and not participate in future." *Id.* The Court held that this language, to a lay person, improperly suggested that by signing the Release the driver was precluded from participating as a witness or otherwise participating in the litigation, not just that he will not be a class member. *Id.* In addition, the Court found that Serenity did not provide the fourth amended complaint, or any version of the complaint, to the drivers when it presented them with the Release. Finally, the Court was troubled by the letter's suggestion that the drivers contact Defendants' counsel. The Court opined that it was one thing to identify Defendants' counsel, but it was another to suggest that a driver contact Defendants' counsel. *Id.* at *22. The Court held that Defendants' misstatements and omissions required invalidating the Release as to all drivers and sending curative notice to all drivers notifying them that their releases were invalid and re-instating the FLSA opt-in period for a period of 60 days from the sending of new notice. *Id.* at *23. The Court also ordered that Serenity not have any contact with the drivers about the lawsuit during the renewed opt-in period. Accordingly, the Court granted Plaintiffs' motion.

***Katz, et al. v. DNC Services Corp.,* 2017 U.S. Dist. LEXIS 195736 (E.D. Pa. Nov. 29, 2017).** Plaintiffs, a class of former campaign workers who were hired by several state Democratic parties during the 2016 presidential election, alleged that the state parties colluded with the Democratic National Committee to over work and under-pay field organizers in violation of various federal and state wage & hour laws. *Id.* at *2. The out-of-state Democratic party Defendants ("Foreign Defendants") sought dismissal of the action on the grounds that the Court could not exercise personal jurisdiction over them. The Court found that: (i) it would be improper to exercise jurisdiction over any one of the Foreign Defendants; and (ii) Plaintiffs failed to demonstrate that further jurisdictional discovery would be fruitful. Plaintiffs alleged that they regularly worked upwards of 12 hours in a day on behalf of their respective state party employers, but were only paid a flat monthly rate regardless of the total number of hours worked. *Id.* at *4. Plaintiffs contended that pursuant to the alter ego theory of personal jurisdiction, the Court should exercise jurisdiction over each Foreign Defendant because Defendant DNC was subject to the jurisdiction of the Court. *Id.* at *5. Plaintiffs further argued that Foreign Defendants' participation in 2016 presidential campaign activities constituted in-state contacts sufficient to independently support a finding of general personal jurisdiction over each state party. *Id.* at *5-6. The Foreign Defendants submitted affidavits that collectively established that: (i) the Foreign Defendants were neither corporate parents nor subsidiaries to any

other corporate entity; (ii) the Foreign Defendants were each subject to individual state and federal campaign finance requirements; (iii) the Foreign Defendants did not own property, solicit business, advertise, or hire within Pennsylvania; (iv) the Foreign Defendants were self-governing; and (v) the Foreign Defendants did not require any Plaintiff employed as a field organizer to work within Pennsylvania as a condition of employment. *Id.* at *6. The Court found that that Plaintiffs failed to establish that the Foreign Defendants' contacts with the forum, alone or in the aggregate, were sufficient to support general or specific jurisdiction consistent with constitutional due process. Plaintiffs argued that the Foreign Defendants were the alter egos of Defendant DNC because Defendant DNC "exercised a sufficient amount of operational control" over each state Democratic Party. *Id.* at *7. The Court disagreed, and determined that Defendant DNC did not exercise the requisite level of control over the Foreign Defendants' day-to-day operations to be considered their alter egos. The Court reasoned that the "corporate fusion" required for a finding of an alter ego relationship also did not exist. *Id.* at *16. First, Defendant DNC did not own any one of the Foreign Defendants, in whole or in part, and each Foreign Defendant fulfilled tax and campaign finance filing requirements as independent entities. Second, by Plaintiffs' own account, each Foreign Defendant was "responsible for governing" the Democratic Party of its respective state and "raises money, hires staff, and coordinates strategy to support candidates" running for local, state, and national office. *Id.* at *17. Third, all of Plaintiffs' arguments surrounding the existence of common marketing strategies, logos, trademarks, and information databases were limited to Presidential campaign efforts, not that of state or local elections. *Id.* The Court therefore found no act by the Foreign Defendants that would constitute purposeful availment sufficient to confer specific jurisdiction. The Court also opined that Plaintiffs failed to satisfy the second element of the specific jurisdiction standard, which required a showing that Plaintiffs' claims arose from or related to the Foreign Defendants' instate activities. *Id.* at *19. Accordingly, the Court granted the Foreign Defendants' motion to dismiss.

***Lackie, et al. v. U.S. Well Services, LLC,* 2017 U.S. Dist. LEXIS 12373 (S.D. Ohio Jan. 30, 2017).** Plaintiffs, a group of employees, filed a collective action alleging Defendant failed to pay overtime compensation in violation of the FLSA. Plaintiffs filed a motion for conditional certification of a collective action. The parties subsequently stipulated to conditional certification of the collective action and agreed to language detailing the notice, with the exception of whether the notice should notify putative Plaintiffs of the potential tax consequences associated with opting-in to the action. The parties submitted briefing on the issue and each presented the Court with proposed notices. The proposed collective action consisted of "all current and former hourly employees who were employed by Defendant during the period of December 11, 2012 to March 15, 2015, received per diem payments, and worked more than forty hours in one or more workweeks in which the per diem payments were paid." *Id.* at *2. The parties further stipulated that counsel for Plaintiffs would serve as lead counsel for the collective action, Plaintiffs would serve as the representative Plaintiffs, and Defendant would provide the names and last known contact information for all putative class members within twenty-one days of the Court's approval of the notice. *Id.* at *2-3. The Court found that it was necessary to make minor changes to the notice's language concerning the putative Plaintiffs' right to select counsel of their own choosing and lead counsel's proposal to potentially "advance" the litigation expenses incurred by Defendant in the event Plaintiffs did not succeed on their claims and the Court awarded costs to Defendant. *Id.* at *3. Specifically, the with regard to the tax implications of a fee award, the Court determined that it must strike a balance between the potential *in terrorem* effect of the language and the desire to provide putative Plaintiffs with sufficient information to allow them to make an informed decision on whether they wish to participate in the litigation. The Court therefore found although that some statement was warranted in the notice, it could not be excessive. *Id.* at *5. The Court also amended the notice to contain language stating that if an individual chose not to join this lawsuit, the individual would not be affected by any judgment or settlement rendered in this case, and could file a separate own lawsuit. *Id.* at *7. Finally, the parties agreed to language pertaining to the fee agreement under which lead counsel will represent the putative Plaintiffs. The Court stated that all language in the proposed notice pertaining to the advancement of costs must be stricken and replaced with language stating that Plaintiffs are not required to pay fees unless successful in this action. *Id.* at *10. The Court thereby granted Plaintiffs' motion for conditional certification of a collective action and approved the notice with modifications as directed.

***Lietzbach, et al. v. Atlas Van Lines, Inc.,* Case No. 16-CV-8790 (C.D. Cal. Feb. 22, 2017).** Plaintiff, a truck driver, filed a putative class action against Defendant claiming various wage & hour violations under California labor law. Defendant moved to dismiss all claims, transfer venue, and strike Plaintiff's class definition. The Court

denied the motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, and denied the motion to transfer venue under Rule 12(b)(3) for improper venue. The Court granted the motion to dismiss for failure to state a claim under Rule 12(b)(6) except as to the claim under § 204 of the California Labor Code ("CLC"). The Court granted the motion to strike and ordered Plaintiff to amend. The Court ruled that the "minimum contacts" test was satisfied and it did have personal jurisdiction, as Plaintiff was a citizen of California, Defendant was licensed to do business in California, and the alleged violations involved California law. *Id.* at 4. The Court also noted that the proposed class included all drivers residing in California, and hence California had an interest in addressing violations of its laws that injured its citizens. *Id.* at 5. The Court ruled that venue was proper because of those same facts. *Id.* at 6. The Court also denied Defendant's motion to transfer on the basis that even though the action could have been brought in the Southern District of Indiana, the balance of convenience and justice did not weigh in favor of transfer to the Southern District of Indiana. *Id.* at 7-8. Plaintiff and the entire class of drivers were California residents and the allegations involved violations of California wage & hour laws. Further, California had a strong interest in protecting its citizens and enforcing its laws. The Court dismissed with prejudice Plaintiff's claim of failure to pay all wages owed under the CLC, finding that Plaintiff did not have a private right of action under § 204. The Court denied Defendant's motion to dismiss all of Plaintiff's claims on the basis that Plaintiff failed to allege an employment relationship, finding that the allegation that Defendant improperly classified Plaintiff was sufficient to survive the motion to dismiss stage. *Id.* at 13. Defendant also moved to dismiss Plaintiff's meal and rest claims as Plaintiff alleged no facts in support of this claim. *Id.* at 15. The Court agreed and ruled that Plaintiff's conclusory allegations were insufficient because Plaintiff failed to explain how the shifts were scheduled to prevent him from taking meal or rest breaks. *Id.* Similarly, the Court dismissed Plaintiff's overtime claims as he failed to allege any facts to support the claim. *Id.* at 18. The Court also dismissed Plaintiff's claim for failure to pay all wages upon separation in violation of California law because it was based upon his inadequate meal, rest break, and unpaid wage claims. *Id.* The Court also dismissed the accurate wage statement claim because the underlying claims were not properly alleged. *Id.* at 19. The Court dismissed Plaintiff's claim of failure to reimburse business expenses as he failed to allege any expenses that he incurred. *Id.* at 20. The Court also dismissed Plaintiff's California Unfair Competition Act ("UCL") claim because it was derivative of the insufficiently pled meal period, rest break, unpaid wage, and failure to reimburse claims. *Id.* The Court also denied Plaintiff's motion to dismiss the class claims for failure to meet the Rule 23 standards. *Id.* at 21. The Court noted that while Plaintiff barely alleged more than legal conclusions with respect to numerosity, typicality, and adequacy and was unlikely to satisfy Rule 23 requirements, this was an issue to be determined at the class certification stage. *Id.* Defendant's motion to strike the class was granted and the Court ordered Plaintiff to amend the class definition to clarify the scope of the class to include drivers who resided in California and drove for Defendant. *Id.* at 22.

***Lopes, et al. v. Heso, Inc.*, 2017 U.S. Dist. LEXIS 178709 (E.D.N.Y. Oct. 27, 2017).** Plaintiffs, a group of hourly electricians and foremen, filed a collective and class action alleging that Defendant failed to pay overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). In lieu of a motion for conditional certification of a collective action, the parties requested that the Court provide rulings on several points, including: (i) whether the recipients of a Court-approved notice should be determined based on a three-year or six-year notice period; (ii) if the proper date for calculating the look back period was the date the complaint was filed or the date notice was issued; (iii) whether Defendants should be required to post notice in conspicuous areas in the workplace; and (iv) if a reminder notice may be sent. *Id.* at *1-2. As to the first point, the Court noted that the FLSA has a three-year statute of limitations, while the NYLL has a six-year statute of limitations. The Court stated that where Plaintiffs have yet to request Rule 23 certification, a six-year notice period will best serve the Court's interests in judicial economy by more rapidly providing the Court with information about the FLSA opt-in Plaintiffs. *Id.* at *13. The Court reasoned that the six-year limitation period would aid the parties and the Court in determining whether to certify a Rule 23 class. The Court opined that a six-year notice period further served the interests of judicial economy by only requiring Defendants to make one production of the names of all potential Plaintiffs. *Id.* The Court also found that it would be appropriate to use the date of the complaint's filing as the look-back date for the statute of limitations, given how often equitable tolling issues emerge in FLSA cases. *Id.* at *15. The Court therefore ruled for notice to be mailed to all electricians and foremen who worked for Defendants during the six years prior to December 8, 2016, the date of the filing of the complaint. *Id.* at *16. Defendants objected to Plaintiffs' request that notice of the action be posted in the workplace in addition to being mailed. *Id.* at *16-17. The Court determined that Defendants failed to articulate convincing reasons to deny

Plaintiffs' request for notice posting at the corporate office. *Id.* at *18. The Court noted that case law authorities regularly find that notice posting requests place a very low burden on Defendants in FLSA collective actions, particularly when compared to other forms of notice. *Id.* at *19. Finally, with respect to a reminder notice being sent, the Court noted that a frequent objection to reminder notices is that they will convey the appearance that the Court itself is encouraging participation in the lawsuit. *Id.* at *20. The Court explained that this concern could be addressed by requiring that the reminder notice contain an up-front disclaimer stating that the Court neither encourages nor discourages participation in the lawsuit. *Id.* at *20-21. The Court held that this approach would be appropriate in this case. Accordingly, the Court ruled on the parties' contested procedural points regarding conditional certification.

***Mitchell, et al. v. Federal Express Corp.,* 2017 U.S. Dist. LEXIS 127018 (D. Md. Aug. 10, 2017).** Plaintiff, a security specialist for Federal Express, filed suit to recover unpaid wages for overtime in violation of the FLSA and Maryland Wage & Hour Law ("MWHL"). *Id.* at *3. Defendant moved to dismiss pursuant to Rule 12(b)(6), and the Court denied the motion. Defendant argued that Plaintiff was exempt from the FLSA's maximum hours' provisions as an "employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act." 29 U.S.C. § 213(b)(3). *Id. at *5* Defendant argued that Courts have found that it qualified as an air carrier. *Id.* at *6. Plaintiff alleged that most of his work revolved around servicing and maintaining the safety and security needs of employees and customers, and whether his duties were related to Defendant's transportation activities was a question of fact that could not be resolved on a motion to dismiss. *Id.* The Court agreed and denied the motion, ruling that whether an employee's activities excluded them from the overtime benefits of the FLSA was a question of law, but how employees spent their working time was a question of fact. *Id.* Accordingly, the Court denied the motion as to the FLSA claims because applicability of the FLSA exemptions required an individualized determination into the work that the employee performed. *Id.* at *7. Defendant also argued that Plaintiff's MWHL claim was preempted by the Airline Deregulation Act ("ADA"). *Id.* at *7. The ADA prohibits any state from "enacting or enforcing a law, regulation, or other provision . . . related to a price, route, or service of an air carrier." *Id.* Defendant argued that Plaintiff's duties were encompassed within the definition of Defendant's services. However, the Court ruled that a determination of how the MWHL's wage & hour requirements related to or affected Defendant's prices, routes, or services were also questions of fact. *Id.* at *8. Accordingly, the Court denied Defendant's motion to dismiss as to Plaintiffs' MWHL claim.

***Ndrecaj, et al. v. 4 A Kids LLC,* 2017 U.S. Dist. LEXIS 101537 (S.D.N.Y. June 28, 2017).** Plaintiff filed an action asserting violations of the FLSA and the New York Labor Law ("NYLL"). Before Defendants were served, Plaintiff's counsel submitted a letter stating that Plaintiff had requested to withdraw from the case. Plaintiff told his counsel that he wanted to "drop the case" and "just didn't want to go forward with it," but that he would pay all of the fees that had accrued. *Id.* at *1-2. The letter from Plaintiff's counsel contended that, if the Court were to view Plaintiff's request as a proposed dismissal, the Court should deny that request. *Id.* at *2. The letter further sought an order "addressing Plaintiff's stance/status in the case" and an expedited initial pretrial conference. *Id.* The Court issued an order to show cause why this case should not be dismissed for lack of subject-matter jurisdiction. The Court noted that, because Plaintiff sought to withdraw before Defendants filed their answer and before any class or collective action certification order, he did not need the Court's approval to withdraw. The Court also ordered briefing on the question of whether the Court continued to have subject-matter jurisdiction over the case given that the only named Plaintiff had withdrawn. *Id.* at *2-3. Plaintiff's counsel submitted a response arguing that the Court should continue to assert jurisdiction over this case. Defendants argued that the Court lacked jurisdiction. The Court ultimately concluded that it lacks subject-matter jurisdiction. Because Plaintiff's voluntary withdrawal occurred well before any collective or class certification order, the Court found that Plaintiff's voluntary withdrawal rendered "the entire action . . . moot." *Id.* at *4. The Court noted that far from there being a pending certification motion, Defendants in this case have not yet been formerly served. *Id.* at *7. Plaintiff's counsel contended that the Court should retain jurisdiction in order "to hold Defendants responsible for their" purported violations of the FLSA. *Id.* at *8. The Court rejected that position. It explained that it was dismissing the action without prejudice for lack of subject-matter jurisdiction, and such a dismissal would not impede the FLSA's goal of ensuring "employee protections," as the Defendants may face liability for any FLSA violations they may have committed in another lawsuit filed by either this Plaintiff or by others. *Id.* at *9. Therefore, because there was no named Plaintiff in this action, the Court dismissed the matter without prejudice for lack of subject-matter jurisdiction.

***Oldershaw, et al. v. Davida Healthcare Partners, Inc.,* 2017 U.S. Dist. LEXIS 84882 (D. Colo. June 1, 2017).** Plaintiffs, a group of employees, filed an action asserting that Defendant denied them overtime wages for work performed outside of scheduled shift hours, on weekends, and during lunch breaks in violation of the FLSA and the Colorado Wage Claim Act ("CWCA"). The Court bifurcated the FLSA claims from the CWCA claims and directed that the FLSA claims proceed first. The Court explained that there are important distinctions between a FLSA collective action and a Rule 23 class action. The Court explicitly concluded that a named Plaintiff in an FLSA action has no interest in the collective action beyond her individual claim because no separate legal entity is created, which is "fundamentally different from a class action" in which certification creates a "Plaintiff class," which is then represented by the named Plaintiff and Plaintiffs' counsel. However, the Court explained that in an FLSA collective action, every named Plaintiff and opt-in Plaintiff pursues his or her individual claim. The Court noted several logical corollaries to the distinction, including: (i) applicable statute of limitation is calculated differently; (ii) a FLSA collective action acts much like a civil suit with many Plaintiffs who pursue their own claims with possible different counsel, different pre-trial decisions, and different settlement terms; and (iii) in a Rule 23 class action, the representative Plaintiff and class counsel act for the class. *Id.* at *6-7. The Court therefore concluded that the differences between an FLSA collective action and a Rule 23 class action made the simultaneous consideration of both types of claims unworkable, inconvenient, costly, and potentially prejudicial to some Plaintiffs. *Id.* at *7. The Court found that these difficulties would be best addressed by bifurcating the FLSA claims from the state law claims, and sequencing their determination. The Court stated that it would begin with the FLSA claims and stay all state law claims until the FLSA claims were resolved. The Court noted that proceeding with the FLSA claims prior to the state law claims accomplished several objectives, including: (i) preserving the rights of the employees with regard to statutes of limitation; (ii) determination of issues with regard to the FLSA claims may have preclusive effect with regard to the state claims; and (iii) the Court had subject-matter jurisdiction as to the FLSA claims. *Id.* at *18-19. The Court stated that if the parties reached a settlement of both the FLSA and state law claims simultaneously, they could request that the Court entertain the class certification question solely for the purposes of effectuating the settlement. *Id.* at *19. Accordingly, the Court bifurcated the claims and ruled it would proceed on Plaintiff's FLSA claims and stay the state law claims.

***Robbins, et al. v. Xto Energy, Inc.,* 2017 U.S. Dist. LEXIS 118582 (N.D. Tex. July 28, 2017).** Plaintiff filed a collective action against Defendant, his former employer, alleging it failed to pay him and other similarly-situated employees overtime in violation of the FLSA. Plaintiff alleged he was responsible for inspecting and operating well equipment and performing other routine duties as assigned. Plaintiff defined the scope of the collective action as current and former frontline oilfield workers, including lease operators, automation technicians, and other production-side workers. *Id.* at *1-2. Plaintiff asserted that he and other collective action members worked in excess of 40 hours per week but were not paid the time and a half rate required by the FLSA. Defendant moved to dismiss Plaintiff's alleged overbroad collective action definition and related collective action allegations. Defendant alleged that Plaintiff did not properly allege that this action can be maintained as a collective action under 29 U.S.C. § 216(b). Plaintiff asserted that workers were required to work in excess of 12 hours a day, seven days a week, for consecutive weeks, in Defendant's oilfields across 15 states. *Id.* at *3. Plaintiff further alleged that he worked as a lease operator for Defendant "within the last three years and until approximately September 2014." *Id.* at *4. Plaintiff further claimed he was responsible for inspecting and operating well equipment and performing other route and routine duties as assigned, and that collective action members' duties were to "perform similarly non-exempt duties pursuant to Defendant's own common classification scheme." *Id.* The Court stated that although the Fifth Circuit has not addressed the issue, many case law authorities in the Fifth Circuit have consistently found an FLSA pleading sufficient when it "puts Defendant on notice as to the relevant date range, as well as the approximate number of hours for which Plaintiff claims [he or she] was under-compensated . . . the FLSA does not require more." *Id.* However, the Court found that Plaintiff's allegations did not cite the date range when he worked or when the FLSA violations allegedly occurred. *Id.* at *5. The Court explained that although Plaintiff's complaint asserted that he worked over 12 hours a day for seven days for weeks at a time, he did not state the number of hours for which he was allegedly under-compensated. *Id.* Further, Plaintiff named 15 states where the Defendant conducts business, but did not state where the alleged FLSA violations occurred. Finally, the Court noted that Plaintiff gave several job titles for members of the collective action, he did not describe their work or state the common attributes between them, and only vaguely asserting that the purported collective action members had duties similar to his

own. *Id.* Overall, the Court held that Plaintiff failed to adequately put Defendant on notice of the characteristics of the members of the purported collective action. Accordingly, the Court granted Defendant's motion to dismiss.

***Schilling, et al. v. PGA, Inc.*, 2017 U.S. Dist. LEXIS 38407 (W.D. Wis. June 19, 2017).** Plaintiffs filed a collective action alleging that Defendant violated various provisions of the FLSA and Wisconsin state labor laws. The Court had previously granted Plaintiffs leave to: (i) add two new Plaintiffs; and (ii) assert a claim that Defendant violated Wisconsin law by computing overtime pay using the rate for the type of work performed during the overtime hours, rather than the often higher average wage rate earned by the employee during that workweek. The Court, however, denied Plaintiffs leave to add a prevailing wage claim and a discrete claim concerning Plaintiff Sinclair. *Id.* at *1. Plaintiffs filed a motion for reconsideration and a motion for sanctions. At the same time, Defendant filed a motion to strike Plaintiffs' third amended complaint. The Court found no basis to revisit its decision to deny Plaintiffs leave to amend their complaint to add a prevailing wage claim because such a representative claim would require class certification under Rule 23. The Court held that it was simply too late to add that claim to the proposed hybrid FLSA collective action and class action overtime pay claims already at issue. *Id.* at *4. As such, the Court denied Plaintiffs' motion for reconsideration. Defendant also urged the Court to award attorneys' fees in responding to Plaintiffs' motion for reconsideration. *Id.* at *5. Plaintiffs also filed a motion for sanctions, and argued that Defendant's request for fees was unfair and improper. The Court stated that Plaintiffs should have developed their argument in their original motion to amend, rather than simply cite to a state law case precedents in the reconsideration motion without any explanation or analysis as to why a state procedure embraced in that case would govern a class action in a federal lawsuit. Accordingly, the Court declined both Defendant's motion for attorneys' fees and Plaintiffs' motion for sanctions. Finally, in its prior opinion and order granting Plaintiffs leave to amend their complaint in certain respects, the Court had directed Plaintiffs to file a third amended complaint consistent with the rulings by February 23, 2017. Plaintiffs missed that deadline and filed the third amended complaint on March 10, 2017. In response, Defendant filed a motion to strike the third amended complaint as untimely. *Id.* at *6. The Court found that Defendant was not unfairly prejudiced by the delay, particularly since Plaintiffs' allegations were previously disclosed in the proposed third amended complaint for which the Court already had issued a decision on Plaintiff's motion for leave. Accordingly, the Court denied Defendant's motion to strike.

***Shultz, et al. v. Nomac Drilling, LLC*, 2017 U.S. Dist. LEXIS 106564 (W.D. Okla. July 11, 2017).** Plaintiff, a rig welder, brought a collective action asserting that Defendants failed to pay overtime wages in violation of the FLSA. Defendants alleged that they had a contractual agreement with ARMS. Welding, Inc. ("ARMS"), in which ARMS agreed to indemnify Defendants against wage claims. The Master Services Agreement ("MSA") called for ARMS to provide welding services, including the requisite labor, to Nomac. The MSA also deemed ARMS an independent contractor and provided that ARMS would indemnify Nomac for any "claims . . . arising out of or in connection with any asserted or established violation of any such laws, orders, rules, or regulations by [ARMS] or its sub-contractors and their respective employees." *Id.* at *2. Defendants alleged that ARMS had agreed to indemnify them against any FLSA liability and asserted claims against ARMS for breach of contract and indemnification. Plaintiff filed a motion to dismiss Defendants' third-party complaint on the basis that the Court either lacked jurisdiction over the state law claims or that they were not appropriate for public policy reasons. *Id.* at *3. The Court stated that the first inquiry was whether Plaintiff could move to dismiss these claims at all, as Defendants' claims were against ARMS, and not Plaintiff. The Court noted that the question would be whether parties could move to dismiss claims under Rule 12(b)(6) that were not asserted against them personally. *Id.* at *4. The Court determined that other case law authorities unanimously had answered "no" when faced with the same inquiry. However, the Court opined that, even if Plaintiff lacked standing to seek dismissal of Defendants' third-party claims for breach of contract and indemnification, the Court must find that it has subject-matter jurisdiction over those claims to proceed. *Id.* at *5. The Court held that Defendants' claims did little to subvert the FLSA process and, in fact, directly impacted the merits of Plaintiff's overtime wage claim. The Court determined that, if Plaintiff was to recover overtime wages under the FLSA, the Court needed to identify his employer. *Id.* at *5-6. Defendants insisted that, by the terms of the MSA it entered with ARMS, ARMS was Plaintiff's employer and it had a duty to indemnify Defendants for FLSA violations. *Id.* at *6. The Court found that this dispute must be resolved before Plaintiff could recover anything. Therefore, the Court held that, given that Defendants' claims for breach of contract and indemnification were intertwined with the merits of Plaintiff's FLSA claim, exercising supplemental jurisdiction over them was appropriate. *Id.* The Court concluded that Defendants' claims for

breach of contract and indemnification stemmed from a common set of facts, *i.e.*, Plaintiff believed he was owed overtime wages under the FLSA, and the MSA purported to transfer any FLSA liability from Defendant to ARMS. *Id.* Accordingly, the Court denied Plaintiff's motion to dismiss.

***Swamy, et al. v. Title Source, Inc.,* 2017 U.S. Dist. LEXIS 186535 (N.D. Cal. Nov. 10, 2017).** Plaintiff, an appraiser, filed a class action alleging that he was misclassified as an exempt employee and therefore Defendant failed to pay overtime compensation in violation of the FLSA and state wage & hour laws. Plaintiff sought conditional certification of his FLSA collective action on behalf of all "staff appraisers" who he alleged were misclassified as exempt from overtime pay, and as a result are owed back wages. *Id.* at *3. Defendant argued that the putative collective action members were not similarly-situated, and conditional certification would therefore be inappropriate. Defendant further argued that the Court should exercise its discretion to deny Plaintiff's motion and reserve this decision for a later date. *Id.* at *6. Defendant contended that mailing an opt-in notice on federal claims in late November, followed three months later with an opt-out notice in connection with final certification of a class action asserting state law claims (should it be granted) would be confusing to recipients. *Id.* at *7. Defendant also asserted that this two-step process may result in the pointless expenditure of resources should the class later be decertified. Since Plaintiff was required file a motion for class certification of the state law claims by January 18, 2018, Defendant proposed delaying any collective action certification until that date, at which time "the Court will be able to make a determination about the propriety of collective treatment under both Rule 23 and the FLSA in one fell swoop, based upon a full record." *Id.* at *8. Plaintiff argued that Defendant's proposed plan was actually designed to further run the clock on FLSA claims for the statute of limitations, thereby diminishing damages that collective action members would be entitled to with each passing week. *Id.* The Court noted that Defendant, however, agreed to toll the statute of limitations, thereby eliminating Plaintiff's concerns. The Court further held that given the late date at which Plaintiff applied for conditional certification, and its proximity to the last day to seek class certification of his related California labor law claims, the Court found that no conditional certification or opt-in notice is necessary at this time. Accordingly, the Court held Plaintiff's motion for certification of his putative FLSA collective in abeyance.

(xxv) Public Employee FLSA Collective Action Litigation

***Aguilar, et al. v. Management & Training Corp.,* 2017 U.S. Dist. LEXIS 175608 (D.N.Mex. Oct. 24, 2017).** Plaintiffs, a group of correctional workers, filed a putative class and collective action alleging that Defendant failed to pay wages and overtime pursuant to the FLSA and the New Mexico Minimum Wage Act ("NMMWA"). Plaintiffs asserted that they should be compensated for various pre-shift and post-shift, including: (i) waiting at the prison, (ii) clearing security, (iii) taking and returning equipment, and (iv) meeting and reporting to other detention officers. Defendant moved for summary judgment and the Court granted the Defendant's motion in its entirety**.** At the outset, the Court rejected Plaintiffs' claim that that they were entitled to compensation due to Defendant's rounding policy, which Plaintiffs claimed was unlawful. The Court agreed with Defendant that Plaintiffs' rounding policy theory did not apply in this case, because Defendant paid its officers based on their shift schedule, if they clocked-in or clocked-out no more than ten minutes on either side of the scheduled start or stop time. The Court concluded that the practice of rounding could not be reconciled with Defendant's ten-minute adjustment window and simply did not apply. Accordingly, the Court granted summary in favor of Defendant on Plaintiffs' rounding claim. Further, the Court found that the only pre-shift and post-shift activity that was compensable under the FLSA was the officers' pass-down briefings on the post. After the officers arrived at their posts, there was a pass-down or overlap period between the shifts of two to five minutes and the officer going off shift conveyed information about the post to the officer coming on shift. *Id.* at *38. The Court found that the pass-down briefings were indispensable to Plaintiffs' principal activities, and were therefore compensable under the FLSA. *Id.* at *39. However, the Court concluded that Defendant was not precluded as a matter of law from asserting the *de minimis* defense as to the pass-down claims, and that any discrepancy between what Plaintiffs should be paid and their scheduled start and end times was *de minimis*. *Id.* at *59. The Court also ruled that the other challenged activities were not compensable as they were not principal activities. The Court held that Plaintiffs' time was not compensable with respect to: (i) metal detector clearance; (ii) obtaining pre-shift assignments; (iii) briefing and paperwork; (iv) collection of keys and equipment; and (v) walking to and from post-shift activities. Accordingly, the Court granted Defendant summary judgment with respect to all of Plaintiffs' claims under the FLSA. The Court also ruled that its findings on Plaintiffs' FLSA claims with respect to pre-shift

and post-shift activities also applied to Plaintiffs' state law claims. Accordingly, the Court likewise granted Defendant's motion for summary judgment on Plaintiffs' state law claims under the NMMWA.

***Alamo, et al. v. United States,* Case No. 15-CV-5149 (Fed. Cir. Mar. 9, 2017).** Plaintiffs, a group of current and former Army emergency medical technicians and paramedics, filed a collective action alleging that Defendant failed to properly calculate overtime compensation in violation of the FLSA. Defendant filed a motion for summary judgement, which the District Court granted on the grounds that no under-payment occurred. On appeal, the Federal Circuit affirmed the District Court's ruling. Before October of 2012, Plaintiffs were generally scheduled for 24-hours on-duty followed by 48-hours off-duty. After October of 2012, Plaintiffs switched to a schedule consisting of two 48-hour workweeks. Since Plaintiffs worked more than 40 hours in one week, Defendant paid: (i) basic pay under the Federal Employees Pay Act; (ii) stand-by duty premium pay; and (iii) FLSA overtime pay for regularly scheduled overtime. *Id.* at 2-3. Plaintiffs asserted that Defendant under-paid them by using an incorrect formula to calculate the FLSA overtime pay. *Id.* at 3. The Federal Circuit determined that Plaintiffs stand-by premium pay already compensated for the Plaintiffs' pay. Accordingly, the Federal Circuit found that the additional half-time payment sufficiently fulfilled Defendant's obligation for purposes of the FLSA. *Id.* at 8. Accordingly, the Federal Circuit affirmed the District Court's ruling that granted summary judgment.

***Alfaro, et al. v. City Of San Diego,* 2017 U.S. Dist. LEXIS 90097 (S.D. Cal. June 12, 2017).** Plaintiffs, a group of emergency radio operators ("EROs") in the San Diego Fire Department ("SDFD"), filed a collective action asserting that Defendant failed to pay overtime compensation in violation of the FLSA. Defendant filed a motion to dismiss, which the Court denied. Plaintiffs alleged that they worked 56 hours per week and were not paid overtime. Plaintiffs contended that they were entitled to overtime pay and that, when they complained about their missing overtime wages, they were dismissed from their positions in retaliation for their complaints. *Id.* at *2. Plaintiffs alleged that Chief Fennessy, the head of the SDFD, had ultimate decision-making authority over personnel matters. Defendants argued that Chief Fennessy was not a proper Defendant in this action because he was not an "employer" as the term had been applied under the FLSA. *Id.* at *3. Defendants argued that Chief Fennessy was not an employer because he did not control the "purse strings." *Id.* at *4. The Court held that the Chief's ability to control the purse strings was not the sole factor in determining whether he was an employer under the FLSA. The Court explained that the FLSA prescribes conduct for employers that involve other issues than overtime pay, and therefore if the definition of employer was solely dependent on power over the purse strings, then many managers would not be liable under the FLSA for violations of these provisions. *Id.* at *5. The Court noted that if Defendants' argument was accepted, such an outcome would thwart the "broad remedial purposes" of the FLSA. *Id.* The Court found that Plaintiffs alleged that Chief Fennessy had the ultimate decision-making authority over SDFD personnel matters, and therefore it was a reasonable inference that, by exercising ultimate decision-making authority over personnel matters, Chief Fennessy had the power to hire and fire Plaintiffs, control their work schedules and conditions of employment, and access their employment records. *Id.* at *6. The Court thus concluded that Plaintiffs alleged enough facts at the motion to dismiss stage to meet three of the four factors of the economic reality test. *Id.* The Court determined that the thrust of Defendants' argument was that a person could not be liable for failing to pay overtime if he had no power to pay the overtime. The Court noted that could be true but stated that such issue went to the question of liability, not to the definition of employer under the statute. *Id.* at *7. Regardless, the Court found that, at this early stage, Defendants had not established that Chief Fennessy had no power to facilitate overtime pay. Defendants also argued that there was a factual dispute regarding Plaintiffs' hourly wage rates and that, if Plaintiffs prevailed on their claims, the Court would have to interpret a memorandum of understanding ("MOU") between the parties to compute damages. Defendants, therefore, contended that Plaintiffs were required to exhaust the remedies provided in the MOU prior to initiating their action. Defendants argued that if any portion of Plaintiffs' claims required interpretation of an MOU, then Plaintiffs were required to exhaust their remedies under the MOU prior to initiating this action. *Id.* at *8-9. The Court disagreed and opined that the key was whether the claims were based on rights arising from the FLSA or from the MOU. The Court held that although it might need to look to the MOU for damages computation, the FLSA created the rights at issue here. Accordingly, the Court denied Defendants' motion to dismiss.

***Allen, et al. v. City Of Chicago,* 2017 U.S. App. LEXIS 14230 (7th Cir. Aug. 3, 2017).** Plaintiffs, a group of police officers, brought a collective action alleging that Defendant wilfully 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. 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 District 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 District 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. After weighing all admissible evidence, the District Court entered judgment in Defendant's favor. Although Plaintiffs established that they performed off-duty work on their BlackBerrys, the District 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. On appeal, the Seventh Circuit held that the District Court reasonably concluded that requiring the police department to check what they knew of the officers' off-duty work against officers' time slips they approved would be "extremely impractical." *Id.* at *20. Plaintiffs also contended that the police department discouraged them from seeking overtime payment for off-duty BlackBerry work, which discouraged them from submitting time slips for the work. *Id.* at *22. Neither the District Court nor the Seventh Circuit were moved by the evidence in support of this argument, as no supervisor ever told any Plaintiffs not to submit time slips for BlackBerry work, and no officer was disciplined for submitting such time slips. *Id.* Accordingly, the Seventh Circuit upheld the District Court's judgment.

***Cummings, et al. v. Bussey*, 2017 U.S. Dist. LEXIS 61332 (D.N.Mex. April 20, 2017).** Plaintiffs, a group of workers on government public work projects, filed a lawsuit alleging that Defendant violated their federal rights to procedural and substantive due process pursuant to the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C.§ 1983 by failing to pay wages in accordance with the New Mexico Public Works Minimum Wage Act ("NMPWMWA"). *Id.* at *11. Plaintiffs claimed that the rate they were paid was less than that required by the NMPWMWA. Defendant moved to dismiss the complaint on the grounds that it was entitled to qualified immunity. *Id.* at *13. The Court granted Defendant's motion as to Plaintiffs' procedural due process claim, but denied the motion as to the substantive due process claim. The NMPWMWA requires that the state pay workers under contracts for the construction of public works and roads the prevailing minimum wage and establishes the procedure for determining the wages. *Id.* at *3. Plaintiffs claimed that Defendant's failure to follow the statutorily-mandated procedure for setting the prevailing wages was a violation of Plaintiffs' right to procedural due process. *Id.* at *16. However, the Court dismissed the procedural due process claim and ruled that Defendant was entitled to qualified immunity because Plaintiffs failed to allege a constitutional violation. *Id.* at *18. The Court found that the doctrine of qualified immunity applied because the NMPWMWA provided for a right of appeal to challenge the Defendant's decision on wages and Plaintiffs failed to allege that they were not afforded the opportunity to challenge the rates that Defendant used. *Id.* Accordingly, the Court granted the motion to dismiss on the procedural due process claim. *Id.* As to the substantive due process claim, Plaintiffs alleged that the Defendant acted arbitrarily, capriciously, and with deliberate indifference to their rights by failing to set prevailing rates in accordance with the NMPWMWA. *Id.* at *19. Defendant asserted that it was entitled to qualified immunity because Plaintiffs' rights to be paid wages was not clearly established at the time of the contract. *Id.* at *21. The Court ruled that the plain language of the NMPWMWA provided a property right that was clearly established at the time of Plaintiffs' alleged deprivations. *Id.* at *25. Accordingly, Defendant was not entitled to qualified immunity on Plaintiffs' substantive due process claim and the Court denied Defendant's motion to dismiss. In sum, the Court granted Defendant's motion to dismiss in part and denied it in part.

***Fidler, et al. v. Twentieth Judicial District Drug Task Force,* 2017 U.S. Dist. LEXIS 74465 (M.D. Tenn. May 16, 2017).** Plaintiffs, a group of employees, alleged that Defendant, an intergovernmental agency, violated the overtime provisions of the FLSA. Defendant filed a motion to dismiss for lack of standing, and the Court denied the motion. When Plaintiffs began working for Defendant, they continued to receive their salaries from the state government. Defendant maintained a bank account funded solely by fines and civil forfeitures from drug prosecutions. Plaintiffs' overtime compensation was paid from the bank account. In June 2015, the district attorney closed Defendant, and Plaintiffs either left law enforcement entirely or returned to their previous positons. *Id.* at *3. As to Plaintiffs' suit, Defendant argued that it was entitled to sovereign immunity under the Eleventh Amendment because it was a State entity. Plaintiffs did not dispute that state entities are entitled to sovereign immunity, but argued that Defendant was a local entity. *Id.* The Court stated that to determine whether

Defendant was a State entity, it must weigh four factors, including: (i) the State's potential liability for a judgment against the entity; (ii) the language by which State statutes refer to the entity and the degree of State control and veto power over the entity's actions; (iii) whether State or local officials appoint the board members of the entity; and (iv) whether the entity's functions fall within the traditional purview of State or local government. *Id.* at *3-4. The Court found that the State did not have potential liability for a judgment against Defendant because any judgment would be paid from Defendant's bank account. As such, the Court determined that this factor weighed against finding that Defendant was a State entity. *Id.* at *4. Plaintiffs asserted that the State had no control or veto power over Defendant. The Court also held that neither party identified a State statute that referred to Defendant as either a local or State entity relevant to the current FLSA suit. *Id.* at *5. Accordingly, because Plaintiffs alleged that the State did not control or have veto power over Defendant, and State law was silent on the issue, the Court held that this factor also weighed against finding that Defendant was a State entity. *Id.* at *6. The Court therefore denied Defendant's motion to dismiss.

***Hanson, et al. v. Milton Township,* 2017 U.S. Dist. LEXIS 117610 (N.D. Ill. July 27, 2017).** Plaintiffs, a group of deputy assessors, brought an action alleging that they were terminated due to their support of the prior assessor during the April 2013 election in violation of the First Amendment rights; § 1983 equal protection claims based upon age discrimination in violation of the ADEA; and the Illinois Human Rights Act ("IHRA"). Plaintiff also asserted violations of the Illinois Wage Payment and Collection Act ("IWPCA") and the FLSA. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6). Defendants moved to dismiss the § 1983 equal protection claims based upon age and disability discrimination. Defendants argued that Plaintiffs alleged in that their employment was terminated for political reasons and that such a reason is permissible under the law. Defendants contended that Plaintiffs could not allege inconsistently in another count in the complaint that their employment was terminated due to their age. The Court stated that pursuant to Rule 8(d), a party may plead causes of action in the alternative. *Id.* at *5. The Court further noted that there was not necessarily any inconsistency since Plaintiffs could assert that their employment was terminated due to political reasons and because of their age and/or disability. The Court found that Plaintiffs alleged sufficient facts at this juncture to state valid equal protection claims based on age and disability discrimination. *Id.* at *6. Therefore, the Court denied Defendants' motion to dismiss Plaintiffs' equal protection claims. Defendants also sought to dismiss the IWPCA claims. Defendants contended that Plaintiffs' IWPCA claims were premised on an alleged failure to pay Plaintiffs for unused personal and vacation days and overtime pay. Defendants contended that Plaintiffs failed to allege that the compensation was owed under an employment contract or agreement. *Id.* at *7. Plaintiffs argued that an employment policy can suffice in certain instances to support an IWPCA claim and that such policy was alleged in this case. *Id.* Defendants agreed that a formal written employment contract is not always required, but contended that there must be some type of agreement relating to a supporting policy. *Id.* at *7-8. The Court held that Plaintiffs alleged sufficient facts to plausibly suggest a policy that could support an IWPCA claim. The Court opined that whether there existed a written policy that was sufficient to support an IWPCA claim could be determined by examining the evidence beyond the pleadings. At the summary judgment stage, the Court held that Plaintiffs would have to point to sufficient evidence to support their IWPCA claims. Therefore, the Court denied Defendants' motion to dismiss Plaintiffs' IWPCA claims. *Id.* at *8. However, the Court ruled that Plaintiffs failed to allege facts that would plausibly suggest that Plaintiffs were employees of any entity or individual other than the Assessor. *Id.* at *9. Therefore, Defendants' alternative motion to dismiss the IWPCA claims brought against the Township was granted.

***Martin, et al. v. United States*, 2017 U.S. Claims LEXIS 97 (Fed. Cl. Feb. 13, 2017).** Plaintiffs, a group of current or former government employees, filed a collective action alleging that they were not timely compensated for work performed during the government shutdown, in violation of the FLSA. Plaintiffs worked during the first week of the 2013 shutdown, but were not paid for this work on their regularly scheduled paydays because the government understood the Anti-Deficiency Act ("ADA") to prohibit payment until funds were appropriated for that purpose. Plaintiffs asserted that despite prohibitions in the ADA, which prohibits the government from spending money when specific appropriations are not in place, Defendant was still obligated to pay employees pursuant to the FLSA. Defendant contended that "the shutdown placed two seemingly irreconcilable requirements upon Federal agencies: pay excepted employees on their next regularly scheduled payday, and make no such expenditures in the absence of appropriations for that purpose." *Id.* at *6-7. The parties filed cross-motions for summary judgment, and the Court granted Plaintiffs' motion and denied

Defendant's motion. Plaintiffs asked the Court to determined: (i) whether the government owed liquidated damages to certain employees for violating the FLSA during the 2013 shutdown; and (ii) whether the government was legally unable to determine overtime pay during the 2013 shutdown for certain employees by their regularly scheduled paydays. *Id.* at *2-3. Defendant requested the Court to determine: (i) whether the government violated the FLSA by not paying certain employees on their regularly scheduled paydays during the 2013 shutdown; (ii) whether the government owed liquidated damages to certain employees for failing to pay regular wages in violation the FLSA; and (iii) whether the government owed liquidated damages to certain employees for failing to pay overtime wages in violation of the FLSA. *Id.* at *3. The Court was unpersuaded that Defendant could entirely avoid liability based only on the superficial conflict between the FLSA and the ADA. The Court found that Plaintiffs' complaint legally advanced sufficient claims for relief against Defendant for alleged violations of the FLSA. *Id.* at *12. The Court explained that § 216 states, in relevant part, that "any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee … affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages." *Id.* Thus, under the applicable legal framework, together with the undisputed and material facts agreed to by the parties, the Court held that Defendant's failure to timely pay Plaintiffs' wages was a violation of the FLSA. *Id.* at *13-14. Since the Court found that the ADA did not excuse Defendant's FLSA violations, and to allow Defendant to avoid liability under this exception would amount to an end run around that legal conclusion, the Court determined that Defendant was liable for liquidated damages. *Id.* at *24. The Court opined that Defendant made no inquiry into how to comply with the FLSA, and instead relied entirely on of the primacy of the ADA. *Id.* at *26. By its own admission, the government did not consider whether requiring essential, non-exempt employees to work during the government shutdown without timely payment of wages would constitute a violation of the FLSA. Accordingly, the Court granted Plaintiffs' motion for summary judgment and denied Defendant's motion.

***Milwaukee Police Association, et al. v. Flynn,* 863 F.3d 636 (7th Cir. 2017).** Plaintiffs, the Milwaukee Police Association ("MPA"), the labor organization that represents certain non-supervisory Milwaukee police officers as a party in the collective bargaining agreement ("CBA") with the City, and a group of former police officers ("officers"), filed a class action against Defendants Flynn, the Chief of Police, and the City of Milwaukee alleging a violation of procedural due process pursuant to 42 U.S.C. § 1983, and seeking unpaid wages pursuant to Wis. Stat. § 109.03. The officers alleged that Wis. Stat. § 62.50(11) and (18) provided them with a legal entitlement to employment and "pay and benefits" after the chief discharged them, continuing until the Board of Fire and Police Commissioners (the "Board"), affirmed their discharges from the force. *Id.* at *637. The officers were discharged and their benefits and pay stopped immediately. *Id.* at *638. The officers appealed their terminations to the Board, which rejected their appeals and they were permanently discharged. The officers claimed that their employment did not end when they were discharged by the chief because they were entitled to employment until the conclusion of their appeals. The District Court rejected Plaintiffs' claims and granted judgment on the pleadings, finding that under Wisconsin law the former officers were not entitled to employment or pay and benefits between discharge by the chief and affirmation of discharge by the Board. *Id.* On appeal, the Seventh Circuit affirmed the District Court's ruling. The Seventh Circuit found that under Wisconsin law, the former officers had no property interest in employment once they were discharged for cause by Defendant Flynn. The Seventh Circuit further determined that the officers were not entitled to wages for the period of time between their discharge and the conclusion of their appeal under Wisconsin law, as they were not employed during this time. *Id.* The Seventh Circuit explained that the District Court based its order on the statutory interpretation and legislative history of § 62.50, and concluded that the officers had no property interest in employment following discharge, and therefore, were not denied due process or owed additional wages. *Id.* at *639. The officers suggested that discharge by the chief could not take effect until, and unless, affirmed by the Board after a trial. *Id.* at *642. The Seventh Circuit disagreed and stated that § 62.50(17) must be read as identifying that a discharged officer has no further recourse after a discharge is sustained by the Board, not as a term distinguishing between the type of discharge effectuated by the chief and sustained by the Board. *Id.* at *643. The Seventh Circuit therefore concluded that without any property interest in their employment, the officers' procedural due process claim must fail. *Id.* at *644-645. Accordingly, the Seventh Circuit affirmed the District Court's ruling granting Defendants' motion for summary judgment.

***Yanko, et al. v. United States*, 869 F.3d 1328 (Fed. Cir. 2017).** Plaintiff, a part-time federal employee of the U.S. Department of Veterans Affairs, filed a class action alleging that Defendant's "in-lieu-of" holidays policy should be provided to part-time employees. Plaintiff sought to represent a class of all other part-time federal employees who are or were employed by all federal agencies and who were similarly-situated, and were entitled to premium pay for work performed on each day designated as an "in-lieu-of" holiday. *Id.* at *1329. The Court of Federal Claims rejected Plaintiff's claim. On appeal, the Federal Circuit affirmed the Court of Federal Claims' ruling. By statute and Executive Order, certain employees whose basic workweek of five workdays is Monday through Friday are granted days off "in-lieu-of" holidays for those days. *Id.* at *1329-1330. Plaintiff's regular workweek consisted of five days, from Sunday through Thursday, with non-workdays on Fridays and Saturdays. Between December 15, 2009, and May 16, 2016, there were eight official public holidays that fell on either a Friday or a Saturday, and because Plaintiff was a part-time employee, he was not credited with an in-lieu-of holiday during the preceding or succeeding workweek for any of those eight days. *Id.* at *1330. The Federal Circuit explained that it is the longstanding policy of the Office of Personnel Management ("OPM") that part-time employees are not entitled to an in-lieu-of holiday corresponding to a particular holiday when that holiday falls on a non-workday for the part-time employee. That policy is reflected in regulations issued by OPM pursuant to notice-and-comment rule-making. The Court of Federal Claims held that the governing statute and Executive Order do not provide part-time employees such Plaintiff with a right to in-lieu-of holidays when federal holidays fall on days outside the employees' normal workweek. In particular, the Court of Federal Claims concluded that the term "basic workweek," which appears in the statute governing in-lieu-of holidays and in Executive Order No. 11,582, referred only to full-time employees, and not to part-time employees. *Id.* at *1331. On appeal, Plaintiff challenged that construction of the statute and the Executive Order. The Federal Circuit found that the Court of Federal Claims correctly dismissed Plaintiff's complaint for failure to state a claim on which relief can be granted because this case consisted of a pure legal issue of statutory interpretation: *i.e.*, whether part-time federal employees are entitled to in-lieu-of holidays when federal holidays fall on days on which they are not scheduled to work. *Id.* at *1332. Plaintiff's argument proceeded from his contention that part-time employees were "employees" within the meaning of the pertinent statutes, and that once that proposition was accepted, the in-lieu-of holiday provisions of § 6103(b) and the Executive Order necessarily applied with full force to part-time employees. *Id.* at *1333. The Federal Circuit noted that under both § 6103(b) and § 3 of Executive Order No. 11,582, in-lieu-of holiday benefits are limited to employees who work a "basic workweek," whether that constitutes Monday through Friday or some period other than Monday through Friday. *Id.* Referencing 5 U.S.C. § 6101, Defendant argued that the term "basic workweek" referred to the basic 40-hour workweek worked by full-time employees. The Federal Circuit found that nothing in the statute or the Executive Order suggested that the term "basic workweek" applied to part-time employees. The Federal Circuit held that, to the contrary, from as early as the 1945 Pay Act, the term was consistently used in reference to full-time employees. The Federal Circuit determined that reading §§ 6101 and 6103, and Executive Order No. 11,582 as a whole, it was reasonable to interpret the use of the term "basic workweek" to be a shorthand expression for "basic 40-hour workweek," as used in both the text and the heading of § 6101. *Id.* Accordingly, the Federal Circuit rejected Plaintiff's argument that the text of the statute by itself made clear that the "in-lieu-of" holiday rules applied to part-time employees. *Id.* at *1334. The Federal Circuit therefore affirmed the Court of Federal Claims' decision dismissing Plaintiff's class action.

***Souryavong, et al. v. Lackawanna County*, 2017 U.S. App. LEXIS 18173 (3d Cir. Sept. 20, 2017).** Plaintiffs, a group of part-time employees, filed a collective action alleging that Defendant failed to aggregate their hours worked in different jobs and failed to pay overtime compensation in violation of the FLSA. Defendant did not dispute that it violated the FLSA's overtime provisions at various times from 2008 to 2012. However, Defendant disputed that the violations were willful. *Id.* at *2. The case went to trial on the issues of willfulness and damages. *Id.* at *3. At trial, Plaintiffs presented documentary evidence that showed Defendant's failure to pay proper overtime. Defendant thereafter made an oral motion for entry of judgment as a matter of law, arguing that Plaintiffs' evidence was insufficient to create a jury question on willfulness. The District Court granted the motion and directed a verdict that the violations were not willful. *Id.* The jury awarded $5,588.30 in damages. The District Court then addressed several post-trial motions. Plaintiffs moved for liquidated damages, and Defendant opposed that request on the grounds that liquidated damages were inappropriate because it had operated in good faith and its FLSA violations were inadvertent. *Id.* at *5. The District Court granted the motion because it found that Defendant had presented no evidence to show that it had taken any affirmative steps to ascertain the

FLSA's requirements prior to the overtime violations or had acted in good faith. *Id.* Plaintiffs also moved for attorneys' and costs, requesting an award of $166,162.50, based on a fee rate of $400 per hour, 367.6 hours of legal work, and additional legal-assistant time and costs. The District Court found that the proper rate was $250 per hour and that only 278.2 hours were compensable, for a lodestar of $69,550, which it deviated downward to a final award of $55,852.85. *Id.* at *6-7. Plaintiffs appealed on two issues, including: (i) whether the District Court correctly granted judgment as a matter of law on willfulness; and (ii) whether the Court erred in its calculation of attorneys' fees. The Third Circuit concluded that the District Court properly granted judgment as a matter of law on willfulness because the evidence presented at trial did not measure up. *Id.* at *12. The Third Circuit then examined the fee award and concluded that the District Court followed the lodestar method meticulously, since the District Court calculated the lodestar, identified the factors it thought not subsumed in the lodestar, analyzed those factors in light of the facts of the case, and then decided that a downward deviation from the lodestar was justified. *Id.* at *13. Accordingly, the Third Circuit held that the District Court applied the law correctly. Plaintiffs argued that the District Court should have accepted their proposed rate of $400 per hour because Defendant offered no evidence to contradict their proposed rate. *Id.* at *16. The Third Circuit disagreed and determined that Defendant had provided an attorney's affidavit stating that attorneys of similar stature in the region were compensated at rates of $260 and $275 per hour, not far from the $250 per hour rate that the District Court applied. Accordingly, the Third Circuit affirmed the District Court's ruling.

(xxvi) Record-Keeping Claims In Wage & Hour Class Actions

***Aguirre, et al. v. Aaron's Inc.,* 2017 U.S. Dist. LEXIS 146710 (S.D. Cal. Sept. 11, 2017).** Plaintiff, a store manager, brought a collective action alleging that Defendant misclassified store managers and thereby violated various provisions the FLSA and the California Labor Code. In particular, Plaintiffs asserted that Defendant violated the FLSA's record-keeping provisions. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) on the grounds that the FLSA does not provide a private right of action to enforce the record-keeping provisions. *Id.* At *4. The Court granted the motion. Plaintiff alleged that Defendant failed to pay for all hours worked, failed to pay for overtime at the required rate, and failed to keep accurate records of the hours worked. *Id.* at *2. In support of its motion, Defendant argued that, as a matter of law, there was no private right of action to enforce the FLSA's record-keeping requirement and that Plaintiff alleged insufficient facts to state a claim for failure to pay for all hours worked. The Court noted that Plaintiff did not address Defendant's argument that the FLSA does not provide a private right of action to enforce the record-keeping provisions set forth in 29 U.S.C. §§ 211(c) and 215(a)(5). The Court agreed with Defendant that the provision does not include a private right of action for record-keeping violations. Further, the Court explained that the record-keeping provisions were enforceable only by injunctive relief to restrain the alleged violation, and Plaintiff had not requested this relief. *Id.* at *4. Therefore, to the extent the FLSA claim alleged a violation of the record-keeping provisions, the Court granted Defendant's motion to dismiss. *Id.* at *5. The Court further explained that, to state a claim for violation of the FLSA's minimum wage and overtime provisions under 29 U.S.C. §§ 206 and 207, "at a minimum the Plaintiff must allege at least one workweek when he worked in excess of 40 hours and was not paid for the excess hours in that workweek, or was not paid minimum wages." *Id.* The Court found that, although Plaintiff alleged that he "would regularly work between eight to twelve hours per day," he did not allege that he worked more than 40 hours in any given week. *Id.* at *6. The Court further held that Plaintiff failed to allege that he was paid less than his earned regular-time wages. *Id.* Accordingly, the Court concluded that Plaintiff failed to state a claim for a violation of the FLSA's minimum wage and overtime provisions. *Id.* The Court, therefore, granted Defendant's motion to dismiss. However, because it appeared that Plaintiff might be able to amend the FLSA claim, the Court granted Plaintiff leave to amend his complaint.

(xxvii) Sanctions In Wage & Hour Class Actions

***Garber, et al. v. Office Of The Commissioner Of Baseball,* 2017 U.S. Dist. LEXIS 27394 (S.D.N.Y. Feb. 27, 2017).** Plaintiffs brought an action alleging that Defendants violated the minimum wage and overtime requirements of the FLSA and the New York Labor Law ("NYLL"). The parties settled the matter and Sean Hull objected to the proposed settlement ("Hull objection"). Plaintiffs asserted that the Hull objection was frivolous and filed motions for sanctions pursuant to Rule 11 against Hull and his counsel. *Id.* at *25. Although the Rule 11 motions ultimately were withdrawn by stipulation, the Court held a hearing to consider whether to impose *sua sponte* Rule 11 sanctions upon Christopher Bandas of Bandas Law Firm, an attorney representing Hull. The

Court found that although it had grave concerns about Bandas' conduct in the matter, it would not impose sanctions on Bandas. Hull filed a class settlement objection that was drafted by Bandas. The Hull objection was drafted by Bandas but was filed by local counsel, David Stein of Samuel and Stein, after Stein's associate conducted a "basic review." *Id.* at *26. After the Court approved the proposed class settlement and awarded attorneys' fees and costs, Plaintiffs filed a Rule 11 motion for sanctions against Bandas, to which Bandas refused to respond. Bandas reasoned that because he had not filed a notice of appearance, he was not before the Court and therefore his conduct was not sanctionable. *Id.* at *29. The Court stated that Bandas' behavior was, at best, unprofessional, and at worst, an unseemly effort to extract fees from class counsel in exchange for the withdrawal of a meritless objection to the proposed class settlement. *Id.* at *34-35. The Court determined that the Hull objection, which Bandas drafted, had no merit because it objected to the settlement because it provided no damages when the Court had declined to certify a damages class; it objected to the attorneys' fees award for being "excessive" only because the attorneys failed to secure damages, again ignoring that the Court had declined to certify a damages class; and it proposed a reduced fee award that would have resulted in such a low payout to each of the class members that it would have made little economic sense to distribute it. *Id.* at *35. The Court stated that though Bandas was substantially involved in all stages of the Hull objection, he refused to enter a notice of appearance in this case, and he refused to sign any of the filings that he himself drafted. *Id.* at *36. The Court found that numerous other judges throughout the country have publicly excoriated Bandas for the frivolous objections that he has penned and injected into class action settlements. *Id.* at *37. The Court stated that it joined the other judges throughout the country in finding that Bandas orchestrated the filing of a frivolous objection in an attempt to throw a monkey wrench into the settlement process and to extort a pay-off. *Id.* at *38. The Court opined that although Bandas' behavior provided strong indicia of his subjective bad faith, it did not have jurisdiction to sanction him, given that he had not filed an appearance in the case and he was not a member of the bar of the Southern District of New York. Therefore, the Court declined to impose Rule 11 sanctions on Bandas.

***Li, et al. v. Ichiro Restaurant, Inc.,* 2017 U.S. Dist. LEXIS 16595 (S.D.N.Y. Feb. 6, 2017).** Plaintiffs, a group of restaurant employees, brought an action alleging that Defendants violated minimum wage and overtime requirements of the FLSA and the New York Labor Law ("NYLL"). Plaintiffs filed a motion for sanctions pursuant to Rule 37(b)(2) against Defendant and its attorney, David Yan, for discovery failures. Yan moved to withdraw as counsel for Defendant. The Court granted Plaintiffs' motion in part and denied Yan's motion without prejudice. On November 22, 2016, the Court ordered Defendant to respond to Plaintiffs' discovery requests by November 30, 2016, and Defendant failed to do so. *Id.* at *3. The Court held that sanctions therefore were in order. Plaintiffs did not suggest an appropriate sanction, but advised against a default judgment because it could prejudice them by making it less likely that they could build their merits case against Defendant. *Id.* The Court stated that it would not recommend a sanction that Plaintiffs did not want, but it would also not fashion a different sanction without guidance from Plaintiffs as to what would be appropriate. The Court ordered the payment of Plaintiffs' reasonable expenses caused by Defendant's failure to participate in discovery, as required by the Rule 37(b)(2)(C). The Court indicated that if Plaintiffs desired a default judgment against Defendant, they could seek it without recourse to Rule 37 in light of Defendant's failure to answer the complaint. Yan asserted that he lost contact with the principal of Defendant at the time that Plaintiffs propounded their discovery and that all subsequent attempts to contact him were unsuccessful. *Id.* at *4. The Court determined that sanctions were not warranted against Yan because he had neither information nor documents that would allow him to respond to the discovery requests. Moreover, the Court opined that there was no indication that Yan advised or otherwise inspired Defendant to violate the Court's discovery order. With regard to Yan's motion to withdraw as Defendant's counsel, the Court noted that all applications to withdraw must be served upon the attorney's client and upon all other parties. Since there was no evidence that Yan served his motion on Defendant or its principal, the Court denied the motion without prejudice. Accordingly, the Court granted in part and denied in part Plaintiff's motion and denied Yan's motion. The Court also ordered Plaintiffs to submit an application, including attorney time records, outlining the expenses incurred because of Defendant's discovery failures. *Id.* at *5-6.

***U.S. Department Of Labor v. Caring First, Inc.*, 2017 U.S. Dist. LEXIS 174012 (M.D. Fla. Oct. 20, 2017).** On behalf of a group of registered nurses, the U.S. Department of Labor ("DOL") filed a collective action alleging that Defendants misclassified the nurses as independent contractors and thereby denied them overtime

compensation in violation of the FLSA. The DOL filed a motion for sanctions alleging that Defendants willfully destroyed, or negligently allowed to be destroyed, payroll records prior to May 2015, despite an on-going investigation by the DOL. *Id.* at *2. Additionally, the DOL asserted that since May 2015, an administrative employee of Defendants had been deleting payroll records on a weekly basis by writing over them at the end of each workweek. *Id.* at *2-3. Defendants acknowledged that an employee was writing over the payroll week-to-week, but claimed that the records prior to May 2015 were destroyed by a disgruntled former employee, Karen Reyes. *Id.* at *3. The Court entered an order denying the motion for sanctions because there was a factual dispute regarding whether Reyes deleted the payroll records and because the DOL had not yet determined what, if any, prejudice it had suffered. However, the Court ordered Defendants to "immediately halt the destruction of any current payroll records" and produce all payroll records to the DOL on a bi-weekly basis. *Id.* Subsequently, the DOL filed a renewed motion for sanctions pursuant to Rule 37(b), alleging spoliation of payroll records, violation of the Court's orders, and misconduct in discovery. Specifically, the DOL renewed its previous assertion that Defendants intentionally destroyed, or negligently allowed to be destroyed, payroll records from the time the DOL began investigating Defendants until May 2015. *Id.* at *5-6. The DOL alleged that Defendants continued to willfully destroy payroll records by writing over them until mid-February of 2016. Additionally, the DOL asserted that Defendants and their counsel misrepresented that a spreadsheet (the "master list") was a re-creation of all the destroyed payroll records, but the DOL found that it did not contain all of the information when Defendants disclosed a second list as a trial exhibit containing additional information. Finally, the DOL contended that Defendants and their counsel made misrepresentations regarding the information contained on the nurses' paychecks as well as their ability to obtain copies of the paychecks from their bank. *Id.* at *6-7. Regarding the weekly deletion of payroll records, the Court found that the DOL made the requisite showing to convince the Court that sanctions were appropriate against Defendants under Rule 37(b). However, the Court determined that the DOL failed to prove that sanctions were warranted based on the other alleged misconduct of Defendants or as to Defendants' counsel. *Id.* at *7. The Court held that Defendants' conduct deleting payroll records was willful and that the DOL was prejudiced by being unable to confirm the amount of back pay possibly owed. *Id.* at *8. As a sanction, the Court ordered the production of all nurses' paychecks from Defendants' bank in order to allow the DOL to recalculate potential back wages based on the paychecks. *Id.* at *10.

(xxviii) Settlement Approval Issues In Wage & Hour Class Actions And Collective Actions

***Benedict, et al. v. Hewlett-Packard Co.*, 2017 U.S. Dist. LEXIS 1696 (N.D. Cal. Jan. 4, 2017).** Plaintiffs, a group of technical solutions consultants ("TSCs"), brought an action alleging that Defendant misclassified them as exempt and denied them overtime wages in violation of federal and state labor laws. The Court initially conditionally certified an FLSA collective action, then subsequently granted Defendant's motion to decertify the collective action. The case therefore proceeded only with Plaintiffs' individual claims. As of November 1, 2015, Hewlett-Packard Co. ceased to exist, and separated into two discrete corporate entities. The parties then reached a settlement and filed a joint motion for leave to file the settlement agreements between Defendant and each Plaintiff, which the Court denied. The parties sought to file documents related to the settlement under seal because they contended that disclosure would reveal individually negotiated terms between the parties and highly confidential information about the valuation of Defendant's claims, which related to the removal of Defendant's confidential and proprietary information from its premises. *Id.* at *8. Moreover, the parties further asserted that given the individual nature of the negotiations, the information contained in the settlement agreements served no general public interest. The Court found that neither of the parties' justifications constituted a compelling reason to file the settlement agreements under seal in their entirety. *Id.* at *9. The Court determined that the motion to seal the settlement agreements was overly broad in light of the public interests at stake in FLSA actions. *Id.* at *10. Accordingly, the Court denied the joint motion to seal entirety of the settlement agreements, without prejudice to the parties filing a more narrowly tailored motion with specified redactions.

***Brown, et al. v. Progressions Behavioral Health Services*, 2017 U.S. Dist. LEXIS 108487 (E.D. Pa. July 13, 2017).** Plaintiffs, a group of clinicians and therapists, filed a collective action alleging that Defendant misclassified them as independent contractors and thereby failed to pay overtime compensation in violation of the FLSA. The parties subsequently reached a settlement and Plaintiffs filed an unopposed motion for settlement approval, which the Court granted. The settlement agreement provided for a total settlement amount of $865,000, of which approximately $542,586.00 would be distributed to the collective action members, with the remaining amount sought by counsel for attorneys' fees representing 33% of the settlement amount, incentive

awards for the three collective action representatives, and the claims administrator's fees. *Id.* at *2-3. The Court noted that members may receive amounts ranging from approximately $500 up to a maximum of $70,000, with an average payout of approximately $10,000. *Id.* at *3. The Court certified the collective action for settlement purposes, finding that all members were all non-exempt, hourly employees of Defendant, and all were paid the same way and were subject to the same payroll and time-keeping practices. *Id.* at *7. The Court further noted that Plaintiffs averred that the payments from the settlement fund will "represent a significant recovery of the unpaid wages and overtime compensation that could reasonably have been proven at trial." *Id.* at *8. The Court determined that the settlement came about after extensive arm's-length negotiations and resolve a *bona fide* dispute over unpaid compensation and wages. *Id.* at *12. Plaintiffs also moved for an order awarding attorneys' fees of $285,450, constituting 33% of the settlement amount, and reimbursement of expenses in the amount of $3,714. The Court stated that after reviewing counsels' declaration and billing invoices, the 33% fee was reasonable. The lodestar amount reflected in the invoices was approximately $91,866.24 for 287.06 total hours of work. As a result, the lodestar cross-check in this case was 3.1, which was within the range generally approved in common fund cases. *Id.* at *18. The Court also found the service awards justified, as Plaintiffs explained that the basis of the service award payments was that the collective action representatives were actively involved in the litigation since it was commenced, they provided the information and documents that formed the basis for the lawsuit, and they were willing to assume the risk associated with being a named Plaintiff in a collective action lawsuit against their current employer. *Id.* at *19. Finally, the Court determined that the costs requested were reasonable because the majority of the amount requested was for mediation fees. Accordingly, the Court granted Plaintiffs' motion for settlement approval.

***Doe, et al. v. Deja Vu Services, Inc.,* 2017 U.S. Dist. LEXIS 16661 (E.D. Mich. Feb. 7, 2015).** Plaintiffs, a group of exotic dancers, filed a class action alleging that Defendants violated the FLSA and the Minimum Wage Law when it misclassified dancers as independent contractors instead of employees, and thereby wrongly deprived them of various benefits under federal and state law. The parties reached a settlement and filed a motion for preliminary settlement approval, which the Court granted. The parties jointly moved for preliminary approval of a class action settlement pursuant to Rule 23 and 29 U.S.C. § 216(b). The Court found that the attorneys representing the parties presented a comprehensive description of the claims and defenses, a description of the settlement goals and efforts made to achieve those goals by the parties, and a detailed outline of the final settlement terms. *Id.* at *2-3. The Court remarked that it had experience and familiarity with a prior case involving the same issues and some of the same Defendants, in which the Court presided over a class action settlement and retained ancillary jurisdiction. *Id.* at *3. The Court found that the Plaintiffs satisfied the elements of Rule 23(a), because: (i) the class was so numerous that joinder of all members was impracticable; (ii) there were questions of law or fact common to the class; (iii) the claims or defenses of the representative parties were typical of the claims or defenses of the class; and (iv) the representative parties would fairly and adequately protect the interests of the class. *Id.* at *3-4. Additionally, pursuant to Rule 23(b)(3), the Court held that the questions of law or fact common to class members predominated over questions affecting only individual members, and that a class action was superior to other available methods for fairly and efficiently adjudicating the controversy. *Id.* at *4. The Court also opined that the proposed settlement was a fair, reasonable, and adequate resolution of a *bona fide* dispute between Defendants and Plaintiffs and all other class members. Accordingly, the Court granted preliminary approval to the settlement and certified a settlement class of all current and former entertainers who worked for Defendants at any time during the class period and the date of the order. *Id.* at *5. The Court further approved the parties' notice plan and ordered a fairness hearing to rule on final settlement approval. *Id.* at *7.

***Doe, et al. v. Deja Vu Services, Inc.,* 2017 U.S. Dist. LEXIS 93455 (E.D. Mich. June 19, 2015).** Plaintiffs, a group of exotic dancers, filed a class action alleging that Defendants violated the FLSA and state minimum wage laws when it misclassified dancers as independent contractors instead of employees, and thereby wrongly deprived them of various benefits under federal and state law. The parties reached a settlement for $6.55 million and previously filed a motion for preliminary settlement approval, which the Court granted. The Court granted preliminary approval of a class action settlement pursuant to Rule 23 and 29 U.S.C. § 216(b). The parties now sought final settlement approval, which the Court granted. The Court held that the proposed class – which consisted of 28,177 members – met all the requirements of Rule 23(a) and Rule 23(b)(3). *Id.* at *6-7. The Court noted that Plaintiffs certified that notice was provided in accordance with the Court's preliminary approval order.

Further, the Court found that the proposed settlement offered value to the class in the form of cash, rent-credit, or dance-fee payments, and long-term structural changes to Defendants' business practices, all of which directly benefited class members. *Id.* at *19-20. The Court stated that Plaintiffs' likelihood of success on the merits was not guaranteed; if class members were to continue to litigate, they could receive nothing, and therefore the high risk of continued litigation and the uncertain likelihood of success on the merits weighed heavily in favor of approval. *Id.* at *21. The Court noted that the case presented complex legal issues because it combined a Rule 23 class action with a FLSA collective action. *Id.* at *22. Continued litigation would require great expense and be of long duration because Defendants possessed meritorious defenses, and there were unique challenges to obtaining sufficient records to prove class-wide damages. *Id.* at *22-23. The positive reaction of absent class members also weighed in favor of approval, as only 66 individuals opted-out of the settlement. Finally, the Court found that the settlement served the public interest, as it resolved the parties' disputes and put an end to "potentially long and protracted litigation." *Id.* at *24. In conclusion, the Court found that the settlement was the result of a *bona fide* dispute, and the terms established in the settlement were a fair, reasonable, and an adequate resolution of the claims. *Id.* at *25. Accordingly, the Court granted Plaintiffs' motion for final settlement approval.

***Flood, et al. v. Carlson Restaurants Inc.,* Case No. 14-CV-2740 (S.D.N.Y. Sept. 21, 2017).** Plaintiffs, a group of employees, filed an action alleging that Defendant violated various provisions of the FLSA. The parties reached a settlement, and Plaintiffs filed a motion for preliminary settlement approval. The Court denied the motion, finding that the proposed confidentially provision in the settlement agreement was overbroad. *Id.* at 2. The Court found that the settlement agreement contained confidentiality and release provisions that were too vaguely worded. The Court stated that Section XVII of the agreement required confidentiality "prior to the filing of the motion for preliminary approval," but recited that any named Plaintiff who breached confidentiality "at any time" shall "forfeit to Defendants the full amount of his or her service payment." *Id.* at 4. The Court ruled that there was no justification, much less "compelling justification," for the confidentiality provisions. *Id.* The Court held that absent any reason for such restrictions, and wary that a lack of clarity may undermine the FLSA's core purpose, it could not approve the terms of Section XVII. *Id.* The Court further determined that the releases in Sections XI-XII of the proposed agreement extended what was "fair and reasonable." *Id.* at 5. The Court explained that some Plaintiffs would be required to sign a general release waving "any claims or any type arising out of incidents that occurred before the date they sign the general release and waiver, known or unknown, related to anything to do with their employment, or any other time." *Id.* The Court opined that not only have case law authorities typically rejected such broad releases, but also the Court had already rejected a similarly broad release earlier in this litigation when other named Plaintiffs had resolved their claims. *Id.* Accordingly, the Court ruled that the releases in Sections XI-XII must be limited to wage & hour claims relating to the existing lawsuit. *Id.* The Court thereby denied Plaintiffs' motion for preliminary settlement approval without prejudice.

***Hart, et al. v. ITC Service Group, Inc.,* 2017 U.S. Dist. LEXIS 96997 (W.D. Mo. June 23, 2017).** Plaintiffs, a group of cable installers, brought a collective action alleging that Defendant willfully withheld overtime compensation in violation of the FLSA. The parties submitted to arbitration and ultimately settled the matter. The parties subsequently filed a joint motion for an order approving the arbitrator's order approving the settlement agreement under seal. At the outset, the Court noted that there is a common law presumption that judicial records are open to the public and that this right to public records creates a presumption in favor of disclosure. However, the Court stated, the right of access is not absolute, and a party may overcome the presumption of openness by showing a compelling need to seal documents. In support of their motion, the parties argued that: (i) a confidentiality provision was part of the proposed settlement; (ii) case law authorities routinely permit FLSA settlements to be filed under seal; and (iii) the parties' interests and public's interest weighed in favor of sealing the settlement documents. *Id.* at *4. The Court found the arguments unavailing. The Court held that there was no claim that the proposed settlement concerned any highly sensitive matter that would rebut the presumption in favor of openness and justify sealing the record. *Id.* at *4-5. The Court found that the settlement represented an ordinary FLSA settlement, and thus it should be open to the public. *Id.* at *5. The Court determined that while sealing the record may encourage one or both parties to settle, the public's access to judicial records is not a bargaining chip the parties may trade away in their settlement negotiations. Accordingly, the Court denied the parties' motion for an order approving the settlement.

***Hoover, et al. v. Mid-Atlantic Lubes, Inc.*, Case No. 16-CV-64 (E.D. Pa. Aug. 25, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendant failed to pay all wages due in violation of the FLSA. The parties ultimately settled the matter and moved for settlement approval. The Court denied the motion. The Court determined that a proposed $6,000 incentive award to the named Plaintiff was not warranted, and when combined with his $1,800 settlement award, he would be receiving 37% of the settlement funds paid by Defendant. *Id.* at 2. The Court found that this excessive and unduly preferential payment would result in conflict between Plaintiff and members of the collective action. *Id.* Further, the Court determined that the request of counsel for the named Plaintiff for $175,512 in fees was excessive and troubling in light of the proposed $15,000 settlement fund. The Court noted that Plaintiff's counsel sought almost 12 times the amount that opt-in collective action members would receive in total. *Id.* Accordingly, the Court denied preliminary settlement approval without prejudice, and ordered the parties to renegotiate the settlement before the Magistrate Judge. *Id.* at 3.

***In Re FedEx Ground Package System, Inc. Employment Practices Litigation*, 2017 U.S. Dist. LEXIS 20478 (N.D. Ind. Feb. 15, 2017).** Plaintiffs brought a multi-district consumer class action litigation alleging numerous state and federal claims. Co-lead counsel, FedEx, and two of the seven class representatives, Michael Tofaute and David McMahon, participated in a mediation in February 2016 to resolve the various claims in the New Jersey class action. Tofaute and McMahon alleged that they never agreed to the proposed settlement that arose from the mediation and alleged that co-lead counsel failed to communicate an offer to them that would have shifted attorneys' fees onto FedEx instead of the common fund. Tofaute and McMahon asserted that they rejected it out of hand. *Id.* at *3. Co-lead counsel and FedEx thus signed onto a settlement agreement purportedly resolving all claims in the New Jersey class action, but only one of the six class representatives signed the agreement. Co-lead counsel submitted a motion for preliminary approval of the New Jersey class action settlement, which the Court granted. Less than a week later, all seven class representatives objected to final approval of the settlement. The Court subsequently invited expedited briefing on the threshold question of whether a valid settlement existed for the Court to assess. The class representatives argued that co-lead counsel could not bind the class to an agreement that all class representatives opposed, that allegedly undervalued the claims, and that was allegedly signed without discussing a proposed fee-shifting arrangement with the class representatives. *Id.* at *5. The class representatives claimed that co-lead counsel rejected an offer for a fee-shifting arrangement without discussing it with them first. *Id.* at *5-6. The class representatives argued that "major claims or types of relief sought in the complaint have been omitted from the settlement." *Id.* at *6. The class representatives also argued that "[c]lass counsel must discuss with the class representatives the terms of any settlement offered to the class." *Id.* The class representatives claimed that co-lead counsel rejected an offer for a fee-shifting arrangement without discussing it with them first. *Id.* at *6-7. As a result, the Court considered "the extent of participation in the settlement negotiations by class representatives" and examined "closely any opposition by class representatives to a proposed settlement." *Id.* at *7. The Court found that none of the class representatives arguments was sufficient to invalidate the settlement before reaching the issue of fairness. *Id.* The Court stated that it is possible that the likelihood of success on the Consumer Fraud Act claim was minimal. The Court further explained that the class representatives did not have to agree to a settlement for it to be fair and binding on the class. The Court therefore held that the settlement agreement was valid, denied the class representatives' motion to compel, and declined to direct any discovery as to whether the agreement was fair, reasonable, and adequate.

***Larrea, et al. v. FPC Coffees Realty Co.,* 2017 U.S. Dist. LEXIS 69166 (S.D.N.Y. May 5, 2017).** Plaintiffs, a group of restaurant cooks, brought an action alleging that Defendant violated various provisions of the FLSA and the New York Labor Law ("NYLL"). The parties reached a settlement and filed a motion for preliminary settlement approval. The Court denied the motion. The Court addressed five aspects of the proposed settlement agreement, including: (i) the settlement amount; (ii) the release provision; (iii) the confidentiality provision; (iv) the non-disparagement provision; and (v) the attorneys' fees provision. *Id.* at *3. While the Court found that the proposed settlement amount was fair and reasonable, it concluded that the proposed agreement must be rejected on the basis of the remaining four aspects. *Id.* at *3-4. Under the proposed settlement agreement, Defendants agreed to pay Plaintiffs the sum of $130,000. The Court stated that the proposed settlement amount represented approximately 43% of Plaintiffs' anticipated maximum recovery, including cumulative liquidated damages, and that the amount was fair and reasonable. The Court found that the amount was significant in light of the legal and evidentiary challenges that Plaintiffs would face in the absence of a settlement. *Id.* at *5.

However, the Court determined that the proposed confidentiality and release provisions were grossly overbroad. The Court further rejected the proposed non-disparagement agreement. Finally, the Court declined to approve the attorneys' fees provision, as it allocated $52,000, or 40% of the net settlement amount, to Plaintiffs' counsel. *Id.* at *13. The Court held that in light of the net settlement amount and the records the parties submitted of counsels' work in the action, the amount was unreasonable. Accordingly, the Court denied the parties' motion for settlement approval.

***Lewis-Ramsey, et al. v. The Evangelical Lutheran Good Samaritan Society,* 2017 U.S. Dist. LEXIS 31259 (S.D. Iowa Jan. 10, 2017).** Plaintiffs brought a collective action alleging that Defendants violated the overtime requirements of the FLSA. The parties settled the matter and filed a motion for preliminary settlement approval, which the Court denied. The Court stated that the proposed agreement failed to contain any information upon which to form a conclusion as to the basis as to whether the case should proceed as a collective action on this record. *Id.* at *10-11. The Court found that after the parties made a record on the certification issue and submitted a renewed motion for approval of the settlement, the Court would be able to reconsider whether to certify the collective action identified in the proposed settlement agreement. The Court further determined the record did not contain information that would allow it to examine the risk that continuing this litigation would present to the proposed collective action members with respect to each of their asserted claims. *Id.* at *16. If the Court were to assume no outstanding legal or factual disputes remained in the case other than those the parties have identified, it stated that it would still be unable to assess: (i) the basis upon which class counsel calculated the proposed collective action members' damages relating to their alleged under-payment; (ii) the available evidence supporting their claim for damages relating to their alleged non-payment for compensable travel-time hours or the value of estimated their travel-time hours at the proposed rate; or (iii) why the proposed settlement compensated proposed collective action members for their alleged under-payment only through October 13, 2015, rather than November 7, 2015. *Id.* at *16-17. Thus, the Court opined that it lacked the basic information it needed to determine the value of the settlement payments relative to the value of the proposed collective action members' claims. *Id.* at *17. The Court also found that the proposed opt-in period of 30-days was insufficient due to the size of the proposed collective action, the length of time that has passed since the beginning of the release period, and the procedure outlined in the proposed settlement agreement for contacting collective action members. *Id.* at *30. The Court therefore denied the parties' motion for preliminary settlement approval without prejudice and directed the parties to file a renewed motion curing these deficiencies.

***Mar, et al. v. NAPA Auto Parts,* 2017 U.S. Dist. LEXIS 2391 (E.D. Cal. Jan. 6, 2017).** Plaintiff, an executive management trainee ("EMT"), filed an action alleging that Defendant misclassified EMTs as non-exempt, and therefore denied them statutory protections and wages afforded to hourly employees in violation of the FLSA. After mediation, the parties settled the matter. Ninety-four of Defendants' 100 EMTs opted-in to the settlement. *Id.* at *2. Under the terms of the agreement, Defendants were required to pay $775,000, disbursed among the 94 opt-in members, and attorneys' fees of 33.3% of the $775,000 ($258,333.33). The remaining funds would be apportioned such that each of the 94 EMTs received $5,236.07. *Id.* at *3. Named Plaintiff Mar would also receive an enhancement of $7,500 for his time and effort in bringing the case and other opt-in Plaintiffs would receive enhancements of $2,500. *Id.* Defendant also agreed to reclassify EMTs as non-exempt going forward. *Id.* The Court stated that in the Ninth Circuit, 25% is considered the "benchmark" for determining whether attorneys' fees are reasonable when they are based on a percentage of the award. *Id.* Further, if attorneys' fees deviate from the 25% benchmark, "it must be made clear by the District Court how it arrives at the figure ultimately awarded." *Id.* at *4. The Court found that the parties' disagreement over the application of the FLSA to EMTs was sufficient to establish the existence of a *bona fide* dispute, making settlement of Plaintiff's claims appropriate. *Id.* at *5. However, the Court opined that though the total award secured by Plaintiff's counsel on behalf of Plaintiff and the other EMTs who opted-in to the settlement might be fair and reasonable, the attorneys' fees were too high for the Court to grant settlement approval. *Id.* The Court determined that Plaintiff's counsel sought an award of 33.3% of the fund secured on behalf of the FLSA collective action, which was a significant upward departure from the 25% benchmark for attorneys' fees in the Ninth Circuit and outside the ordinary range of 20% to 30%. *Id.* Plaintiff justified the high award of attorneys' fees in part based on comparison to a lodestar analysis. While it is appropriate to use the lodestar as a cross-check on the reasonableness of attorneys' fees, the Court stated that the hourly rates provided by Plaintiff's counsel fell outside the norms for the Eastern District of California and therefore did not support an award of 33.3%. In making his lodestar cross-

check, Plaintiff's counsel used a rate of $650 per hour for his work as principal of his firm, $350 and $400 per hour for associates, $200 per hour for law clerks and legal assistants, and $150 per hour for administrative support. *Id.* at *6. The Court found that these rates were higher than rates typically accepted by the Court. The Court determined that Plaintiff failed to provide any explanation for why such high fees were appropriate and provided no evidence that the case was exceptionally difficult or novel. *Id.* at *7. Thus, the Court concluded that Plaintiff did not show that the requested attorneys' fees were sufficiently fair and reasonable, and therefore denied settlement approval. *Id.* at *9.

***Martinez, et al. v. SJG Foods, Inc.,* 2017 U.S. Dist. LEXIS 74503 (S.D.N.Y. May 16, 2017).** Plaintiffs, a group of employees, brought an action alleging that Defendant violated various provisions of the FLSA and the New York Labor Law ("NYLL"). The parties reached a settlement and filed a motion for preliminary settlement approval, which the Court denied. The Court addressed three aspects of the proposed settlement agreement, including: (i) the release provision; (ii) the confidentiality provision; and (iii) the attorneys' fees provision. The Court found that the release provision in the agreement was too broad to survive judicial scrutiny, as it required Plaintiffs to "unconditionally release and forever discharge" Defendants and any related entities "of all charges, complaints, claims, and liabilities of any kind whatsoever, known or unknown, suspected or unsuspected . . . which each Plaintiff at any time has, had or claimed to have against Defendants relating to their employment with Defendants and regarding events that have occurred as of the Effective Date of this Agreement." *Id.* at *3-4. The Court also determined that the confidentiality provision contained in the agreement prohibited the parties from disclosing "directly or indirectly, any claims asserted in the lawsuit or any claims of unlawful conduct by Defendants, or any of the terms or conditions of the Agreement, any related negotiations, or the amount or nature of any consideration paid (either specifically or as a range), including the Settlement Amount." *Id.* at *6. This provision, the Court stated, like the release provision, was overbroad. Moreover, the Court opined that the parties' insistence on the confidentiality was difficult to comprehend as the information had already been disclosed on the public record through ECF filings. *Id.* at *7. Plaintiffs' counsel also sought approval of $66,000 in attorneys' fees and costs. However, the Court noted that they did not submit contemporaneous billing records documenting, for each attorney, the hours expended and the nature of the work done, and therefore the Court did not have sufficient information to determine if the requested fee amount was fair and reasonable. Accordingly, the Court denied the parties' motion for settlement approval.

***McAfee, et al. v. East St. Louis Park District,* 2017 U.S. Dist. LEXIS 62676 (S.D. Ill. April 25, 2017).** Plaintiffs, a group of police officers, filed an action alleging that Defendant failed to pay proper overtime pay and/or straight time pay and were at times paid less than both the federal and state minimum wage pursuant to the FLSA, the Illinois Wage Collection and Payment Act ("IWCPA"), the Illinois Minimum Wage Law ("IMWL"), and Illinois common law. The parties reached a settlement and the Court granted preliminary approval of the settlement agreement. The parties then filed a motion for attorneys' fees and final settlement approval, which the Court granted. The Court stated that based on the representations made by Plaintiffs' counsel and Defendant's counsel, the FLSA claims arose from similar factual and employment settings. All Plaintiffs were current or former police officers with the East St. Louis Park District Police Department who were entitled to but did not receive minimum wage and overtime pay. Further, Plaintiffs alleged that Defendants' policy requiring police officers to volunteer certain shifts in an effort to save costs violated the FLSA and Illinois wage laws. The Court found that fairness and procedural considerations, including the number of Plaintiffs in the case and the effectiveness in allowing them to pool their resources for litigation, also supported collective treatment. Therefore, the Court held that final certification of the FLSA collective action was appropriate. *Id.* at *6-7. The Court held that counsel met numerous times to negotiate the settlement agreement and participated in a full-day settlement conference, and therefore it was clear the settlement was result of contentious arm's-length negotiations. *Id.* at *8. Further, no objections were filed to the settlement agreement, and 12 of the 15 total possible members of the settlement class opted-in to the litigation. Therefore, given the parties' representation that they wish to accept the settlement amount after months of negotiations, the amount of settlement weighed against Defendants' inability to withstand a larger judgment, and the complexity, expense, and likely duration of the litigation, the Court concluded that the settlement amount was fair, reasonable, and adequate. *Id.* at *9-10. The Court further approved incentive awards to the named Plaintiffs, including an award of $212.10 to Plaintiff McAfee, $1,235.20 to Plaintiff Durgins, $5,258.60 to Plaintiff Stewart, and $5,126.03 to Plaintiff Waters. Plaintiffs' counsel sought approval of $27,935.20 in attorneys' fees and costs, or approximately 36% of the total

settlement amount. *Id.* at *11. The Court stated that the attorneys representing Plaintiffs in this case were experienced wage & hour class and collective action litigators and obtained a positive outcome in the case. Plaintiffs' counsel submitted affidavits showing that they actually incurred more than $43,910 in fees and expenses in this case. *Id.* Taking into account the stage of the litigation, which included discovery, research, and negotiations, the Court considered the discounted amount of $27,935.20 in Plaintiffs' attorneys' fees and costs to be reasonable. *Id.* at *12. The Court further found the amount reasonable in light of the risk of non-payment that counsel faced, since they took the case on a contingent basis. Accordingly, the Court granted final settlement approval and Plaintiffs' request for an award of attorneys' fees.

McMahon, et al. v. Tuesday Morning, Inc., **Case No. 14-CV-5547 (N.D. Cal. Feb. 3, 2017).** Plaintiffs, a group of employees, brought a class action alleging that Defendant violated the California Labor Law and the California Private Attorneys General Act ("PAGA"). The parties ultimately settled the matter. Plaintiff filed a motion for preliminary approval of the settlement, and the Court ordered the parties to further meet and confer regarding the motion. *Id.* at 1. Plaintiff asserted that the maximum verdict value of the PAGA claim was $6.8 million. However, the Court noted that the parties settled the PAGA claim for only $13,333, or only .20% of its possible maximum value. *Id.* Defendant asserted that the maximum verdict value of the PAGA claim was $3.5 million, or .38% of the total possible value. *Id.* at 1-2. In light of these issues, the Court indicated that it had concerns about whether the settlement of the PAGA claim was fair, reasonable, and adequate. *Id.* at 2. The Court noted that the concern was particularly true based on the Court's assessment that the value of the Rule 23 class action settlement also was not "robust" given the risks on the merits. Accordingly, the Court ordered the parties to meet and confer regarding the settlement of the PAGA claim, and submit briefing to the Court why the settlement is fair, reasonable, and adequate.

Prim, et al. v. Ensign United States Drilling, **2017 U.S. Dist. LEXIS 136017 (D. Colo. Aug. 24, 2017).** Plaintiff, an hourly oilfield employee, filed a collective action alleging that Defendant failed to pay the correct overtime rate in violation of the FLSA. The parties settled the matter and Plaintiff filed an unopposed motion for settlement approval. The Court denied the motion. At the outset, the Court noted that Plaintiff's motion made no reference to collective action certification, failed to provide any facts demonstrating the similarities of the proposed collective action members, and did not discuss any of the factors the Court should consider in certifying a collective action for purposes of settlement. *Id.* at *3. The Court stated that while Plaintiff's motion should be denied on these grounds alone, it would address several other defects in the motion and proposed settlement in anticipation of a renewed motion for approval of settlement. Plaintiffs stated that the parties disputed whether collective action members received non-discretionary bonuses that Defendant excluded from its overtime calculations. *Id.* at *4. Defendant, in contrast, argued that "most, if not all, of the contested bonuses were discretionary in nature and therefore excludable from the … regular rates." *Id.* The Court found that the parties did not present any description of the bonuses at issue in the case, how they were paid, or what facts underlie the dispute between the parties. *Id.* The parties also disagreed on whether Plaintiff could satisfy his burden to demonstrate that Defendant acted willfully, which in turn would affect whether Plaintiff could recover compensation for two years or three years. *Id.* at *5. The Court determined that there was also no description in the motion of the facts in support of or in opposition to a finding that Defendant's conduct was willful. Turning to whether the agreement was fair and reasonable, the Court found that Plaintiff failed to provide any value of the potential recovery. In order to determine whether the value of immediate recovery outweighed a possible future recovery, the Court stated that the parties had to submit this information. *Id.* at *10. The Court held that it could not approve the settlement without information regarding the number of potential collective action members, the average expected recovery, and the extent to which the settlement represented a compromise of the amounts owed. Accordingly, the Court denied Plaintiff's motion for settlement approval.

Ramirez, et al. v. Benito Valley Farms LLC, **2017 U.S. Dist. LEXIS 137272 (N.D. Cal. Aug. 25, 2017).** Plaintiff, a seasonal agricultural worker, brought an action alleging that her supervisor, Foreman Alfonso Flores, created a hostile work environment and engaged in discrimination and retaliation directed at Plaintiff. Plaintiff also alleged Defendant failed to comply with its legal duties in the provision of housing because the employee housing in which Plaintiff resided contained serious habitability issues, including inadequate flooring and the presence of rats and flies in violation of the California Private Attorneys General Act ("PAGA"). The parties ultimately reached a settlement, and Defendant agreed to pay $27,500 allocated to civil penalties to resolve the

PAGA claims on behalf of 226 claimants and various injunctive relief. The settlement also provided $41,800 for attorneys' fees and costs. The Court approved the settlement agreement. The Court determined that there was no indication that the settlement would be "unjust, arbitrary and oppressive, or confiscatory." *Id.* at *11. The Court noted that the parties reached a settlement early in the case, and before any motion practice. As such, further litigation would necessitate further expenses and costs for both Plaintiff and Defendant. The Court stated that, given Defendant's weak financial condition, continuing litigation would decrease the amount available for settlement and would financially weaken Defendant. *Id.* at *13. Thus, further litigation might harm Defendant to such an extent that there would be few resources available for a monetary recovery or for injunctive relief. *Id.* at *14. The Court held that, although the monetary amount represented only 4.5% of the total estimated possible recovery for the PAGA civil penalties, considering the very early stage of the litigation and Defendant's weak financial condition, the percentage was reasonable. *Id.* at *15. Additionally, the Court noted that the settlement's injunctive relief provided that Defendant would comply with California wage & hour laws in the future, would join a farm employer association, and would ensure that employees were fully trained to prevent and respond to claims of sexual harassment. *Id.* at *15-16. For these reasons, the Court found that the proposed settlement was fair and reasonable and promoted the purposes of the PAGA. Therefore, the Court granted Plaintiff's motion for settlement approval. The Court also found that an award of $41,800 for attorneys' fees and costs was warranted. *Id.* at *18. The parties agreed that the lodestar method was the preferable method for measuring attorneys' fees. Plaintiff's counsel provided detailed, contemporaneous billing records that indicated that the hours spent on the litigation were justified. Accordingly, the Court granted approval of the proposed settlement.

***Roberts, et al. v. Marshalls Of CA, LLC*, 2017 U.S. Dist. LEXIS 45944 (N.D. Cal. Mar. 28, 2017).** Plaintiffs, a group of retail sales employees, filed a collective action alleging that Defendant's bag check policy violated the California Labor and Business and Professions Code, as well as the Industrial Welfare Commission's ("IWC") wage orders by preventing Plaintiffs from taking their full 30-minute meal or 10-minute rest breaks and failing to pay compensation for missed breaks. The parties ultimately settled the matter, and Plaintiffs moved for preliminary settlement approval. The Court denied Plaintiffs' motion. Plaintiff sought to certify a class for settlement purposes consisting of "all current and former non-exempt employees who worked at a T.J. Maxx, Marshalls, or Homegoods branded retail store in the State of California during the class period." *Id.* at *4. The settlement provided injunctive relief and monetary relief of $8.5 million including $5,525,000 for the net distribution fund. The Court found that Plaintiffs' proposed settlement class failed to satisfy the typicality requirement of Rule 23(a)(3). The Court noted that Plaintiffs asserted they "have held the same positions" as other class members, but they did not describe how their positions were similar. *Id.* at *19. The Court explained that where Plaintiffs fail to identify their positions relative to the putative classes, case law authorities often are unable to find there are no dissimilarities among the classes that would "impede the generation of common answers apt to drive the resolution of the litigation." *Id.* at *20. Furthermore, the Court reasoned that under the terms of the settlement, all employees were class members, regardless of their position, but Plaintiffs had not shown that class members were uniformly subject to the security screenings that allegedly give rise to Plaintiffs' claims. The Court stated that Plaintiffs' claims might be typical of those class members who held the same positions or worked the same hours as Plaintiffs, but the Court lacked sufficient information to determine whether this was the case. *Id.* at *22. Accordingly, the Court ruled that Plaintiffs had not met the typicality requirement. Plaintiffs also had not shown that their interests aligned with those of the class, and the Court therefore could not conclude that Plaintiffs satisfied Rule 23(a)(4). *Id.* at *23. The Court also found the existence of individual issues that precluded certification under Rule 23(b)(3). *Id.* at *24. First, the Court held that Plaintiffs had not demonstrated their off-the-clock claims applied to both managerial and non-managerial class members, yet both received benefits under the terms of the agreement. *Id.* at *27. Second, since two of Plaintiffs' causes of action were only relevant to class members who no longer work for Defendants; they would not apply to those class members who were currently employees. The Court found that Plaintiffs did not identify how many class members were former employees who were entitled to recover under these claims versus current employees who were not. *Id.* at *28. Accordingly, the Court ruled that Plaintiffs failed to meet the requirements of Rule 23. The Court also determined that Plaintiffs did not provide any estimates about Defendants' potential liability because they did not explain how they calculated the estimated damages or state the maximum recovery they could have obtained if parties were to litigate the class action on its merits. *Id.* at *42. The Court noted that Plaintiffs also failed to estimate how much the injunctive relief was worth. Without such information, the Court opined that it could not determine whether the proposed settlement was reasonable. *Id.* at *43. Therefore, even

if Plaintiffs had met their burden under Rule 23(a) and (b)(3), the Court found that Plaintiffs failed to demonstrate preliminary approval was otherwise appropriate.

***Sanchez, et al. v. Frito-Lay,* 2017 U.S. Dist. LEXIS 99468 (E.D. Cal. June 27, 2017).** Plaintiff, a non-exempt hourly employee, filed an action asserting that Defendant violated various provisions of the California Labor Code. The parties ultimately settled the matter and Plaintiff filed a motion for settlement approval. The Court had denied Plaintiff's motion on two previous occasions, and Plaintiff subsequently filed a third amended motion for preliminary approval of the settlement. The Court noted that in submitting the renewed motion, Plaintiff presented several new facts that called into doubt the valuation of the relevant meal period and rest break claims. *Id.* at *8-9. The Court stated that these new facts created serious doubts about whether Plaintiff's assumed violation rate was tethered to the experiences of all parties for whom relief was requested. *Id.* at *12-13. The Court opined that even if Plaintiff's assumed violation rates were accurate, it was unconvinced that the proposed class definition was appropriate or that questions of law or fact were plausibly common to the proposed class. *Id.* at *13. The Court further noted that Plaintiff presented an entirely new and contradictory theory for arriving at 1.3 violations per week. *Id.* The Court stated that Plaintiff's counsel now applied this violation rate to each type of violation, and as a result, inappropriately doubled the estimated value of recovery for the claims. *Id.* at *14. Because the Court was unable to confidently consider Plaintiff's expected recovery balanced against the value of the settlement offer, it held that it could not reasonably conclude that the amended settlement was reasonable or fell "within the range of possible approval." *Id.* at *17. The parties thereafter requested one final opportunity to address the Court's concerns. The Court granted the parties' request, but advised the parties to carefully review all of the Court's numerous prior rulings in this case and to fully address each of its previously expressed concerns in any potential motion for preliminary settlement approval and conditional class certification. *Id.* at *17-18.

***Sanchez-Rodriguez, et al. v. Jackson's Farming Co. Of Autryville,* 2017 U.S. Dist. LEXIS 5770 (E.D.N.C. Jan. 27, 2017).** Plaintiffs, a group of H-2A visa migrant workers, filed a putative class action and collective action alleging that Defendants violated various provisions of the FLSA and the North Carolina Wage & Hour Act ("NCWHA"). Plaintiffs sought payment of back wages and liquidated damages based upon Defendant's alleged failure to timely pay weekly wages that were at least the minimum wage rate, to pay all wages when due at the wage rate that was disclosed to Plaintiffs, and to pay for travel time. *Id.* at *2. The parties previously negotiated a settlement agreement that included class-wide relief. For settlement purposes only, Defendants consented to and joined in the motion for class certification pursuant to the settlement agreement reached between the parties. The parties' settlement requested the certification of a class defined as "all migrant or seasonal agricultural workers who performed temporary or seasonal work in agriculture under the H-2A guest-worker program for Jackson Farming Company of Autryville, William Brent Jackson, or William Rodney Jackson at any time during calendar years 2015 and through September 28, 2016." *Id.* at *3. The parties sought certification a class under the NCWHA for under-paid wages and liquidated damages. The Court determined that the proposed class included approximately 135 individuals who worked for Defendants during the relevant time period and therefore the class was sufficiently numerous. *Id.* at *5-6. The Court stated that Plaintiffs and the other putative class members shared common questions of law or fact, including whether Defendant: (i) failed to timely pay the class members weekly wages that were at least the minimum wage rate; (ii) failed to pay all wages when due at the wage rate that was disclosed; (iii) failed to pay for travel time; and (iv) failed to pay all wages due. *Id.* at *6. Therefore, the Court determined that the commonality requirement was satisfied. The Court found that Plaintiffs' claims and the claims of the putative class members arose from the same alleged practices and course of conduct by Defendants and therefore established typicality. *Id.* at *7. The Court further held that Plaintiffs shared a common interest with class members in the litigation and possess a personal financial stake in the outcome of this litigation. The Court noted that class counsel was experienced counsel who regularly had been counsel in class action litigation, including class litigation involving claims that are materially similar to those asserted in this case. *Id.* at *9. The Court also opined that certification of the class was appropriate under Rule 23(b)(3) because the legal and factual issues described in the second amended complaint predominated over any individual issues of law and fact for any named Plaintiff or class member. *Id.* Finally, the Court concluded that class treatment was superior to other procedures for handling the claims in question because no member of the proposed class had any necessary interest in individually controlling the

prosecution of the claims at issue in this litigation and because of the relatively small amount of the wage claims. *Id.* at *11. Accordingly, the Court granted Plaintiffs' motion for class certification for settlement purposes.

***Sandoval, et al. v. Philippe North American Restaurants, LLC*, 2017 U.S. Dist. LEXIS 141480 (S.D.N.Y. Aug. 31, 2017).** Plaintiff, a group of tipped restaurant employees, filed a collective action alleging that Defendant failed to pay minimum wage in violation of the FLSA. The parties ultimately settled the matter and Plaintiffs filed a motion for preliminary settlement approval. Plaintiffs also requested certification of the proposed class, appointment of class counsel, and approval of the proposed class notice. *Id.* at *4. The Court found that the general release provision contained in the proposed settlement agreement was overbroad, and therefore the motion for preliminary settlement approval must be denied. The Court determined that the release provision imposed almost no limitations on Plaintiffs' waiver of claims and required Plaintiffs to waive virtually any claim, of any type, without regard to whether the claim is related to the wage & hour violations alleged. *Id.* at *8. The Court further stated that the parties offered no basis for finding that the release provision provided Plaintiffs with any legitimate benefit. *Id.* As such, Court held that the provision was not reasonable, and Plaintiffs' motion for preliminary settlement approval must be denied without prejudice. *Id.* at *8-9. Accordingly, as the Court denied Plaintiffs' motion for preliminary settlement approval, it also denied without prejudice Plaintiffs' request for certification of the proposed class, appointment of class counsel, and approval of the proposed class notice.

***Santinac, et al. v. Worldwide Labor Support Of Illinois, Inc.,* 2017 U.S. Dist. LEXIS 42394 (S.D. Miss. Mar. 23, 2017).** Plaintiff brought a collective action asserting that Defendant violated various provisions of the FLSA. Plaintiff alleged that he regularly worked over 40 hours a week, but did not receive adequate overtime pay based on Defendant's mischaracterization of a portion of his regular wages as "per diem." *Id.* at *4. Plaintiff further alleged that all employees were subject to this improper per diem scheme to reduce overtime compensation. The Court conditionally certified a collective action, and approximately 100 individuals opted-in. The parties ultimately reached a settlement and sought preliminary settlement approval, which the Court granted. First, the Court found that the settlement was fair, reasonable and adequate because: (i) no fraud or collusion occurred between counsel for the parties; (ii) further litigation of this matter would have been costly and protracted; (iii) the parties had the opportunity to evaluate the merits of their respective positions; (iv) both liability and damages were strenuously disputed, and the parties detailed numerous issues that would have remained for resolution at trial; (v) each Plaintiff would receive 100% of the overtime he or she could possibly be owed, even after attorneys' fees and costs were deducted; and (vi) the parties and their attorneys agreed that the settlement was a fair and reasonable resolution of a *bona fide* dispute. *Id.* at *8-10. As to the attorneys' fees requested, the Court held that 30 hours of the requested 361.57 hours qualified as redundant, excessive, or unproductive time. *Id.* at *13. The Court therefore reduced the hours expended by that amount, for a total 331.57 hours. Taking into account the nature of the action and the reputation and experience of the lawyers involved, the Court opined that $250 was an appropriate hourly rate for the work performed by each of the three attorneys. *Id.* at *14. Applying the rate to the 331.57 hours yielded a lodestar of $82,892.50. The Court held that the lodestar of $82,892.50 was adequate, and that adjustment of the lodestar was unnecessary to make the fee award reasonable. *Id.* at *16. Applying the lodestar cross-check, the Court found that the fees requested resulted in over-compensation, and therefore it reduced the fee award to equal the lodestar amount of $82,892.50, which represented more than 30% of the common fund and was therefore on the upper end of fees awarded in similar cases. *Id.* at *17. Plaintiffs also sought payment of $3,801.96 in expenses incurred by their attorneys, which the Court held was reasonable. Accordingly, the Court granted the parties' motion for preliminary settlement approval.

***Saravia, et al. v. Dynamex, Inc.*, 2017 U.S. Dist. LEXIS 53892 (N.D. Cal. April 7, 2017).** Plaintiff, a delivery driver, brought a collective action alleging that Defendant misclassified him as an independent contractor and thereby denied him minimum wage and overtime compensation in violation of the FLSA. The parties subsequently settled the matter and requested the Court's approval of the settlement. The settlement required Defendant to pay $500,000 to settle all claims exclusive of attorneys' fees and costs, settlement administration costs, and the service award to the named Plaintiff. *Id.* at *3. The amount disbursed to each Plaintiff would be a minimum payment of $200, plus a proportion of the total settlement fund after disbursement of the minimum payment, which proportion would be based on each Plaintiff's *pro rata* share of the total number of overtime hours worked. *Id.* at *3-4. The result was an average distribution of approximately $4,500 per Plaintiff. The

settlement also required Defendant to pay all costs of administering the settlement. *Id.* at *4. The Court noted that the notice distributed to Plaintiffs underwent several rounds of edits by the Court to ensure it accurately and clearly explained the terms of the settlement agreement and the procedures surrounding the motion for final approval. *Id.* at *6. The Court noted that the recovery represented a significant discount on the total recovery for the collective action if it had won at trial but there remained a very real risk that the members of the collective action, or the bulk of them, would have received nothing. *Id.* at *7. In light of those risks, the Court found that the recovery, while modest, constituted fair, reasonable, and adequate consideration for the release of Plaintiffs' claims. *Id.* at *8. Plaintiffs also sought a service award of $7,500 to the named Plaintiff, Juan Saravia, in addition to his share of the settlement. The Court found that Saravia's contribution did not differ meaningfully from that of the other dozens of Plaintiffs who responded to discovery requests. *Id.* at *12. Therefore, the Court found that there was no reason to allow Saravia to recover substantially more than other Plaintiffs. However, the Court noted that Saravia initiated the case, participated in three settlement conferences, and provided assistance to counsel from the outset. *Id.* Accordingly, the Court determined that a service award of $1,000 was appropriate. The Court, therefore, granted the parties' motion for settlement approval.

***Sardina, et al. v. Twin Arches Partnership, Ltd.,* 2017 U.S. Dist. LEXIS 113137 (D. Colo. July 20, 2017).** Plaintiffs, a group of non-exempt restaurant employees, brought a collective action asserting that Defendant violated the overtime provisions of the FLSA by failing to pay for work in excess of 40 hours in a workweek, for off-the-clock work, and for mandatory work-related activities at the beginning and end of their shifts. *Id.* at *3-4. Plaintiffs also alleged that Defendants failed to maintain records of the hours worked by Plaintiffs. The parties reached a settlement in the matter and filed a joint motion for preliminary settlement approval, which the Court granted. The Court found that the settlement appeared to be fair, reasonable, and adequate. *Id.* at *5. The Court further stated that the settlement was the product of intensive, arms-length negotiations involving experienced counsel who were well-versed in employment law, class action litigation procedures, and the legal and factual issues of this case. *Id.* The Court explained that sufficient disputed questions of law and material fact existed that made the outcome of a trial on the merits uncertain, and therefore the settlement would avoid the time and expense of continuing this litigation for an indeterminate period of time, with attendant risks, costs, and delay for both sides. *Id.* at *5-6. Moreover, the Court found that the value of the proposed settlement appeared reasonable given the possible outcome of protracted and expensive litigation. *Id.* at *6. The Court also stated that the parties and their attorneys, who were experienced in wage & hour class action litigation, believed that the settlement was fair and adequate. *Id.* The Court stated that the attorneys' fees requested also appeared to be fair, reasonable, and adequate. The Court thereby granted preliminary settlement approval. The Court then directed counsel to develop a brief proposed form of notice of the settlement to be directed to all members of the collective action.

***Thompson, et al. v. Costco Corp.,* 2017 U.S. Dist. LEXIS 63504 (S.D. Cal. April 26, 2017).** Plaintiff, a former truck driver, filed a class and collective action alleging that Defendant violated the FLSA, the California Labor Code, and the California Private Attorneys General Act ("PAGA") by failing to provide meal and rest periods and failing to pay proper compensation. The parties subsequently settled the matter, and Plaintiff filed a motion for preliminary approval of the settlement. The Court denied the motion because the parties failed to distinguish between the payments to the members of the Rule 23 class and the FLSA collective action. *Id.* at *1. Among other things, the settlement did not have a proper opt-in procedure for the FLSA collective action and would have required Rule 23 class members to release FLSA claims to participate in the settlement of the Rule 23 class claims in exchange for no consideration. *Id.* at *2. Plaintiff thereafter filed an unopposed renewed motion for preliminary settlement approval, which the Court again denied. First, the Court ruled that, although the renewed motion corrected some of the shortcomings of the original settlement by creating a separate settlement fund for the FLSA collective action and including an appropriate opt-in procedure, the release language was inadequate. *Id.* The Court stated that the settlement defined the "released claims" by participating class members as including "any claims under federal law and state law" that could have been alleged. *Id.* The Court determined that, because the FLSA is a federal statute, the provision would mean that participating class members would release FLSA claims regardless of whether they participated in the collective action. Accordingly, the Court explained that the parties must specify that FLSA claims were not included within the definition of released claims. *Id.* Second, the Court noted that the "release of claims by participating class members" section contained the following sentence: "The Parties stipulate that Costco shall not owe, beyond the

amount of the Gross Settlement Fund, any further monies to the Settlement Class or to the State of California based upon the claims made in the Lawsuit during the Settlement Period." *Id.* at *3. Because the settlement referenced FLSA claims, the Court ruled that the stipulation effectively amounted to a release of those claims by Rule 23 class members, regardless of whether they opted-in to the FLSA collective action. *Id.* Finally, the Court found that the settlement stated "the procedures adopted under the Agreement will operate as a release of any FLSA claim by those Settlement Class Members who cash, deposit, or endorse settlement checks." *Id.* However, the Court noted that the only individuals who should be releasing FLSA claims were those who opted-in to the FLSA collective action. *Id.* at *4. The Court opined that these deficiencies underscored the difficulty of maintaining a Rule 23 class action and an FLSA collective action in the same lawsuit. *Id.* The Court further noted that while the parties may choose the language to remedy the deficiencies, the easiest way to do so might be to include an express statement in the release that, notwithstanding any other terms in the agreement, that participating class members who did not opt-in to the FLSA collective action did not release any FLSA claims against Defendant. *Id.* Accordingly, the Court denied the renewed motion for preliminary settlement approval.

***Thompson, et al. v. Costco Corp.,* 2017 U.S. Dist. LEXIS 72389 (S.D. Cal. May 11, 2017).** Plaintiff, a former truck driver, filed a class and collective action alleging that Defendant violated the FLSA, the California Labor Code, and the California Private Attorneys General Act ("PAGA") by failing to provide meal and rest periods and failing to pay proper compensation. The parties subsequently settled the matter, and Plaintiff filed a motion for preliminary approval of the settlement. The Court denied the motion because the parties failed to distinguish between the Rule 23 class and the FLSA collective action. *Id.* at *1. Among other things, the settlement did not have a proper opt-in procedure for the FLSA collective action and would have required Rule 23 class members to release FLSA claims to participate in the settlement of the Rule 23 class claims in exchange for no consideration. *Id.* at *2. Plaintiff later filed an unopposed renewed motion for preliminary settlement approval, which the Court again denied. The Court stated that although the renewed motion corrected some of the shortcomings of the original settlement by creating a separate settlement fund for the FLSA collective action and including an appropriate opt-in procedure for the FLSA collective action, the release language was inadequate. *Id.* Plaintiff thereafter filed a second renewed motion for preliminary settlement approval, which the Court granted. Plaintiff sought preliminary certification of a Rule 23 class containing all current and former fleet drivers employed at a business center or depot operated by Defendant in California from October 17, 2010, through October 4, 2016, and FLSA collective action certification of all current and former fleet drivers employed at a business center or depot in California operated by Defendant from October 17, 2011, through October 4, 2016. *Id.* at *18. The settlement provided a $2 million gross settlement amount to be paid by Defendant, including $5,000 as an incentive award for Plaintiff; $500,000 to Plaintiff's counsel for fees; $20,000 in reimbursement to Plaintiff's counsel for costs; $10,000 to settlement of PAGA claims; up to $30,000 to the claims administrator for administration costs; 90% of the remainder after the payments as the net Rule 23 class settlement fund (estimated to be $1,320,750); and 10% of the remainder as the net FLSA collective action settlement fund (estimated to be $146,750). *Id.* Plaintiff's counsel estimated that the 882 class members who also opted-in to the FLSA collective action would receive an average of $1,664 from the gross settlement amount based on the agreed allocation. Plaintiff's counsel argued that the gross settlement amount reflected approximately 10% of the potential exposure and that, based on Defendant's defenses and the hurdles of Plaintiff's case, this settlement was fair, adequate, and reasonable. *Id.* at *20. The Court stated that the only information available to prove that the estimate was correct was the declaration of Plaintiff's counsel. However, the Court found that Plaintiff's counsel was not a credible witness in light of his previous declaration that the FLSA claims were worth very little to nothing, which was contradicted by a subsequent declaration of his law partner, and by the new settlement itself. *Id.* at *21. Because the motion did not provide any evidence other than the declaration of Plaintiff's counsel to support the reasonableness of the settlement, the Court lacked any credible evidence to support the settlement amount. Notwithstanding the foregoing, the Court determined that it was appropriate to preliminarily approve the settlement. The Court stated that it would give careful consideration to any objections from class members when determining whether final approval was warranted. Accordingly, the Court granted Plaintiff's second unopposed motion for preliminary settlement approval.

***Thompson, et al. v. Costco Wholesale Corp*., 2017 U.S. Dist. LEXIS 142290 (S.D. Cal. Sept. 1, 2017).** Plaintiff, a former truck driver, filed a class and collective action alleging that Defendant violated the FLSA, the California Labor Code, and the California Private Attorneys General Act ("PAGA") by failing to provide meal and

rest periods and failing to pay proper compensation. The parties subsequently settled the matter, and Plaintiff filed a motion for preliminary approval of the settlement. The Court preliminarily approved the settlement, and Plaintiff subsequently filed a motion for final settlement approval. *Id.* at *3. The proposed settlement included: (i) a gross settlement fund in the amount of $2 million; (ii) a class representative award of $5,000 to Plaintiff; (iii) $10,000 for settlement of the PAGA claims; (iv) $21,000 in class administrator fees; (v) $500,000 to Plaintiff's counsel for fees and $20,000 in costs; (vi) 90% of the remainder, after these payments, as the net Rule 23 class settlement fund (estimated to be $1,320,750); and (vii) 10% of the remainder as the net FLSA collective settlement fund (estimated to be $146,750). *Id.* at *4. Additionally, Plaintiff estimated that 924 participating class members would receive an average payment of $1,397.73, and the 459 class members who had opted-in to the FLSA collective action would receive a settlement payment of $312.64 based on the agreed upon allocation. *Id.* The settlement defined the Rule 23 class as "all current and former fleet drivers employed at a Costco business center or depot in California at any time during the period of October 17, 2010, through October 4, 2016." *Id.* The settlement also sought certification of the FLSA collective action comprised of "all current and former drivers employed at a Costco business center or depot in California at any time during the period of October 17, 2011 and October 4, 2016." *Id.* at *5. The Court found that the proposed class met all the requirements of Rule 23 and it thereby certified the class for the purposes of settlement. Additionally, because the FLSA collective action satisfied the Rule 23 class certification requirements, the Court held it also satisfied the FLSA's less stringent requirement that the members be "similarly-situated" for the purposed of the settlement under 29 U.S.C. § 216(b) *Id.* at *11-12. Accordingly, the Court conditionally certified the FLSA collective action for purposes of the settlement. As to the settlement, the Court found that the class and collective action members received adequate notice. The Court noted that Defendant had strong defenses to class liability and damages determinations, and there was no guarantee that Plaintiff would prevail. Furthermore, the risk of attaining class/collective certification on any of the claims would be on-going. The Court found these risks weighed in favor of settlement. The Court determined that in light of the risks associated with continuing the litigation, the pay-outs appeared reasonable and weighed in favor of approval of the settlement. The Court opined that class counsel provided a declaration detailing their experience in wage & hour class cases involving workers in the transportation industry. Further, only one class/collective member opted-out of the class and no objections to the settlement had been received. The Court ruled that the parties reached agreement after extensive arms-length negotiations, an all-day mediation before a neutral third-party, and further non-collusive negotiations. *Id.* at *20. The Court also found that an award of 15% of the common fund was reasonable. Accordingly, the Court awarded attorneys' fees in the amount of $300,000. *Id.* at *21. The Court also awarded $26,071.99 in costs. Plaintiff requested an incentive award of $5,000. The Court found that awarding the class representative over three times more than what the average class member would receive was excessive, and therefore reduced the award to $2,000. *Id.* The Court approved that $7,500 from the settlement to be used for payment of civil penalties provided for the PAGA claims to the California Labor & Workforce Development Agency. Finally, the Court approved payment of $21,000 to the claims administrator. Accordingly, the Court granted Plaintiff's motion for final settlement approval.

***Williams, et al. v. Alimar Security, Inc.,* 2017 U.S. Dist. LEXIS 13530 (E.D. Mich. Feb. 1, 2017).** Plaintiffs, a group of alarm response security officers, brought a putative class action and collective action alleging that Defendants denied them overtime compensation in violation of the FLSA. The Court conditionally certified the matter as a collective action and the parties eventually reached a settlement. Plaintiffs thereafter filed a motion for settlement approval and submitted their settlement agreement for *in camera* review. The Court entered an order denying the motion for approval without prejudice. The parties then filed a revised joint motion for settlement approval, which the Court granted. After reviewing the pleadings and the parties' joint motion, the Court found that the parties' proposed settlement represented a fair and reasonable resolution of a *bona fide* dispute over FLSA provisions. *Id.* at *2. The Court stated that there were several genuine disputes at issue, for example: (i) whether the time Plaintiffs spent "on-call" or "waiting to be engaged" constituted working time under the FLSA; and (ii) whether the parties agreed to a fluctuating workweek schedule. *Id.* at *3. Therefore *bona fide* issues remained as to the amount of wages, if any, Defendant owed Plaintiffs and the ultimate amount they could recover if they prevailed on the merits. *Id.* at *4-5. The Court found it reasonable that the proposed settlement agreement provided Plaintiffs half as much as they would receive if the method of damage calculation was adopted by the Court, plus liquidated damages. *Id.* at *6. The Court also stated that the parties would not have to incur the burden and expense of trial, which favored approving the agreement. The Court

opined that both parties faced risks if the Court determined the appropriate calculation of overtime pay, because Court might either identify Plaintiffs as "on-call" or determine that Defendant was liable for damages that exceed the settlement amount. *Id.* Fourth, the Court determined that the settlement agreement was the product of arm's-length bargaining because the parties reached the settlement during a settlement conference before the Magistrate Judge, after informal discussions and a prior settlement conference. Finally, the Court held that there was no reason to suspect fraud or collusion with regard to the proposed agreement. *Id.* at *7. After reviewing the time records submitted by Plaintiffs' counsel, the Court concluded that the amount allocated for attorneys' fees was fair and reasonable in light of the result reached in this case, and the total number of hours that Plaintiffs' counsel dedicated to this matter. Accordingly, the Court granted the motion to approve the settlement and for an award of attorneys' fees.

***Wilson, et al. v. Maxim Healthcare Services, Inc.,* 2017 U.S. Dist. LEXIS 95048 (W.D. Mo. June 23, 2017).** Plaintiffs, a group of employees, brought a collective action alleging that Defendant failed to pay overtime compensation in violation of the FLSA. The Court had previously granted the parties' stipulated motion to decertify Plaintiffs' collective action and withdraw their class claims, in which the parties stated that they had reached a global settlement for all Plaintiffs and opt-in Plaintiffs on an individual basis. Plaintiffs then filed a stipulated motion for approval of all Plaintiffs' individual settlement agreements, and for dismissal with prejudice. *Id.* at *2. Plaintiffs argued that because the settlement agreements involved the settlement and release of claims under the FLSA, the parties must submit their proposed agreements to the Court for its examination and determination as to whether those agreements represent "a fair and reasonable resolution of a *bona fide* dispute." *Id.* at *2-3. The Court, however, determined that since Plaintiffs had decertified their collective action and reached settlement agreements on an individual basis, it need not review those agreements for fairness and reasonableness. *Id.* at *3. The Court thereby declined Plaintiffs' request to submit copies of the 135 individual settlement agreements for *in camera* review and approval. *Id.* at *4. The Court held that Plaintiffs remained free to dismiss their wage claims voluntarily pursuant to Rule 41(a) in light of their individual settlement agreements.

***Yang, et al. v. Matsuya Quality Japanese, Inc.,* 2017 U.S. Dist. LEXIS 14823 (E.D.N.Y. Feb. 2, 2017).** Plaintiff filed a collective action alleging that Defendant violated the FLSA. The parties settled the matter and requested settlement approval. The Court previously had rejected the proposed settlement agreement because it contained a confidentiality provision and a "sweeping" release provision and failed to specify the amount of attorneys' fees. *Id.* at *2. The parties then filed a revised settlement agreement for the Court's review, and the Court again denied the proposed agreement. First, the Court found that the settlement agreement's release provision was unreasonable. The settlement agreement stated that "Plaintiff . . . release[s] the Defendant . . . from any and all debts, obligations, claims, demands, orders, judgments or causes of action of any kind whatsoever, whether in tort, contract, statute, at common law, or on any other basis . . . whether asserted in the Action or not . . . ." The Court opined that the language constituted an unreasonable and sweeping release that reached far beyond the claims in the action. *Id.* at *3-4. The Court also held that the settlement agreement's non-disparagement clause was unreasonable because it did not include a carve-out allowing Plaintiff to speak truthfully regarding the case. *Id.* at *4. The Court thereby denied the parties' joint request to approve the settlement agreement. The Court directed the parties to either: (i) file a revised agreement with a limited release provision and a non-disparagement clause with the appropriate carve-out; (ii) submit a joint letter for *in camera* inspection that explained why the Court should approve the settlement agreement, either in its present form or with the previously noted modifications; or (3) file a letter indicating their intent to abandon their settlement and continue to litigate this action. *Id.* at *5.

(xxix) Settlement Bar And Estoppel Issues In Wage & Hour Class Actions

***Caraballo, et al. v. United States,* 2017 U.S. App. LEXIS 9334 (Fed. Cir. May 30, 2017).** Plaintiffs, a group of federal employees previously certified as a class in *Carballo I*, filed suit alleging that Defendant breached the parties' settlement agreement and its duty of good faith and fair dealing. Plaintiffs had brought a class action against Defendant alleging that Defendant paid the cost of living adjustment ("COLA") at rates lower than the levels required by law. *Id.* at *2. The parties eventually entered a settlement agreement that required Defendant to pay $232.5 million to a trustee and mandated that the Office of Personnel Management ("OPM") issue new regulations governing the COLA program. *Id.* Defendant initially complied with its obligations under the settlement agreement. *Id.* at *5. However, after Congress enacted the Non-Foreign Area Act of 2009, Defendant

reduced COLA by 65% of the locality pay received. *Id.* at *6. Plaintiffs subsequently filed suit alleging that Defendant breached the settlement agreement and its duty of good faith and fair dealing. *Id.* at *8. Defendant filed a motion to dismiss asserting that: (i) the District Court lacked jurisdiction over Plaintiffs' claims; (ii) Plaintiffs' claims were barred under the doctrine of *res judicata*; and (iii) Plaintiffs failed to state a claim upon which relief could be granted. *Id.* The District Court granted the motion to dismiss and determined that, although it had jurisdiction and that *res judicata* did not bar the claims, Plaintiffs failed to state a claim upon which relief could be granted. *Id.* On Plaintiffs' appeal, the Federal Circuit affirmed. *Id.* at *22. Defendant argued that the trial court lacked jurisdiction over the suit because the settlement agreement did not provide for monetary damages in the event of a breach. The Federal Circuit disagreed and ruled that Plaintiffs' claim for breach of the settlement agreement, if proven, provided for money damages, and jurisdiction was proper pursuant to the Tucker Act. *Id.* at *11. The Federal Circuit also rejected Defendant's argument that the District Court's denial of Plaintiffs' motion to amend constituted a final judgment for purposes of *res judicata*. Because Plaintiffs could not have raised their breach of settlement agreement claims in *Caraballo I* before they entered the settlement agreement, the Federal Circuit concluded that the District Court's denial of Plaintiffs' motion to amend did not have *res judicata* effect and did not bar Plaintiffs' suit. *Id.* at *12. Further, the Federal Circuit ruled that the District Court properly dismissed Plaintiffs' claims that Defendant: (i) breached the express terms of the settlement agreement; and (ii) breached the implied and express covenants of good faith and fair dealing. The Federal Circuit concluded that the OPM was not required to consult the Survey Implementation Committee and the Technical Advisory Committee established pursuant to the settlement agreement and, therefore, did not breach the settlement agreement when it failed to do so*. Id.* at *14. The Federal Circuit also found that Defendant did not breach the contract by failing to give notice to the class members that it no longer intended to be bound by the conforming methodology because the OPM provided adequate notice to the class members when it published the 2010 Interim Regulations in the Federal Register. *Id.* at *19. Moreover, the Federal Circuit ruled that Defendant did not breach the implied and express covenants of good faith and fair dealing by eliminating COLA through the passage of the Non-Foreign AREA Act and implementing the regulations without considering the terms of the settlement agreement because Plaintiffs did not bargain for the COLA regulatory regime to be maintained in perpetuity. *Id.* at *21. Rather, the Federal Circuit opined that Plaintiffs bargained for a one-time lump sum payment to satisfy back pay claims and for a confirming methodology that OPM was expected but not required to follow pursuant to the settlement agreement. *Id.* at *22. Accordingly, the Federal Circuit affirmed the District Court's order granting Defendant's motion to dismiss.

***In Re Walgreens Co. Wage & Hour Litigation*, Case No. 11-CV-7664 (C.D. Cal. June 22, 2017).** Plaintiffs filed a punitive class action in state court alleging various violations of the California Labor Code for failure to provide meal and rest periods and accurate itemized wage statements. *Id.* at 1. Defendant removed the action pursuant to the CAFA and eight additional Plaintiffs filed identical actions, which the Court consolidated. The parties ultimately settled the matter for $23 million. Plaintiff Zamora received a settlement payment and completed a claim form that included a release of claims. *Id.* at 2. In the release, Zamora covenanted to participate in an subsequent California Labor Code PAGA action against Defendant for penalties. *Id.* However, Zamora then filed a PAGA action in state court against Defendant. Defendant argued that Zamora released the claims and sought the Court's power to enforce the settlement and release of claims and enjoin Zamora's lawsuit. *Id.* at 3. The Court granted Defendant's motion. The Court found that the parties did not dispute that Zamora participated in the settlement and signed the release. However, Zamora argued that: (i) her claim for suitable seating was not covering by the release; (ii) that enforcing the release violated public policy; and (iii) the release did not bar her suitable seating claims because she filed the action before the settlement was finalized. *Id.* at 4. The Court determined that there was no dispute that Zamora could have raised her suitable seating claim alongside the other wage & hour violations, and therefore it could not find that the release that Zamora signed did not encompass the suitable seating claim. *Id.* at 4-5. The Court opined that a settlement agreement is a mutual agreement between two parties to end litigation. *Id.* at 5. Further, the Court stated that enforcing a settlement agreed did not in any way prevent Zamora from proceeding collectively with other employees or from receiving compensation for injuries. *Id.* Finally, the Court held that Zamora signed the settlement release on August 12, 2014, at which time she was bound by the settlement terms. *Id.* Plaintiff filed her state court lawsuit on August 21, 2014, after signing the settlement release. Accordingly, the Court concluded that because allowing Zamora to proceed in state court would require Defendant to litigate a matter that could have been litigated in the original action, there was substantial justification for enjoining the state court proceeding. *Id.* at 6.

Accordingly, the Court granted Defendant's motion to enforce the settlement and enjoined Zamora from pursuing the action in state court.

***Lao, et al. v. H&M Hennes & Mauritz, L.P.*, 2017 U.S. Dist. LEXIS 177135 (N.D. Cal. Oct. 25, 2017).** Plaintiff, a store manager, filed a class action alleging that Defendant failed to provide accurate itemized wage statements and failed to pay minimum wage, overtime wages, and premium pay for missed meal and rest periods in violation of the California Labor Code. Defendant filed a motion for partial summary judgment on Plaintiff's fourth cause of action for meal time violations and sixth cause of action for waiting time claims, on the ground that the claims were barred by the doctrine of *res judicata*. Plaintiff agreed to dismiss the fourth cause of action without prejudice but opposed the motion as to the waiting time claims. *Id.* at *1. In an earlier-filed wage & hour class action suit in state court, Suzanne Tran brought suit to challenge Defendant's alleged policy or practice of requiring non-exempt employees to work substantial amounts of time "off-the-clock and without pay, and failing to provide non-exempt employees with meal and rest periods." *Id.* at *4-5. Tran alleged that she was required to perform numerous tasks both at the beginning and the end of her meal and rest breaks, and therefore she was not provided with 30 minutes of off-duty time for meal breaks or 10 minutes of off-duty time for rest breaks, nor paid one hour of wages for each meal/rest period violation. Accordingly, Tran sought recovery of waiting time penalties as provided under § 203 of the California Labor Code. The Court certified a class in *Tran* ("Tran class"). Plaintiff in the instant action was a member of the Tran class. *Id.* at *6. The state court had granted preliminary approval of a settlement in *Tran*. The settlement notice contained a release provision, which the claims administrator mailed to all class members. *Id.* at *7. Plaintiff admitted that he received a claim form, but he did not submit a completed form nor did he request to be excluded from the *Tran* settlement. The Court found that although *Tran* and Plaintiff's action both involved a Labor Code waiting time cause of action, the causes of action were not based upon the same underlying facts. *Id.* at *13. The Court explained that *Tran* was predicated on Defendant's alleged failure to provide meal and rest periods, and did not include allegations regarding security checks, or unpaid wages based on an incorrect regular rate of pay or ATM cards, which were alleged in the instant action. *Id.* at *14. Moreover, the Court held that the scope of the release in the *Tran* settlement was tailored to the factual allegations in that complaint to encompass "all claims . . . that were alleged . . . or that could have been alleged based on the facts alleged in the First Amended Complaint. . . ." *Id.* Further, the Court determined that the claim form notified the class members in *Tran* that the class action settlement released all claims included in the complaint. The Court found that because the complaint in *Tran* did not include factual allegations regarding security checks or ATM cards, the resulting settlement and judgment did not preclude Plaintiff's waiting time claim in this case based upon those allegations. *Id.* at *15. Accordingly, the Court denied Defendant's motion for summary judgment.

***U.S. Department Of Labor v. Taste Of Mao,* 2017 U.S. Dist. LEXIS 107923 (S.D.N.Y. July 12, 2017).** Plaintiffs, a group of former waiters, delivery workers, and cashiers, alleged that Defendant failed to pay overtime wages in violation of the FLSA. Defendant had previously entered into a settlement supervised by the U.S. Department of Labor (the "DOL settlement") to resolve FLSA-related liabilities. The DOL's investigation, which covered the period from August 2013 to August 2015, found that 19 employees, including four of the five Plaintiffs in this action, were entitled to back wages totaling $38,883.80. Defendant agreed to settle the matter by paying $48,641.21 to the DOL. To ensure that the DOL settlement covered all 19 employees, Defendant asked the DOL to provide an assurance that it "had the authority to represent the employees." *Id.* at *2. The DOL confirmed its authority to represent and resolve all of the employees' claims. Defendant then paid the DOL, and the DOL mailed WH-60 forms to the employees, notifying them of the settlement. *Id.* at *3. To receive payment, the employees were required to sign the WH-60 form and return an executed copy to the DOL. Notwithstanding the settlement, five former employees, including one who was not covered by the DOL settlement, commenced their own action and sought damages arising from alleged FLSA violations that exceeded the period covered by the DOL settlement. Defendant contended that the DOL settlement barred their claims. Despite Plaintiffs' decisions not to sign the WH-60 forms and accept their settlement payments, Defendant argued that the funds were still constructively in Plaintiffs' possession because the DOL, as their agent, had not returned any of the settlement monies. *Id.* at *4. Therefore, Defendant claimed that the non-return of the DOL settlement funds constituted a waiver of Plaintiffs' right to sue. Plaintiffs argued that their decision not to sign the WH-60 forms represented an unequivocal rejection of the DOL settlement, thereby preserving their right to sue. Moreover, Plaintiffs asserted that the relief provided by the DOL settlement was

insufficient when compared to the relief they sought in their own action because their action included a former employee who was never covered by the DOL settlement and expanded the time period at issue. The Court noted that waiver requires: (i) that the employee agree to accept payment which the Secretary of Labor determines to be due; and (ii) that there be payment in full, with both elements satisfied independently. *Id.* at *5. The DOL WH-60 forms contained a clear waiver clause stating that the "amount of back wages, liquidated damages, or other compensation" in the DOL settlement, if accepted, resulted in "waive[r] [of] any right [Plaintiffs] have to bring suit on [their] behalf for the payment of such unpaid minimum wages and/or unpaid overtime compensation for the period of time indicated [in the form] and an equal amount in liquidated damages, plus attorneys' fees and court costs under Section 16(b) of the FLSA." *Id.* at *6. The Court concluded that Plaintiffs did not execute their WH-60 forms, and therefore none of them could be deemed to have accepted the DOL settlement and waived their right to sue. *Id.* The Court noted that, while none of the Plaintiffs expressly rejected the DOL settlement, their refusal or failure to sign the WH-60 form was tantamount to a rejection because: (i) the WH-60 form did not provide an option to expressly reject payment; and (ii) the FLSA maintains a provisions stating that the amount "recovered by the Secretary of Labor on behalf of an employee . . . not paid to [such] employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts." *Id.* at *7-8. Accordingly, the Court denied Defendant's motion to dismiss.

(xxx) Statute Of Limitations Issues In Wage & Hour Class Action Litigation

***Kim, et al. v. Capital Dental Technology,* 2017 U.S. Dist. LEXIS 162731(N.D. Ill. Oct. 2, 2017).** Plaintiffs, a group of laboratory technicians, filed a class action alleging overtime violations pursuant to the FLSA and the Illinois Minimum Wage Law ("IMWL"). Defendants moved for partial summary judgment on the basis that: (i) certain claims were barred by the statutes of limitations; (ii) Plaintiffs were only entitled to fluctuating workweek ("FWW") overtime compensation; and (iii) two Plaintiffs were exempt from overtime pursuant to the FLSA's executive employee exemption. *Id.* at *2. The Court denied Defendants' motion. First, as to Defendants' assertion that the claims were time-barred, Plaintiffs contended that the statute of limitations should be tolled because Defendants failed to post required materials concerning employees' FLSA rights. Plaintiffs submitted declarations that they never saw any posters regarding minimum wage or overtime pay posted inside of Defendants' facility. Plaintiffs argued that because they never saw the required labor posters and Defendants did not otherwise demonstrate that Plaintiffs had acquired general knowledge of their FLSA rights, the limitations period must be tolled for the period during which they were unaware of their rights. The Court agreed and ruled that a reasonable jury could conclude that the required labor posters were not properly displayed and that the statute of limitations should be tolled. *Id.* at *12. Second, as to Plaintiffs' overtime claims, Defendants asserted that because they utilized a fluctuating workweek overtime compensation method, they were permitted to pay half-time rather than time-and-a-half to certain salaried employees whose hours fluctuated from week to week. *Id.* at *13. Defendants contended that because Plaintiffs were paid a regular salary every two weeks that generally did not fluctuate based on the hours they worked, Defendants were entitled to summary judgment on the matter of the FWW method's application. *Id.* at *15. Defendants offered pay stubs and deposition transcripts showing the frequency and method with which Plaintiffs were paid. Plaintiffs countered that Defendants had not established that Plaintiffs' bi-weekly salaries were fixed because Defendant made deductions when Plaintiffs worked fewer than 40 hours. *Id.* Additionally, Plaintiffs disputed that there was a clear mutual understanding that their bi-weekly salary would compensate them for all straight-time hours worked. The Court agreed that Plaintiffs raised a triable dispute as to how their overtime should be calculated because for the FWW method to apply, Plaintiffs' salary must not be diminished even if their number of hours fell below 40 and several of Plaintiffs' pay stubs showed that they were docked pay for partial-day absences and for absences caused by the employer's lack of work. Finally, Defendants argued that two Plaintiffs were overtime-exempt executive employees and sought summary judgment as to their claims. The Court rejected Defendants' assertion because Defendants failed to establish that either of the employees played a role in making decisions to hire, fire, and promote other employees as required under the FLSA. *Id.* at *23. Accordingly, the Court denied Defendants' motion for summary judgment.

***Marrs v. United States*, 2017 U.S. Claims LEXIS 1347 (Fed. Cl. Oct. 27, 2017).** Plaintiffs, a group of current or former government employees, alleged that they were not timely compensated for work performed during a shutdown of the federal government in October 2013, in violation of the FLSA. The Court found that the failure to

pay the workers in a timely fashion was indeed a violation of the FLSA. At issue was whether the government's violation of the FLSA was willful under 29 U.S.C. § 255(a), thereby extending the statute of limitations from two years to three years. *Id.* at *3. Based upon the information received from relevant personnel and review of the relevant documents, the agencies that advised Defendant on the implementation of labor law and policy did not – prior to or during the 2013 government shutdown – consider whether requiring employees designated as "non-exempt" under the FLSA; they also did not consider whether workers "excepted" for purposes of the shutdown to work during the shutdown – without pay or overtime wages on their regularly scheduled paydays for work performed during the first week of the shutdown – would violate the FLSA. *Id.* at *10. Defendant understood that during a lapse in appropriations the Anti-Deficiency Act prohibited payment of wages for work performed during the 2013 government shutdown until funds had been appropriated. Defendant did not seek a formal legal opinion regarding how to meet its obligations under both the Anti-Deficiency Act ("ADA") and FLSA as to employees designated as "non-exempt" under the FLSA and as "excepted" for purposes of the shutdown who were required to work during the shutdown. *Id.* Defendant argued, however, that these facts did not rise to the level of a willful FLSA violation. The Court found that the undisputed facts showed that the federal government, as a whole, understood that it could not pay excepted employees during the 2013 shutdown due to the constraints of the ADA. However, the Court ruled that complying with the ADA and not paying excepted employees during the shutdown did not mean that these federal agencies showed a reckless disregard of the FLSA. *Id.* at *17-18. Instead, the Court held that the agencies' conduct, in the context of the 2013 government shutdown, did not exceed a level of merely negligent or unreasonable conduct vis-à-vis the FLSA. The Court noted that although there was no case directly on point, the Court had previously found that a federal agency did not recklessly disregard the FLSA when it attempted to comply with a particular federal statute and, as a result, neglected its obligations under the FLSA. Thus, the Court determined that although federal agencies may blunder in their interpretation of a federal statute that implicates their responsibilities under the FLSA, they can do so without committing a willful violation of the FLSA. *Id.* at *18-19.

***Marshall, et al. v. Louisiana,* 2017 U.S. Dist. LEXIS 3349 (E.D. La. Jan. 10, 2017).** Plaintiff, a former deputy sheriff, filed a putative collective action complaint against the Sheriff and the Law Enforcement District for the Parish of New Orleans ("Defendants"), seeking unpaid wages and overtime under the FLSA. Plaintiff, on behalf of himself and others similarly-situated, sought wages and overtime for time spent less than 30 minutes prior to his shift and for up to 30 minutes after his shift for which he was not paid. The Court had previously conditionally certified the action as a collective action. After notice was sent, 99 individuals opted-in to the action. Defendants filed a motion summary judgment as to individuals who failed to timely file their opt-in notices and/or who worked at a facility not covered by the opt-in collective action. *Id.* at *3. Defendants contended that the FLSA claims of 13 of the opt-in Plaintiffs were barred by the statute of limitations. Additionally, Defendants contended that six of the opt-in Plaintiffs never worked at one of the eight opt-in facilities within the specified time-frame. Plaintiff did not oppose summary judgment as to the individuals who did not file timely opt-in notices. *Id.* at *4. However, Plaintiff argued that summary judgment was not appropriate as to the claims of opt-in Plaintiffs Carla Thomas ("Thomas") and Stephanie Hudson ("Hudson") because the evidence showed that they worked in facilities covered by the conditionally certified action during the specified time-frame. *Id.* at *5. Because genuine disputes as to material issues of fact existed as to the locations of their employment, Plaintiff argued that the Court should deny summary judgment as to the claims of Thomas and Hudson. *Id.* The Court stated that under the FLSA, a cause of action must be commenced within two years after the cause of action accrued, or within three years if the cause of action arose out of a "willful violation" of FLSA. *Id.* at *8. Plaintiff did not oppose summary judgment as to "those individuals whose opt-in forms were received more than three years after the last date of work, based on all discovery provided to Plaintiff." *Id.* Accordingly, the Court granted summary judgment as to the opt-in Plaintiffs whose claims were barred by the statute of limitations. Additionally, Plaintiff did not oppose summary judgment as to the claims of opt-in Plaintiffs who did not work at one of the facilities covered by the conditionally certified collective action during the applicable time period. Therefore, the Court granted summary judgment as to the claims of those opt-in Plaintiffs as well. The Court, however, found that Plaintiff submitted sufficient evidence to raise a genuine issue of material fact as to whether opt-in Plaintiffs Thomas and Hudson worked at facilities covered by the conditionally certified collective action during the applicable time period. Accordingly, the Court denied summary judgment as to the claims of opt-in Plaintiffs Thomas and Hudson. Finally, the Court noted that Plaintiff did not address in his opposition whether summary judgment was appropriate as to the claim of opt-in Plaintiff Carylenna Grant ("Grant"). *Id.* at *10. The record indicated that

Grant did not opt-in to the collective action until more than three years after she worked with Defendants. The Court determined that because the uncontroverted evidence in the record indicated that Grant did not consent to join the litigation until more than three years after her employment, her claim was barred by the statute of limitations. *Id.* at *11. The Court accordingly granted summary judgment as to Grant's claim too. The Court therefore granted in part and denied in part Defendants' motion for summary judgement.

(xxxi) Stays In Wage & Hour Class Actions

***Bankwitz, et al. v. Ecolab, Inc.*, 2017 U.S. Dist. LEXIS 171786 (N.D. Cal. Oct. 17, 2017).** Plaintiffs, a group of employees, alleged that they were misclassified as exempt employees and therefore wrongfully denied overtime and double-time premiums in violation of the California Labor Code, the Unfair Competition Law, and the Private Attorney General Act ("PAGA"). Defendant moved to compel arbitration of all Plaintiffs' claims except the PAGA claim, or in the alternative to stay this case pending the U.S. Supreme Court's ruling on the enforceability of arbitration agreements like Defendant's arbitration agreement in *Morris v. Ernst & Young, LLP,* 834 F.3d 975 (9th Cir. 2016). The Court denied the motion to compel arbitration and granted the motion to stay the proceedings. In deciding whether to stay a case pending a Supreme Court's future ruling, it considered: (i) the possible damage that may result from granting of a stay; (ii) the hardship or inequity that a party may suffer in being required to go forward; and (iii) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law that could be expected to result from a stay. *Id.* at *12-13. Plaintiffs argued that the stay would damage them by delaying the relief they were allegedly owed. The Court reasoned that the forthcoming Supreme Court ruling in *Morris* minimized any potential damage because the stay would be short and not indefinite. *Id.* at *13. The second factor considered the possible harm from requiring Defendant to litigate while *Morris* is pending in the Supreme Court. The Court noted that if *Morris* was overturned, the agreement's class action waiver ultimately may be deemed enforceable, Plaintiffs would be precluded from pursuing class claims in any forum, and the Court would have to refer Plaintiffs' individual claims to arbitration, and only Plaintiffs' PAGA claims would arguably remain in the Court. *Id.* at *13-14. The Court found that continued litigation on class certification issues might cause unnecessary hardship on Defendant if the class action waiver were ultimately enforced. Further, allowing substantive motion practice on Plaintiffs' individual claims to proceed absent a stay – such as motions to dismiss or motions for summary judgment– might also be prejudicial insofar as it would deprive Defendant of the right to benefit from arbitration of those issues. *Id.* at *14. However, the Court held that Defendant was unlikely to suffer prejudice from limited discovery on Plaintiffs' individual claims in the interim, since a similar exchange of information would likely need to occur in arbitration as well. The Court further held that allowing discovery of the PAGA representative claims may be premature because if *Morris* was reversed and arbitration was compelled, there was possibility that the PAGA representative claims might be stayed. *Id.* at *15. In that event, Defendant would be prejudiced by having to engage in PAGA discovery that might ultimately be mooted depending on the outcome of Plaintiffs' individual arbitration. Given the risk that the PAGA claims might be stayed pending arbitration, and the relatively short stay pending *Morris*, the Court found that the second factor leaned slightly in favor of granting a stay of the litigation provided Plaintiffs were allowed to proceed with discovery on Plaintiff's individual claims. *Id.* at *16. The third factor considered whether a stay would simplify or complicate the judicial process. The Court found little value in litigating a class certification motion or undertaking class discovery at this juncture when the Supreme Court's impending ruling might ultimately moot those claims, and therefore the third factor also weighed in favor of granting the stay. However, no matter what the resolution in *Morris*, the Court noted that Plaintiffs would be entitled to bring their individual claims in some forum and their PAGA claims, and therefore some limited discovery into the individual claims would not involve a potential waste of resources. *Id.* at *16-17. The Court therefore granted the stay in part with the following conditions: (i) the parties may proceed with individual discovery; (ii) the parties shall undertake preservation of evidence relevant to all claims pursuant to Rule 26(f); and (iii) the parties shall meet and confer regarding a limited discovery plan.

***Campanelli, et al. v. Image First Healthcare Laundry Specialists,* 2017 U.S. Dist. LEXIS 106394 (N.D. Cal. July 10, 2017).** Plaintiff, a delivery driver, brought a class and collective action alleging that Defendants failed to pay overtime compensation in violation of the FLSA and the California Labor Code. Plaintiff filed a motion for conditional certification of a collective action as to his FLSA claims under 29 U.S.C. § 216(b) and a motion for class certification of his California Labor Code claims pursuant to Rule 23. Defendants filed a motion to stay all class and collective action proceedings until the U.S. Supreme Court issued a decision in *Epic Systems Corp. v.*

Lewis, Case No. 16-285, and the cases consolidated with *Epic* including the Ninth Circuit's decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). The Court noted that *Epic* would address whether "an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act." *Id.* at *4. Defendants' motion to stay argued that "virtually all" of the putative class members had signed arbitration agreements that include a concerted action waiver. *Id.* at *4. Defendants thereby argued that if the Supreme Court overturned the Ninth Circuit's decision in *Morris*, it was possible that many putative class members would be precluded from participating in a class or collective action. Defendants asserted that the decision in *Epic* could have a dramatic impact on the size of the putative class/collective action in this case. *Id.* at *8. Plaintiff argued that Defendants have not shown that any class members were subject to binding arbitration agreements, because Defendants relied on only a "hearsay" declaration that does not attach any signed, dated agreements. *Id.* at *8-9. Even if Defendants' evidence was accepted, Plaintiff claimed that a stay was inappropriate because any further delay in this case would affect the rights of the putative class. The Court noted that in similar cases, case law authorities had divided over whether to grant stays pending a decision in *Epic*. However, under the particular circumstances of this case, the Court found that a stay was appropriate because two preliminary legal issues must be resolved before the propriety of class and collective certification can be determined, including: (i) whether the employees of non-party ImageFIRST entities were properly part of the putative class; and (ii) whether the alleged arbitration agreements are enforceable, and if so, how many putative class members signed concerted action waivers. *Id.* at *10. The Court concluded that it would be inefficient to proceed to the certification stage until these two issues are resolved, and thereby granted Defendants' motion to stay in part. The Court noted that the stay would not be unduly long, as *Epic* will be heard in the fall of 2017 and decided by early 2018. *Id.* at *12-13. Moreover the Court determined that the case can continue to proceed in a limited fashion. The Court ordered that while *Epic* is pending, Plaintiff could obtain discovery on his "joint employer" theory and move for summary judgment on the issue. *Id.* at *13. The Court found that this would allow it and the parties to therefore have clarity as to which ImageFIRST entities may be considered to be an "employer" for purposes of Plaintiff's FLSA claims. Accordingly, the Court granted Defendants' motion to stay the proceedings pending the ruling in *Epic* in part.

***Hernandez, et al. v. Sephora,* 2017 U.S. Dist. LEXIS 35758 (N.D. Cal. Mar. 13, 2017).** Plaintiffs brought a putative class and collective action alleging that Defendant required employees to perform work without proper compensation in violation of state and federal law. Plaintiffs asserted one claim under the FLSA and nine claims under California state law. Plaintiffs subsequently discovered that there were two prior-filed class actions pending in state court that involved overlapping California state law claims. Plaintiffs, therefore, voluntarily dismissed their California claims and re-filed them in state court. Defendant moved to stay Plaintiffs' remaining FLSA claim. *Id.* at *2. In Plaintiffs' FLSA claim, they asserted that Defendant made its employees work off-the-clock by requiring them to submit to bag inspections after clocking-out and by requiring them to spend significant time laundering their work uniforms and applying required high levels of makeup during off hours and on breaks. *Id.* at *3. Defendant argued that the *Colorado River* doctrine – from *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and its progency – required the Court to stay Plaintiffs' FLSA claim pending the resolution of the two state court actions. The Court explained that, under the *Colorado River* doctrine, considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, may justify a stay of federal proceedings pending the resolution of concurrent state court proceedings involving the same matter. *Id.* at *5. The Court noted that the threshold for applying the *Colorado River* doctrine was whether the relevant federal and state court cases are substantially similar. *Id.* at *6. Defendant argued that the federal and state cases were substantially similar because they involved the same underlying factual issues, the same Defendant, and overlapping California class members. The Court disagreed and found that the FLSA claim and the state law claims differed in that Plaintiffs brought the FLSA claim on behalf of collective action members nationwide who worked 40 or more hours "on the books" in a given week, while Plaintiffs brought the state law claims on behalf of a putative class of California employees and sought unpaid compensation for all work performed off-the-clock. *Id.* at *4. The Court determined that, although the state court proceeding could resolve the underlying factual issues pertinent to the FLSA claim, legally those issues would have no impact on the claims of collective action members in 49 states. *Id.* at *18. Defendant suggested that this supported a partial stay of the California collective action claims alone, but the Court held that such a partial stay would do nothing to conserve judicial resources or avoid unnecessary

discovery. *Id.* at *18-19. The Court concluded that because a stay would do little to serve the purposes of the *Colorado River* doctrine and would provide Defendant a means of dismissing the potentially meritorious FLSA claims of collective action members in 49 states, a stay was not appropriate. Accordingly, the Court denied Defendant's motion to stay Plaintiffs' nationwide FLSA claim.

***Holmes, et al. v. Kelly Services, Inc.*, 2017 U.S. Dist. LEXIS 40895 (E.D. Mich. Mar. 22, 2017).** Plaintiff, a former call center agent, alleged that Defendants violated the FLSA by failing to compensate her and the other employees at her call center for all of the time they spent working. *Id.* at *1. Plaintiff filed a motion for conditional certification of a collective action pursuant to 29 U.S.C. § 216(b). *Id.* at *2. Defendants asserted that Plaintiff executed an arbitration agreement that: (i) required her to arbitrate her dispute with Defendants; and (ii) prohibited her from participating in a collective action. *Id.* at *3. According to Defendants, the Supreme Court and the Sixth Circuit were currently considering the enforceability of arbitration agreements, like the one Plaintiff signed, which purport to waive an employee's right to proceed in a collective civil action. *Id.* at *5. Defendants argued that resolution of the appeals in their favor of their position would prohibit Plaintiff from proceeding with her action and would render the conditional certification motion moot. *Id.* Defendants therefore requested that the Court stay consideration of the certification motion until after the U.S. Supreme Court and/or Sixth Circuit ruled in the appeals before them. *Id.* at *5-6. The Court concluded that a stay was not warranted and denied Defendant's motion. First, the Court determined that a stay could unfairly prejudice potential members of the collective action, as the longer the Court delayed in ruling, the more likely it was that contact information for potential members of collective could become stale. *Id.* at *6. This Court stated that this could make it impossible to inform potential collective action members about the action and their potential claims. *Id.* at *6-7. Moreover, the Court determined that if potential collective action members were not promptly informed about the lawsuit, they could lose or dispose of documentary evidence that could be useful to the prosecution of their claims. *Id.* at *7. Defendants asserted that such prejudice was merely speculative and that Plaintiff had not identified any evidence of concrete harm that members of the collective action had suffered or could suffer. *Id.* The Court stated that the stay Defendants requested could last for months, if not longer, substantially increasing the likelihood that potential members of the collective action could becoming unreachable or that relevant documents could be destroyed. *Id.* Thus, because any stay the Court entered would be lengthy, the potential for prejudice would be exacerbated. Defendants also argued that potential collective action members would not suffer any prejudice because Defendants were willing to toll the statute of limitations to ensure that no member of the collective action lost the ability to bring a claim after the Court lifted the stay. *Id.* at *7-8. The Court, however, held that this would not mitigate the risk of unfair prejudice from the loss of contact information or evidence that could result from a lengthy stay. *Id.* at *8. The Court also found that Defendants would not be unfairly burdened were the Court to deny the motion to stay, as they would only be required to brief the issue of conditional certification. *Id.* The Court further stated that even if it were to grant the Plaintiff's motion for conditional certification, Defendants found not be unfairly burdened because Defendants would only be required to produce information that Defendants already should have in their possession. Finally, the Court opined that once the membership of the collective action was notified, the Court could then stay the action in its entirety pending the decisions of the U.S. Supreme Court and/or Sixth Circuit. *Id.* at *9. The Court noted that while this procedure would cause some burden to Defendants, it did not believe that the burden was unfair when compared to the prejudice facing the potential members of the collective action. Accordingly, because the cases currently pending before the U.S. Supreme Court and Sixth Circuit addressed the enforceability of arbitration agreements, which went to the merits of Defendants' opposition to Plaintiff's claims, the Court concluded those cases should pose no bar to the Court's initial consideration of Plaintiff's certification motion. *Id.* at *11. Accordingly, the Court denied Defendant's motion to stay the proceedings.

(xxxii) Tip Pooling And Tip Credit Claims Under The FLSA

***Bergstrom, et al. v. Coco Pazzo Of Illinois, LLC*, 2017 U.S. Dist. LEXIS 43805 (N.D. Ill. Mar. 27, 2017).** Plaintiffs, a group of employees, brought a collective action alleging that Defendants failed to pay overtime and minimum wage in violation of the FLSA. The parties filed cross-motions for summary judgment disputing whether Defendants properly claimed a tip credit. The Court denied the motions. Plaintiffs contended that Defendants failed to provide Plaintiffs proper notice of the tip credit. *Id.* at *2. Defendants asserted that the FLSA directed its restrictions on the tip credit only to mandatory tip pools and that Defendants' system was voluntary, rendering the requirements inapplicable. *Id.* Defendants also contended that their notice of the credit was proper

and that managers did not participate in the tip pool. *Id.* Plaintiffs argued that Defendants did not identify any evidence demonstrating that they provided proper notice of the tip credit and that this failure invalidated the tip credit and entitled Plaintiffs to summary judgment. Defendants filed an affidavit from Defendant Weiss, Coco Pazzo's president, stating that he personally informed employees about their pay and the tip pool either during initial interviews or at run-throughs before the employees began active duty. *Id.* at *5-6. Plaintiffs argued that the Court should disregard the affidavit for purposes of their motion. Plaintiffs contended that a party opposing summary judgment cannot defeat the motion "merely by manufacturing a conflict in his own testimony by submitting an affidavit that contradicts an earlier deposition." *Id.* at *6. The Court noted that the Seventh Circuit has observed that "an affidavit can be excluded as a sham only where the witness has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact." *Id.* at *7. The Court held that the testimony cited by Plaintiffs did not provide clear answers. *Id.* at *8. The Court explained that questions about the credibility of Weiss' deposition testimony did not provide a basis for striking the similar assertions of his affidavit or for holding as a matter of law that Defendants offered no evidence that it gave notice of the tip credit. *Id.* The Court, therefore, concluded that Plaintiffs' motion for summary judgment should be denied. Defendants asserted that the FLSA's tip-pooling parameters applied only to involuntary tip pooling and that the arrangements among Defendants' employees were entirely voluntary. *Id.* at *8. The Court, however, noted that Plaintiff Bergstrom testified at her deposition that Defendants told her when she interviewed that the restaurant was a "pool house," and that she took that statement to mean that, if she wanted to work there, she had to participate in the tip pool. *Id.* at *9. Further, Weiss himself testified at his deposition that, when he referred to the tip pool arrangement as voluntary, he meant that someone who did not like it could discuss it with the other employees or look for work elsewhere. *Id.* Because the Court could point to such contradictory testimony, it found that a jury question existed, and therefore Defendants were not entitled to judgment as a matter of law on the voluntary nature of the tip pool. Defendants further contended that the floor managers who participated in the pool were "employees" for FLSA purposes rather than managers with sufficient authority to be considered "employers" whose participation invalidated the pool. *Id.* Defendants argued that managers did not have ultimate decision-making authority to hire, fire, schedule, or determine pay of employees. *Id.* at *10. However, the Court found that Plaintiffs responded with testimony indicating that managers did have some authority in these areas. The Court, therefore, decided that a genuine issue of material fact remained on whether Defendants' managers were employees for purposes of participating in the tip pool. Accordingly, the Court denied the parties' motions for summary judgment.

***Eldridge, et al. v. OS Restaurant Services, LLC,* 2017 U.S. Dist. LEXIS 75746 (M.D. Fla. May 18, 2017).** Plaintiff, a tipped employee, brought an action alleging that Defendant violated the Florida Minimum Wage Act ("FMWA") and the Florida Constitution by unlawfully applying the tip credit against the minimum wage rate paid to him for "side work" tasks in excess of 20% of his total working time. *Id.* at *2. Defendant filed a motion to dismiss, which the Court denied. Plaintiff alleged that he spent more than 20% of his workday doing non-tipped activities including bar set up, table set up, and maintenance and janitorial work. *Id.* at *3. Plaintiff asserted that Defendant should have compensated him for the full minimum wage for the time he spent performing more than 20% of his time on these non-tipped tasks. *Id.* The Court noted that the U.S. Department of Labor ("DOL") states that employees who spend more than 20% of their time performing general preparation work or maintenance are not subject to a tip credit for the time spent performing those duties. *Id.* at *6. Defendant argued that the Court should reject the DOL's 20% rule because it is not binding authority. The Court disagreed and stated that the DOL's 20% rule is highly persuasive authority. The Court further noted that other case law authorities have utilized the 20% rule because it clarifies the ambiguity contained in 29 C.F.R. § 531.56(e) "by delineating how much time a tipped employee can engage in related, non-tip-producing activity before such time must be compensated directly by the employer at the full minimum wage rate." *Id.* at *7. Accordingly, the Court denied Defendant's motion to dismiss.

***Goodson, et al. v. OS Restaurant Services*, LLC, 2017 U.S. Dist. LEXIS 71923 (M.D. Fla. May 11, 2017).** Plaintiff, a tipped restaurant employee, filed a collective action alleging that Defendant violated overtime and minimum wage provisions of the FLSA, Article X, § 24(c) of the Florida Constitution ("Article X"), the Florida Minimum Wage Act, and the Florida Wage & Hour Law ("FMWA"). Plaintiff alleged that Defendant improperly took a tip credit against Plaintiff's wages while requiring Plaintiff to spend more than 20% of his time in non-tipped work activities. *Id.* at *2. Defendant filed a motion for summary judgment, which the Court denied. The

Court stated that it must answer the administrative law question of whether the 20% Rule was entitled to deference as a permissible interpretation of the FLSA. *Id.* at *2-3. The Court explained that case law precedents in other circuits have concluded that the 20% Rule "was reasonable, persuasive, and entitled to deference." *Id.* at *8. The Court noted that this analysis of the 20% Rule has rarely been criticized, and has been relied on and cited favorably across the country. *Id.* at *9-10. The Court found that the dual job regulation – that related work must be only "occasional" and constitute only a "part of" a tipped employee's work – provided that employers may not take the tip credit when related work consumes "a substantial amount of time (in excess of 20%)" of the tipped employee's work time. *Id.* at *12. Given the ambiguity of the tip credit provisions of the FLSA and the formal steps taken in promulgating the tip credit regulations, the Court rejected Defendant's argument that the dual job regulation was not entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). The Court further determined that the 20% Rule was not "clearly erroneous" or inconsistent with the pertinent regulations. *Id.* at *13. Finally, given the long and largely undisturbed history of the tip credit regulations in general and the dual job regulation in particular, both in the case law authorities and the U.S. Department of Labor, the Court held that the 20% Rule would be entitled to deference, and therefore Defendant's motion must be denied.

***Malivuk, et al. v. Ameripark, LLC,* 2017 U.S. App. LEXIS 10261 (11th Cir. June 9, 2017).** Plaintiff, a valet driver, brought an action alleging that Defendant violated the FLSA by appropriating tips from drivers. The District Court dismissed Plaintiff's complaint, finding that Plaintiff did not allege that she was either: (i) paid less than the minimum wage; or (ii) under-compensated for overtime work, which is necessary before a party can plead a private cause of action under § 216 of the FLSA. On appeal, the Eleventh Circuit upheld the District Court's ruling. The U.S. Department of Labor ("DOL") previously promulgated 29 C.F.R. § 531.52, which declared that "[t]ips are the property of the employee whether or not the employer has taken a tip credit under [§ 203(m)] of the FLSA." *Id.* at *3. The regulation further specified that "[t]he employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in [§ 203(m)]: as a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool." *Id.* Plaintiff contended that Defendant violated this regulation, and therefore the FLSA, when it confiscated Plaintiff's tips, even if Defendant did not take the "tip credit" under § 203(m). *Id.* at *4. The Eleventh Circuit found that, as to whether an employee can utilize § 531.52 to sue an employer, an employee can launch a private action against an employer only when the FLSA authorizes such an action. *Id.* at *5. The Eleventh Circuit held that there was no statutory authority for a private suit by an employee who claims only that her tips were withheld, but who does not also allege that she received less than the minimum wage, before tips, or that she received less than she was entitled for overtime work. Section 216(b) establishes a private right of action for violations of § 206 and § 207 of the FLSA. Section 207 limits the maximum working hours an employee may work without receiving overtime compensation; here, however, Plaintiff did not assert that she was under-compensated for overtime work. Section 206 requires the payment of a minimum wage, but Plaintiff did not assert that she was paid less than the minimum wage before calculation of tips. Plaintiff's contended that Defendant constructively took a tip credit in violation of § 203(m) because it could use diverted tips to off-set business expenses, such as employee wages. *Id.* at *7. Alternatively, Plaintiff asserted that even if Defendant's actions did not constitute the taking of a tip credit, its appropriation of employee tips violated the DOL's 2011 regulation protecting an employee's right to those tips even when an employer does not take the tip credit. *Id.* at *7-8. The Eleventh Circuit rejected Plaintiff's arguments on the grounds that Plaintiff's tip-withholding claim implicated neither § 206 nor § 207, and Plaintiff could not assert a private cause of action under § 216(b). Accordingly, the Eleventh Circuit upheld the District Court's ruling.

***Marin, et al. v. Apple-Metro, Inc.,* 2017 U.S. Dist. LEXIS 165568 (E.D.N.Y. Oct. 4, 2017).** Plaintiffs, a group of restaurant servers, brought two actions alleging violations of the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") that were consolidated. Plaintiffs sought to certify two sub-classes. Plaintiffs also moved for partial summary judgment of the claims of the members of the collective action alleging that: (i) Plaintiffs were not provided with proper wage notices; and (ii) Defendants failed to pay minimum wage. *Id.* at *68. The Magistrate Judge recommended that the Court certify the two sub-classes subject to modification, and grant in part and deny in part Plaintiffs' motion for summary judgment. At the outset, the Magistrate Judge rejected Defendant's argument that the motion for partial summary judgment should be denied because claims for unpaid minimum wages and failure to provide a wage notice statement were not specifically alleged in the

complaints. The Court ruled that Defendant's answers raising affirmative defenses to the complaints indicated that it had notice of Plaintiffs' minimum wage and wage notice claims under NYLL. As to Plaintiffs' motion for summary judgment on the wage notice forms, Defendants claimed that the motion was premature as they had not taken the depositions of Plaintiffs. The Magistrate Judge rejected this argument, noting that Defendants had sole possession of the wage forms, as well as any additional forms that would demonstrate proper notice of the tip credit, so additional discovery was not needed. Plaintiffs asserted that because the wage notices failed to comply with the NYLL, Defendant was not entitled to take a tip credit. Plaintiffs argued that Defendant's notices established that Plaintiffs were not paid proper minimum wages if Defendants were not entitled to this tip credit. *Id.* at *72. The Court agreed with Plaintiffs. The Magistrate Judge ruled that summary judgment was appropriate based on Defendants' failure to provide accurate wage notice information as required by the NYLL. The Magistrate Judge reviewed Plaintiffs' wage notices and found that none of the wage notices contained the proper figures for the overtime hourly pay rate in violation of NYLL. Defendants raised the statutory the affirmative defense that they: (i) paid Plaintiffs the proper overtime rate; and (ii) reasonably believed in good faith that they provided the required notice, claiming that there was a genuine issue of material fact as to whether they could invoke the affirmative defenses. However, because the affirmative defenses became effective after each Plaintiff was hired, the Magistrate Judge concluded that the affirmative defenses did not apply retroactively. The Magistrate Judge also concluded that none of the wage notices produced by Defendants conformed to the requirements of NYLL. However, given that Plaintiffs began employment at different dates, and the NYLL did not provide a remedy for wage notice violations prior to April 9, 2011, four Plaintiffs were unable to recover damages as a matter of law. Plaintiffs who were hired after April 9, 2011, could recover if the wage notice was not proper. Thus, there was a question of fact as to when the notice was provided as to some Plaintiffs as the evidence was insufficient to determine as a matter of law that that some employees received a notice at the time of hire. Hence, summary judgment was not appropriate. However, 36 Plaintiffs were hired after April 9, 2011, and the notice that was provided to each of these Plaintiffs at the time of hire did not contain the proper overtime rate, which established Defendants' liability. *Id.* at *95. Accordingly, partial summary judgment was proper as to these Plaintiffs. Because Defendant failed to provide proper notice of a tip credit, Defendant forfeited any right to claim the tip credit, and therefore failed to pay Plaintiffs the required minimum wage. Beginning on January 1, 2011, employers seeking to take advantage of a tip credit had to provide the employee, prior to the start of employment, with written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of tip credit, if any, to be taken from the daily rate and that extra pay is required if tips are insufficient to bring the employee up to the minimum wage. *Id.* at *97. The Court granted partial summary judgment as to the minimum wage claim because Plaintiffs contended that all the information that employers were required to provide to employees to claim a tip credit needed to be in a single written notice. Defendants claimed that it placed posters in a prominent area of their restaurants containing the tip notice. *Id.* at *103. However, the Court ruled that to claim a tip credit toward the required minimum wage, a tip credit notice must include each individual employee's regular hourly pay rate, overtime hourly pay rate, the amount of the tip credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The tip credit notice must include personalized information and the Court rejected Defendant's claims of notice via posters, handbooks, and orally at orientation, as none satisfied the notice requirement. Accordingly, because Defendants were not entitled to claim a tip credit, there was no genuine issue of material fact that Plaintiffs, except for four individual Plaintiffs, were paid below minimum wage. *Id.* at *131. The Magistrate Judge recommended, except for those four Plaintiffs, that the motion for summary judgment on the minimum wage claims be granted. *Id.* at *132. The Court found that both Plaintiffs' original proposed sub-classes were "fail-safe" classes and the Magistrate Judge modified the classes. In sum, the Magistrate Judge recommended that the Court grant Plaintiffs' partial motion for summary judgment in part and deny it in part. The Court also recommended that Plaintiffs' request for class certification of the two revised sub-classes be granted.

***Marsh, et al. v. J. Alexander's*, 2017 U.S. App. LEXIS 17199 (9th Cir. Sept. 6, 2017).** Plaintiff, a restaurant employee, filed a collective action alleging the Defendant failed to pay minimum wage for time spent performing non-tipped work in violation of the FLSA. Plaintiff asserted that he was employed in dual occupation capacity and thereby subject to the minimum wage requirements of the FLSA when performing non-tipped work. The District Court dismissed the case, holding that Plaintiff had not alleged a dual occupation and that deference to the U.S. Department of Labor ("DOL") guidance underpinning his theory of the case was unwarranted. On appeal, the Ninth Circuit affirmed. The Ninth Circuit noted that under the FLSA's regulations, an individual

employed in dual occupations (one tipped and one not) cannot be paid using the tip credit for hours worked in the non-tipped occupation. The regulations clarify, however, that "such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses, as such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips." *Id.* at *7. The DOL guidance states that the tip credit may not be used if an employee spends over 20% of hours in a workweek performing duties related to the tipped occupation but not themselves tip-generating. The guidance further states that an employer also may not take the tip credit for time spent on duties not related to the tipped occupation because such an employee is "effectively employed in dual jobs." *Id.* at *9. The Ninth Circuit, however, concluded that the DOL's guidance was both inconsistent with the FLSA regulations and attempted to create a *de facto* new regulation such that it did not merit deference. *Id.* at *31. In particular, the Ninth Circuit noted the regulations' focus on dual occupations or jobs as contrasted with the DOL guidance: "instead of providing further guidance on what constitutes a distinct job, [the DOL] takes an entirely different approach; it . . . disallows tip credits on a minute-by-minute basis based on the type and quantity of tasks performed. Because the dual jobs regulation is concerned with when an employee has two jobs, not with differentiating between tasks within a job, the [DOL's] approach is inapposite and inconsistent with the dual jobs regulation." *Id.* at *29. Moreover, the Ninth Circuit found that the DOL guidance "creates an alternative regulatory approach with new substantive rules . . . [and] 'is *de facto* a new regulation' masquerading as an interpretation." *Id.* at *30. Accordingly, the Court affirmed the District Court's ruling dismissing Plaintiff's claims.

***Osman, et al. v. Grube, Inc.*, 2017 U.S. Dist. LEXIS 105276 (N.D. Ohio July 7, 2017).** Plaintiff, a server, brought an action on behalf of herself and those similarly-situated alleging that Defendant required her to perform approximately 40% of her work time performing non-tipped tasked while being paid her tipped wage in violation of the FLSA. Plaintiff asserted that Defendants violated the FLSA by taking a tip credit for significant amounts of time she spent performing untipped related and unrelated duties. Defendant filed a motion to dismiss for failure to state a claim, which the Court denied. The Court explained that that the occupation as a whole, rather that the duties performed, governs whether an employee is employed in a dual job. *Id.* at *7. The regulation does not require an employee to hold two distinct titles to be employed in a "dual job." *Id.* Instead, the Court stated that the employee must work in two distinct capacities. The Court found that previous case law, U.S. Department of Labor ("DOL") opinion letters, and the DOL's Field Operation Handbook all supported a position the "maintenance" duties not performed within the immediate vicinity and time period of tipped duties are "unrelated" duties for which the employer may not take tip credit. *Id.* at *13. Additionally, the Court determined that these sources also supported the assertion that while preparatory and maintenance duties performed within the same vicinity and time period of tipped duties are "related duties," employers may not take tip credit if they consume a "substantial amount of time." *Id.* at *14. The Court held that Plaintiff performed "maintenance" – such as taking out trash, dusting, and cleaning bathrooms, restaurant floors, and video games – in addition to untipped preparatory activities such as slicing fruit, setting up the soda machine, rolling silverware, and washing dishes. *Id.* at *14-15. The Court found that Plaintiff stated that she performed these untipped duties 40% of her work time, considered by the DOL as a "substantial amount of time" in its 1985 opinion letter. *Id.* at *16. Therefore, the Court held that both the dual jobs and substantial amount of time claims were supported by the facts of the complaint. Accordingly, the Court denied Defendant's motion to dismiss.

***Prusin, et al. v. Canton's Pearls, LLC,* 2017 U.S. Dist. LEXIS 183226 (D. Md. Nov. 6, 2017).** Plaintiff, a restaurant server, filed an action under the Fair Labor Standards Act ("FLSA"), the Maryland Wage & Hour Law ("MWHL"), and the Maryland Wage Payments and Collection Law ("MWPCL") alleging minimum wage and overtime violations. *Id.* at *6. Plaintiff moved for partial summary judgment and the Court granted the motion in part and denied it in part. Plaintiff claimed that: (i) he was not given proper notice of tip credit provisions, as required under the FLSA and the MWHL; and (ii) Defendants could not rely upon mandatory gratuities retained by Plaintiff to satisfy the minimum wage and overtime wage under the FLSA. *Id.* at *6. The Court concluded that Defendants failed to point to any evidence in support of their claim that they provided Plaintiff with notification of the tip credit and failed to sustain their burden that they had provided notice. *Id.* at *11. Defendants relied upon their display of labor law posters, which the Court found was insufficient to satisfy the notice requirement under the FLSA and the MWHL. *Id.* Accordingly, the Court ruled that Defendants were not entitled to claim a tip credit as a matter of law. *Id.* Defendants also argued that the mandatory gratuities received by Plaintiff qualified as

service charges and not tips under the FLSA. The Court rejected this argument because the service charge must have been included in Defendants' gross receipts and must have been distributed to the employees. Plaintiff presented dispositive evidence that the mandatory gratuities did not "become part of" Defendants' gross receipts and therefore did not qualify as service charges that may be used to off-set Defendants' minimum wage and overtime pay obligations. Accordingly, the Court granted Plaintiff's motion for summary judgment on his minimum wage claims under the FLSA and the MWHL. *Id.* at *26. Defendants did not dispute that Plaintiff worked overtime hours and that he was not compensated at a different rate for these hours. Defendants contended, however, that Plaintiff was exempt from the FLSA's overtime wage requirements under the retail or service establishment exemption. The Court rejected this argument because whether Defendants were entitled to the exemption turned entirely on whether the mandatory gratuities that they charged qualified as service charges under the FLSA. If so, then the charges would also qualify as commissions and therefore could entitle Defendants to use the exemption. The Court ruled that the mandatory gratuities did not qualify as service charges under the FLSA and Defendants' were not entitled to an exemption under the FLSA. Accordingly, the Court granted Plaintiff's motion for summary judgment as to the FLSA and the MWHL overtime claims. *Id.* at *28. The Court also granted Plaintiff's motion for summary judgment on the FLSA and the MWHL claims as to Plaintiff's individual employer, Defendant Hamilton, given the FLSA's expansive definition of an employer. *Id.* Because there was a genuine dispute of material fact regarding Plaintiff's proper measure of damages, the Court denied Plaintiff's motion for summary judgment as to damages. *Id.* at *40.

***Thomas, et al. v. Bayou Fox, Inc.,* 2017 U.S. Dist. LEXIS 82769 (M.D. Ala. May 21, 2017).** Plaintiffs, a group of servers, brought a collective action alleging that Defendant, a restaurant, violated the minimum wage requirements of the FLSA by taking a tip credit and requiring a substantial amount of non-tipped work. *Id.* at *3. Defendant filed a motion to dismiss, and the Court denied the motion. Plaintiffs claimed that the non-tipped work they were required to complete was compensated at $2.13 per hour, and that there was no opportunity to earn tips during the time they were performing this work because they were no longer serving customers. *Id.* Plaintiffs also alleged that they were required to perform additional "side work" while the restaurant was open that included "washing and rolling silverware, sweeping their area, cleaning tables, filling condiments, making tea, refilling ice machines, and running checkout." *Id.* at *3-4. Plaintiffs asserted that they spent more than 20% of their working time performing non-tip-producing activities. *Id.* at *4. Defendant argued that Plaintiffs failed to adequately plead an FLSA minimum wage claim because Plaintiffs did not allege that their total pay for a workweek divided by the number of hours worked was below the minimum wage of $7.25 per hour. *Id.* at *5. The Court noted that the U.S. Department of Labor's ("DOL") Field Operations Handbook ("FOH") defines the application of the dual jobs regulation, and states that employers may "take a tip credit for time spent in duties related to the tipped occupation of an employee, even though such duties are not by themselves directed toward producing tips, provided such related duties are incidental to the regular duties of the tipped employees and are generally assigned to the tipped employee." *Id.* at *8. When a tipped employee spends over 20% of her work hours in related duties, the FOH provides that the employee is entitled to the full minimum wage for those hours. *Id.* The Court stated that the dual jobs rule was created by the DOL, and its interpretation was thereby controlling unless "plainly erroneous or inconsistent with the regulation." *Id.* In this case, the Court noted that the DOL's interpretation was neither plainly erroneous nor inconsistent with 29 C.F.R. § 531.56(e). The dual jobs rule in § 531.56(e) indicates that "a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses" was still subject to the tip credit provision of the FLSA. *Id.* The Court explained that the inclusion of the words "part of her time" and "occasionally" indicated some temporal threshold under which the tip credit may still be invoked. *Id.* Because Plaintiffs alleged that they spent "in excess of 20% of their working time during a shift or week performing non-tip-producing activities" during which they were paid the tip credit wage, the Court held that Plaintiffs had stated a claim sufficient to survive a motion to dismiss. Accordingly, the Court denied Defendant's motion.

***Wilkes, et al. v. Benihana, Inc.,* 2017 U.S. Dist. LEXIS 29127 (S.D. Cal. Feb. 28, 2017).** Plaintiff, a former server, brought a class action alleging: (i) conversion; (iii) violation of § 17200 of the California Business & Professions Code; and (iii) for penalties under California's Private Attorneys General Act ("PAGA"). *Id.* at *2. The dispute stemmed from Defendant's purportedly unlawful tip-pooling policy (the "TP Policy"). Under the TP Policy, Defendant collected all tips left by customers and paid 8.5% of teppan sales to the teppan chef; 4% of sushi sales to the sushi chef; 4.5% of liquor, beer, and wine sales to the bartender; and 1% of teppan and sushi sales

to the busser. *Id.* at *3. Plaintiff alleged that the TP Policy was improper because it allowed Defendant to pay non-servers' wages using servers' tips. *Id.* Plaintiffs alleged that the TP Policy was mandatory and that Defendant promised a fixed percentage of food and beverage sales to its chefs, bartenders, and bussers; the TP Policy provided for an unlawful "tip credit" and "*de facto* tip credit" because Defendant could use tips to subsidize the sub-market wages it paid non-servers, thereby lowering its payroll expenses while still attracting and retaining qualified employees; and because of the TP Policy's structure, servers could end up with little or none of each tip, a result that was unfair, unreasonable, and contrary to Defendant's own promise that "tips left by guests should be shared in a manner that is equitable and fair to all team members participating in the guest experience." *Id.* at *5. Defendant filed a motion to dismiss, which the Court granted. As to Plaintiff's first cause of action for conversion, the Court first noted that the elements of conversion are: (i) Plaintiff's ownership or right to possession of the property; (ii) Defendant's conversion by a wrongful act or disposition of property rights; and (iii) damages. *Id.* at *10. The Court found Plaintiff failed to state a claim that Defendant violated § 351, because Plaintiff could not allege an ownership or possessory interest sufficient to support a claim for conversion. *Id.* at *11. Plaintiff further alleged that Defendant's use of the TP Policy violated § 17200 because it violated the California Labor Code. Specifically, Plaintiff argued that the TP Policy was unlawful as a tip credit scheme, a *de facto* tip credit scheme, and an unfair and inequitable tip-pooling agreement. *Id.* Defendant argued that the TP Policy was not an unlawful tip credit scheme in either sense, was reasonable and equitable, and did not serve to defraud the public. The Court noted that although Defendant's TP Policy may not be perfect, Plaintiff did not allege that it had ever left him without tips after a shift, and it did not require servers to go into their own pocket for contributions. *Id.* at *20. The Court determined that absent this sort of obvious unfairness, it was in no better position than Defendant to dictate how the TP Policy should operate, and attempting to do so would implicate serious policy concerns. *Id.* at *21. The Court held that the statutory touchstone was whether the gratuity had been paid, given to, or left for the employee or employees, and not whether the tip-pooling arrangement received all employees' approval. *Id.* at *22-23. The Court therefore stated that it should not and would not substitute its judgment for Defendant's business operation in this case. *Id.* at *23. Accordingly, the Court found that Plaintiff has failed to state a claim that the TP Policy violates the California Labor Code on the basis of unfairness. Finally, the Court held that Plaintiff's claim for PAGA penalties was derivative of his claim that Defendant violated the California Labor Code and therefore must also be dismissed. Accordingly, the Court granted Defendant's motion to dismiss Plaintiff's claims.

(xxxiii) Tolling Issues In Wage & Hour Class Actions

***Brown, et al. v. Barnes & Noble*, 2017 U.S. Dist. LEXIS 120177 (S.D.N.Y July 29, 2017).** Plaintiffs, a group of former Café Managers ("CMs"), alleged that Defendant's pay policies violated the FLSA and the New York Labor Law ("NYLL"). Plaintiffs alleged that they, and others similarly-situated, were misclassified as exempt. Plaintiffs sought recovery of unpaid overtime and other pay. Plaintiffs previously moved for conditional certification of their FLSA claim. The Court denied Plaintiffs' motion for conditional certification because Plaintiffs failed to show that CMs nationwide were similarly-situated. This Court further held that to the extent discovery revealed additional evidentiary support for the assertion that CMs nationwide were similarly-situated, Plaintiffs could renew their motion. Plaintiffs subsequently filed a motion for equitable tolling. Plaintiffs argued that they would renew their motion for conditional certification upon completion of discovery and therefore sought to toll the statute of limitations from the date Plaintiffs filed their initial motion for conditional certification on November 22, 2016, to the date the Court would rule on the renewed motion for conditional certification. *Id.* at *4. Plaintiffs argued that the statute of limitations should be tolled to avoid potential opt-in Plaintiffs' claims from expiring before they receive notice of the lawsuit. Plaintiffs argued that they meet the high standard for equitable tolling because they acted with reasonable diligence to protect the potential opt-in Plaintiffs' FLSA claims and because extraordinary circumstances existed to warrant tolling. The Court found that Plaintiffs had not, however, met their burden of demonstrating extraordinary circumstances warranting equitable tolling. *Id.* at *8. Plaintiffs offered no allegations or proof from which the Court could conclude that a reasonably prudent potential Plaintiff would not have known of his or her right to be properly classified and receive overtime pay after 40 hours. Further, because Defendant reclassified CMs from exempt to non-exempt and overtime-eligible status in October 2016, potential collective action members were arguably more likely to be on notice of a potential cause of action for past misclassification. *Id.* at *9. The Court also noted that it did not grant Plaintiffs' motion for conditional certification. Therefore, any delay in ruling on the motion did not affect any potential-opt in Plaintiffs' knowledge of the case, as notice was not authorized. *Id.* at *10. Plaintiffs also argued that Defendant could

delay discovery in order to allow the clock to run on potential opt-in Plaintiffs' claims. *Id.* at *11. The Court observed that it has made no finding that Defendant has intentionally delayed discovery. Accordingly, the Court found that Plaintiffs had not shown "rare and exceptional circumstances" preventing potential opt-in Plaintiffs from exercising their rights. *Id.* The Court therefore denied Plaintiffs' motion for equitable tolling without prejudice to renewal by any future opt-in Plaintiffs.

***Coldwell, et al. v. Ritecorp.*, 2017 U.S. Dist. LEXIS 68252 (D. Colo. May 4, 2017).** Plaintiffs, a group of pest control employees, filed a class and collective action asserting claims under the Fair Labor Standards Act and the Colorado Wage Claim Act. The Court entered a scheduling order outlining a phased discovery approach, during which a ruling on Plaintiffs' motion for conditional certification of a collective action would occur during the second phase. *Id.* at *2. Plaintiffs filed a motion for equitable tolling, requesting the Court to toll the applicable statute of limitations from the date of the scheduling order until 90 days after potential opt-in Plaintiffs received notice of the lawsuit or the Court denied notice, on the basis that potential opt-in Plaintiffs were exposed to significant prejudice and risk that their claims might expire during discovery. *Id.* at *3. Defendant argued that Plaintiffs had not demonstrated the extraordinary circumstances necessary to support application of the equitable doctrine of tolling. *Id.* at *4. The Court agreed with Defendant and found that equitable tolling was not warranted. Plaintiffs asserted that they attempted "to locate and speak with potential opt-in Plaintiffs that may qualify for the proposed collective action," but that "potential opt-in Plaintiffs do not currently have any mechanism to inform the Court of their desire to opt-in or otherwise commence their cause of action outside of filing a completely separate case on their own." *Id.* at *35-36. Plaintiffs also contended that equitable tolling would not prejudice Defendant because Defendant had been on notice since the beginning of the lawsuit that Plaintiffs were pursuing a collective action. The Court held that Plaintiffs provided no reason to support the propriety of equitable tolling other than possible prejudice associated with the delay between the filing of the complaint and the conditional certification of the action, which most FLSA Plaintiffs experience. *Id.* at *36. Accordingly, the Court concluded that equitable tolling was not appropriate and denied Plaintiffs' motion.

***Coppernoll, et al. v. Hamcor, Inc.*, 2017 U.S. Dist. LEXIS 64247 (N.D. Cal. April 27, 2017).** Plaintiff filed a class and collective action asserting claims under the Fair Labor Standards Act, the California Labor Code, and the California Business and Professions Code. Defendant moved to stay the action and compel arbitration pursuant to the arbitration sections of Plaintiff's job application agreement and employment agreement. The Court denied the motion because both parties agreed that the arbitration terms were unenforceable under *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016). Following the Supreme Court's grant of *certiorari* in *Morris*, the parties agreed to stay all class and collective claims pending the Supreme Court's ruling in *Morris*. The Court granted the parties' request, stayed the claims, and ordered the parties to provide an update on *Morris* by August 16, 2017, or when briefing was completed, whichever occurred first. Plaintiff then requested equitable tolling of the FLSA claims from the date of the Court's order of January 12, 2017, until the Court lifted the stay. The Court considered whether a stay pending Supreme Court review of controlling precedent justified equitably tolling the statute of limitations on the FLSA collective action claims. *Id.* at *4. The Court determined that the stay would prevent Plaintiff from engaging in class discovery, filing a motion for class certification, or receiving approval to send Court-approved notice of the case to potential collective action members. *Id.* As such, the Court found that potential members of the collective action were unlikely to receive notice of the pendency of the action until proceedings resumed, at which point their claims might be extinguished. *Id.* Moreover, the Court surmised that the potential collective action members presumably were subject to the same or similar employment agreement that Plaintiff signed. As the Court explained in a previous order, the collective action waiver in Plaintiff's employment agreement forced all claims to arbitration, at which point they were only permitted to proceed individually. *Id.* at *5. The Court noted that, while *Morris* awaited review, the enforceability of Defendant's collective action waiver would be uncertain, and the waiver could impede or dissuade potential claimants from seeking relief in Court. *Id.* at *6. The Court concluded that, absent tolling, potential collective action members with claims on the verge of being extinguished might have no option but to give up their day in Court and arbitrate individually. *Id.* at *9. The Court opined that it would be impractical to encourage the filing of numerous individual claims destined to be drawn through the same motion practice as Plaintiff, only to be stayed while waiting for a decision on *Morris*. The Court, therefore, granted Plaintiff's motion and equitably tolled the statute of limitations on the FLSA collective claims during the stay.

***Leiva, et al. v. GBS Towson East*, 2017 U.S. Dist. LEXIS 173678 (D. Md. Oct. 19, 2017).** Plaintiff, a group of employees, brought a collective action against Defendants alleging violation of various provisions of the FLSA, the Maryland Wage Payment and Collections Act, and Maryland Wage & Hour Law. Plaintiffs filed a motion to amend the Court's scheduling order, which the Court granted in part. Defendant consented to Plaintiffs' proposed extensions to various deadlines, and the Court granted the consensual motion. *Id.* at *2. Plaintiffs also proposed that the Court toll the statute of limitations for collective action members who are former employees of the Aberdeen restaurant by three months to account for Defendant Autry's delay in sending notice, allowing them to recover for unpaid wages and damages incurred between three years and three months prior to their opt-in date and the present. *Id.* at *3. Defendants countered that Plaintiffs failed to demonstrate that they were entitled to equitable tolling because they did not meet their burden for establishing a basis for the doctrine's application and for a willful FLSA violation that would entitle them to a three year statute of limitations, rather than a two year statute of limitations. *Id.* at *4. Furthermore, Defendants argued that a blanket tolling request extending the statute of limitations for claims against all Defendants where only Defendant Autry failed to timely produce certain information would be inequitable. *Id.* The Court noted that equitable tolling was appropriate in two circumstances, including: (i) when Plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of Defendant; and (ii) when extraordinary circumstances beyond Plaintiffs' control made it impossible to file the claims on time. *Id.* at *5. The Court explained that case law authorities have granted equitable tolling in FLSA cases where potential opt-in Plaintiffs lacked notice of the lawsuit because the employer failed to comply with its notice obligations. However, the Court further noted that case law authorities have denied equitable tolling requests on the grounds that procedural delays were not extraordinary in nature. The Court ruled that although Plaintiffs offered evidence of conduct by Defendant Autry that could support equitable tolling, given the statutory framework and the narrow circumstances under which the Fourth Circuit has permitted equitable tolling, the circumstances in this case were not "extraordinary" enough to support a general tolling of the statute of limitations. *Id.* at *5-6. Therefore, the Court denied Plaintiffs' motion as to tolling the statute of limitations, but without prejudice so that any potential Plaintiffs whose notice was delayed by Defendant Autry's actions may file a future motion for equitable tolling with the Court for its consideration.

(xxxiv) Training Time Issues In Wage & Hour Class Actions

***Otico, et al. v. Hawaiian Airlines,* 2017 U.S. Dist. LEXIS 2921 (N.D. Cal. Jan. 9, 2017).** Plaintiffs, a trainee, filed an action alleging that Defendant improperly classified her as a trainee instead of an employee during mandatory pre-employment training in violation of the FLSA and California state law. Plaintiff was accepted into a training program to become a customer service representative for Defendant. The program was ten days and consisted almost exclusively of classroom work and tours of Defendant's facilities. Employees of the company taught the trainees about FAA regulations, the computer system, and the way the company operated. Plaintiff did not provide service to Defendant's customer during the training. Plaintiff was required to take a test at the conclusion of the training period. Plaintiff subsequently passed the test, was hired, and worked a short period for Defendant before she quit. Plaintiff alleged that she was an employee under federal and California law during the training period, and that Defendant should therefore have paid her for time spend in training. Plaintiff also alleged that Defendant failed to pay her for ten minutes of time she worked on eight separate days after she completed the training program. *Id.* at *2. The parties filed cross-motions for summary judgment and the Court granted Defendant's motion as to Plaintiff's training time claims and denied both parties' motions as to Plaintiff's claim that Defendant failed to pay her for all time worked. The Court stated that the U.S. Department of Labor ("DOL") identified six criteria for deciding whether a worker crosses the line from "trainee" to "employee" within the meaning of the FLSA, including: (i) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; (ii) the training is for the benefit of the trainees; (iii) the trainees do not displace regular employees, but work under close observation; (iv) the employer that provides the training derives no immediate advantage from the activities of the trainees; (v) trainees are not necessarily entitled to a job at the conclusion of the training period; and (vi) trainees are not entitled to wages for the time spent in training. *Id.* at *3. The Court found that Plaintiff did not engage in the type of "on-the-job" training specified by the DOL, did not actually perform the work of an employee, and her training was comprised almost exclusively classroom instruction and touring of the facilities, which were precursors to performing the work of an employee. *Id.* at *5. The Court held that no reasonable juror could conclude that Plaintiff was acting as an "employee" when she took her training courses. *Id.* at *6. The Court opined that Defendant was not directly benefitting from Plaintiff's free labor, or potentially scaling back on the work of its

existing employees by using Plaintiff to perform customer service duties. Defendant was using its existing employees to teach Plaintiff how to perform the work, primarily in a classroom setting, and without Plaintiff actually doing any customer service work. *Id.* The Court found that Defendant received no direct benefit from the training, and instead trainees received the benefit of learning how to do a job they hope to obtain with Defendant. The Court held that Plaintiff therefore, was the "primary beneficiary" of the arrangement. *Id.* at *7. The Court concluded that it was not clear if Plaintiff's allegation regarding the uncompensated time was fairly included in the complaint or if Plaintiff asserted the claim on behalf of herself or a class. Accordingly, the Court denied the cross-motions for summary judgment on the remaining claim pending further discussion at a case management conference.

(xxxv) Travel Time Issues In Wage & Hour Class Action Litigation

***Abell, et al. v. Sky Bridge Resources LLC,* 2017 U.S. App. LEXIS 20642 (6th Cir. Oct. 19 2017).** Plaintiffs, a group of information technology consultants, filed suit alleging that Defendant under-compensated them for travel time in violation of their employment contracts, the FLSA, and the Kentucky Wage & Hour Act ("KWHA"). *Id.* at *2. The District Court granted Defendant's motion for summary judgment, and the Sixth Circuit affirmed in part and reversed in part. *Id.* First, the Sixth Circuit affirmed summary judgment as to most Plaintiffs' breach of contract claims. The Sixth Circuit rejected Plaintiffs' assertion that their employment agreements required Defendant to pay full wages for travel time. *Id.* at *9. The Sixth Circuit found that, although travel compensation was a vital part of Plaintiffs' employment relationship with Defendant, the agreements were ambiguous as to compensation for travel time because "hours worked" did not unambiguously include travel time. *Id.* at *13. The Sixth Circuit rejected Plaintiffs' argument that it could not consider extrinsic evidence and that any ambiguities must be construed against Defendant. *Id.* at *17. The undisputed extrinsic evidence showed that each Plaintiff worked under Defendant's travel compensation system for months or years. Prior to 2011, Defendant treated travel by car as hours worked for which Defendant paid full wages. *Id.* at *18. In 2011, Defendant changed its practice and treated travel by car as "hours traveled" for which Defendant paid half wages. *Id.* at *19. There was no evidence that Plaintiffs complained, that Plaintiffs disputed Defendant's authority to make this change unilaterally, or that Plaintiffs even knew about or relied upon the car-travel compensation policy when they signed their employment agreements. *Id.* As a result, the Sixth Circuit found powerful evidence that Defendant and Plaintiffs did not intend their employment agreements to provide full-wage compensation for travel time and it concluded that no reasonable jury could conclude that the parties intended the employment agreements to set wages for time spent traveling. *Id.* The Sixth Circuit, however, reversed the District Court's judgment as to Plaintiff Spaulding's contract claim. Plaintiff Spaulding testified that Defendant told him that it would pay him full hourly wages for travel and that Defendant in fact paid him full hourly wages for a period of time. *Id.* at *5. The Sixth Circuit, therefore, ruled that a reasonable jury could conclude that Defendant intended "hours worked" in Spaulding's contract to include travel time. *Id.* at *20. Second, Plaintiffs also argued that the District Court erred in rejecting their FLSA and KWHA claims because fact issues remained regarding whether Defendant required them to perform work while traveling. *Id.* at *21. Plaintiffs argued that they demonstrated a factual dispute as to what their normal working hours were and as to whether Defendant improperly failed to count work they performed during travel hours toward the 40-hour threshold for overtime under the FLSA and KWHA. *Id.* As to their FLSA claim, the Sixth Circuit ruled that Plaintiffs failed to raise their claim in the District Court and, therefore, waived it. As to their KWHA claim, however, the Sixth Circuit concluded that Plaintiffs did not waive their claim and it reversed the District Court's order granting summary judgment. Because the employment agreements stated that travel away from home was worktime when it cut across the employee's workday, the Sixth Circuit ruled that some travel time might be considered work time and count toward overtime calculations. *Id.* at *31. Third, Plaintiffs argued that Defendant violated the KWHA by breaching the employment agreements because Kentucky law prohibits an employer from withholding any part of an employee's agreed wages. *Id.* at *21, *35. Because it found a factual issue regarding whether Defendant breached its contract with Plaintiff Spaulding, the Sixth Circuit also found a factual issue regarding whether Defendant violated the KWHA on this theory and reversed the District Court's order granting summary judgment as to Spaulding. *Id.* at *35. Accordingly, the Sixth Circuit affirmed the District Court's order in part and reversed it in part.

***Alvarado, et al. v. Skelton*, 2017 U.S. Dist. LEXIS 104274 (M.D. Tenn. July 6, 2017).** Plaintiffs, a group of citizens of Guatemala working pursuant to the H-2B visa program, alleged that Defendants violated the FLSA by failing to compensate Plaintiffs for all hours worked, including overtime. *Id.* at *2. Plaintiffs claimed that they

regularly worked between 60 and 70 hours per week, but that Defendants compensated them for just 30 to 50 hours per week. *Id.* at *3. Defendants contended that the additional hours claimed by Plaintiffs erroneously included time that Plaintiffs spent commuting to and from work, as well as time Plaintiffs spent waiting for other crews to finish work before being transported from a jobsite back to Defendants' place of business. *Id.* at *4. Defendants contended that, although Plaintiffs regularly traveled between one and two hours to a job-site, that travel time should not be included in the calculation of time worked by Plaintiffs. *Id.* Plaintiffs filed a motion for partial summary judgment on liability as a matter of law with respect to their FLSA claims and common law breach of contract claims, which the Court granted. The Court stated that in an action to recover unpaid overtime compensation under the FLSA, Plaintiffs must prove several elements by a preponderance of the evidence, including: (i) that an employer-employee relationship existed; (ii) that the activities at issue were within the coverage of the FLSA; and (iii) that the employer failed to pay overtime wages as required by law. *Id.* at *6. Defendants conceded satisfaction of the first two elements, but disputed that they failed to pay overtime wages. Defendants argued that although Plaintiffs' workdays sometimes lasted between 10 and 13 hours, which was longer than nine hours of daily work mentioned in their contract, portions of that time did not constitute "work" covered under the FLSA. *Id.* at *7. Under the plain meaning of § 254(a) of the Portal-to-Portal Act, the Court concluded that the case turned on whether Plaintiffs were engaging in any work-related activity before arriving at their job-sites. *Id.* at *10. In support of their motion, Plaintiffs submitted employee declarations, which stated that before being transported to a job-site, they were driven from their trailer to a tool storage site where Defendants kept their landscaping tools so that Plaintiffs could "gather the required tools for that day and load them in the vehicle," and that they were taken back to the tool storage site at the end of the workday "to drop off the tools." *Id.* at *11. Defendants did not respond to these contentions. Based on these facts, the Court held that Defendants failed to provide sufficient evidence to demonstrate there were no genuine issues of material fact with respect to Plaintiffs' FLSA unpaid overtime claims. *Id.* The Court found that the uncontroverted evidence showed that the tools loaded and unloaded daily were those required for the day's job, *i.e.*, in other words, in preparation for Plaintiffs' landscaping work, which was the principal activity of the workday. *Id.* at *11-12. The Court similarly determined that there was no genuine issue of material fact as to Plaintiffs' breach of contract claim. Accordingly, the Court granted Plaintiffs' motion for partial summary judgment as to liability on Plaintiffs' FLSA claim for unpaid overtime and breach of contract claim for unpaid overtime.

***Booher, et al. v. JetBlue Airways Corp.*, 2017 U.S. Dist. LEXIS 204385 (N.D. Cal. Dec. 12, 2017).** Plaintiffs, a group of flight attendants, filed a class action asserting that Defendant's pay policies violated various provisions of the California Labor Code. Following discovery, the parties filed cross-motions for summary judgment and the Court granted in part and denied in part the motions. First, as to Plaintiffs' overtime claims, the Court rejected Defendant's argument that California labor laws did not apply to flight attendants during air travel. *Id.* at *8. Based on Defendant's flight records, Plaintiffs alleged that they worked a total of 32 days in which they flew only intra-California flights and worked over eight hours. *Id.* at *10. Defendant argued that because those records did not include in-flight geographic data, Plaintiffs failed to show the time spent flying between California airports actually occurred within the airspace above California, rather than the airspace above federal enclaves or waters. *Id.* at *11. The Court found the records provided a just and reasonable inference that Plaintiffs did work full days within California in which they were eligible for overtime compensation under California law. Accordingly, the Court held that Plaintiffs were entitled to damages on their overtime claim. Defendant argued that applying California's overtime law to flight attendants placed an undue burden on Defendant in violation of the dormant commerce clause of the U.S. Constitution. The Court determined that Defendant's argument was precluded by Ninth Circuit law because "California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents. There is no plausible dormant commerce clause argument when California has chosen to treat out-of-state residents equally with its own." *Id.* at *15. Accordingly, the Court granted Plaintiffs' motion and denied Defendant's motion with respect to the alleged waiting time penalties. Plaintiffs also alleged that Defendant's wage statements failed to meet the requirements of § 226 of the California Labor Code, because the statements only listed hours and hourly rates for in-flight time, despite Plaintiffs' on-the-ground duties. *Id.* at *16. Defendant argued that § 226 did not apply to Plaintiffs, since they principally worked outside of California during the relevant time periods. *Id.* The Court reasoned that § 226 did not apply because the evidence showed that Plaintiffs worked primarily outside of California, spending 25.4% and 16.8% of their hours working in California, and 80.4% and 90% of their workdays with some work at non-California airports. *Id.* at *19. Accordingly, the Court granted Defendant's

motion and denied Plaintiffs' motion with respect to Plaintiffs' wage statement claims. Plaintiffs also brought derivative claims under the Private Attorneys General Act ("PAGA") based on their underlying overtime and improper wage statement claims. Accordingly, the Court found that Plaintiffs' PAGA claims were viable as they related to the overtime claim, but they failed to the extent they related to the wage statements claim. The Court thereby granted in part and denied in part the parties' motions for summary judgment.

***Bridges, et al. v. Empire Scaffold, LLC*, 2017 U.S. App. LEXIS 22520 (5th Cir. Nov. 9, 2017).** Plaintiffs, a group of scaffold workers, filed a collective action alleging that Defendant failed to pay for pre-shift travel time in violation of the FLSA. Defendant filed a motion for summary judgment, which the District Court granted. On appeal, the Fifth Circuit affirmed the District Court's ruling. Defendant required its employees to take buses from its parking lot to its refinery on a first-come, first-serve basis between 5:00 a.m. and 6:15 a.m. *Id.* at *2. Defendant's policy was that an employee who missed the last bus at 6:15 a.m. would not be able to work until the next day. The bus ride to the refinery took approximately 20 to 30 minutes. Defendant did not mandate any work prior to 7:00 a.m. *Id.* at *3. The Fifth Circuit noted that the issue in this case was whether the Portal-to-Portal Act excludes the pre-shift wait time of Plaintiffs from being compensable under the FLSA. The Fifth Circuit noted that the Portal-to-Portal Act exempts employers from liability for claims based on various activities, including: (i) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform; and (ii) activities which are preliminary to or postliminary to the principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases such principal activity or activities. *Id.* at *6. The Fifth Circuit agreed with the District Court that the compensability of the pre-shift wait time under the Portal-to-Portal Act turned on whether Plaintiffs' wait time was integral and indispensable to the principal activities that they were employed to perform. Plaintiffs asserted that their principal activities included erecting and dismantling scaffolding, safety meetings, and completing joint safety analysis paperwork. *Id.* at *9-10. The Fifth Circuit held that Defendant's policy was not to begin such activities until after 7:00 a.m., during the compensated shift time. The Fifth Circuit agreed with the District Court that while reporting to the right location on time at 7:00 a.m. was intrinsic to efficiently implementing the productive work, the time spent waiting for principal activities to begin at 7:00 a.m. was not. *Id.* at *10. The Fifth Circuit explained that the waiting itself was neither tied to nor necessary to the erection and dismantling of scaffolding, which was the work that Plaintiffs were employed to perform. Accordingly, since Plaintiffs' preliminary wait time was not intrinsic to their principal activities, it was not compensable under the Portal-to-Portal Act. The Fifth Circuit therefore upheld the District Court's decision granted Defendant's motion for summary judgment.

(xxxvi) Trial And Damages Issues In FLSA Collective Actions

***Oman, et al. v. Delta Airlines,* 2017 U.S. Dist. LEXIS 2913 (C.D. Cal. Jan. 6, 2017).** Plaintiffs, a group of flight attendants, filed an action alleging that Defendant violated § 226 of the California Labor Code by failing to provide flight attendants who worked for any amount of time on the ground in California individualized wage statements disclosing the total hours worked at specific hourly rates. *Id.* at *2. The parties filed cross-motions for summary judgment, and the Court granted Defendant's motion and denied Plaintiffs' motion. Defendant contended that Plaintiffs could not be covered by §§ 226 and 204 of the California Labor Code – which provide procedural protections for wages earned under California law – when the vast majority of their work occurred in federal airspace governed by federal regulations and any work on the ground in California was *de minimis* and incidental to their work as flight attendants in the air. *Id.* at *10. Plaintiffs asserted that whenever a flight attendant flies into or out of California, their work in that pay period becomes covered by the Labor Code sections, regardless of where the flight attendant resides or is based out of, and regardless of how much time that flight attendant works on the ground in California during that pay period. *Id.* The Court focused on the purpose of § 226, *i.e.*, to give employees clarity as to how their wages were calculated, so they could verify that their wages were calculated appropriately under California law. Because the undisputed facts showed that Plaintiffs only worked a *de minimis* amount of time in California (ranging from 2.6% to a high of 14%), and in light of the nature of their work (necessarily working in federal airspace as well as in multiple other jurisdictions but during each pay period and day at issue), the Court concluded that § 226 did not apply to Plaintiffs' claims. *Id.* at *17. Further, the Court noted that Defendant was not a California-based employer and Plaintiffs explicitly disclaimed any reliance on the residence of the flight attendants, thereby strengthening the Court's conclusion.

Since the Court held that § 226 did not apply to Plaintiffs, it stated that the result for their § 204 claim was the same. Accordingly, the Court granted Defendant's motion for summary judgement and denied Plaintiffs' motion.

(xxxvii) Venue Issues In FLSA Collective Actions

***Dunne, et al. v. E.I. Du Pont De Nemours & Co*., 2017 U.S. Dist. LEXIS 163845 (W.D.N.Y. Oct. 3, 2017).** Plaintiffs, a group of workers, filed a class and collective action alleging that Defendant shortchanged them on overtime wages and failed to pay overtime wages owed to them in a timely matter in violation of the FLSA and New York state wage & hour laws. Defendant submitted that there were currently two other cases in other districts involving Defendant's employees making similar allegations about failure to calculate overtime wages properly and failure to pay overtime wages promptly. *Id.* at *2. Because one of those cases began before the instant action, and because both of the other cases were seeking certification of a national FLSA collective action for similar claims, Defendant filed motions to transfer this case and to stay the proceedings. *Id.* at *3. Plaintiffs opposed a transfer and stay, generally on the basis that they were proceeding individually for their FLSA claim and as this case was the only one of the three that contained state law claims. *Id.* Plaintiffs therefore argued that the instant matter was too different from the other two to qualify for transfer under the "first-filed rule." *Id.* The Court denied Defendant's motions, finding them premature. The Court noted that the U.S. District Court for the Eastern District of Texas would likely decide class certification within a month or two in the lawsuit before it. The Court explained that knowing first what will happen with class certification would bring clarity to Plaintiffs' situation here; without committing to any future positions, denial of certification possibly would strengthen Plaintiffs' argument to keep this case here, while a grant of certification possibly would strengthen Defendant's argument to transfer the case. *Id.* at *22. The Court held that Defendant had not shown such an urgent need to transfer that the issue could not wait a couple of months for guidance from the Eastern District of Texas. *Id.* at *23. Accordingly, the Court denied Defendant's motion to transfer venue without prejudice.

***Murica, et al. v. A Capital Electric Contractors, Inc.,* 2017 U.S. Dist. LEXIS 143089 (D.D.C. Sept. 5, 2017).** Plaintiffs, a group of employees, filed a collective action alleging that Defendants failed to pay proper overtime compensation in violation of the FLSA, the D.C. Minimum Wage Revision Act ("DCMWRA"), and the D.C. Wage Payment and Collection Law ("DCWPCL"). Defendants removed the action pursuant to 28 U.S.C. § 1441, and promptly moved to dismiss for improper venue pursuant to Rule 12(b)(3) and for failure to state a claim pursuant to Rule 12(b)(6). Defendants argued that the Court must dismiss Plaintiffs' complaint on the ground that venue was improper in the District of Columbia in accordance with 28 U.S.C. § 1391(b). Relying on § 1391(b), Defendants argued that Plaintiffs failed to allege sufficient facts to show that a substantial portion of their uncompensated work occurred in the District of Columbia. The Court found that the provision applies to "civil actions brought in district courts of the United States." However, the action was brought in the D.C. Superior Court and thereafter removed by Defendants. *Id.* at *6. The Court noted that because this was a removed action, § 1391 had no application, and instead venue was governed by 28 U.S.C. § 1441, which applies to removed actions. *Id.* That statute "expressly provides that the proper venue of a removed action is 'the district court of the United States for the district and division embracing the place where such action is pending.'" *Id.* at *6-7. Therefore, applying § 1441(a), venue was exclusively in the Court. Plaintiffs brought their claims in the D.C. Superior Court, and Defendants chose to remove the case. Under those circumstances, § 1441(a) provided Defendants with a single option, *i.e.*, to remove the case to this Court, which constituted "the district and division embracing the place where" Plaintiffs' suit was brought. *Id.* at *7. Accordingly, the Court denied Defendants' motion to dismiss for improper venue. Defendants also moved to dismiss for failure to state a claim. Defendants asserted that Plaintiffs have not adequately alleged that they were "employees" of Defendants under the FLSA or the DCMWRA. Defendants argued that Plaintiffs failed to state a claim under the D.C., Maryland, or Virginia wage payment laws because their FLSA and DCMWRA claims failed, and they had not alleged that they sustained "any unpaid wages other than unpaid overtime compensation." *Id.* The Court disagreed and found that although Plaintiff's evidence was minimal, it was sufficient to state a claim on which relief could be granted, and thus survived a motion to dismiss. Accordingly, the Court denied Defendants' motion.

(xxxviii) Willfulness In FLSA Collective Actions

***Cuahua, et al. v. Tanaka Japanese Sushi Inc.*, 2017 U.S. Dist. LEXIS 161714 (S.D.N.Y. Sept. 29, 2017).** Plaintiffs, a group of delivery workers, filed a collective action alleging the Defendants failed to pay minimum

wage for time spent performing non-tipped work, overtime wages, or spread of hours pay in violation of the FLSA and the New York Labor Law ("NYLL"). The Court issued its findings of fact and conclusions of law on whether Defendants acted in good faith, whether their violation of the labor laws was willful, and the proper measure of damages. *Id.* at *2. Plaintiffs alleged that they were hired as delivery workers but were required to spend approximately one quarter of their workday performing other tasks such as: cutting vegetables, washing dishes, carrying down and stocking deliveries in the basement, bringing up food items from the basement for the cook, washing the basement with soap and water, washing the kitchen, twisting and tying cardboard boxes, taking out garbage, and bringing down boxes of fish two to three times a week. *Id.* at *3. The record indicated that Defendant paid Plaintiffs $250 to $300 per week, and Plaintiffs typically worked 60 to 70 hours per week. *Id.* at *5-7. The Court determined that Defendants clearly violated the FLSA and the NYLL. The Court stated that to the extent Plaintiffs' allegations allowed recovery under both state and federal law, the law providing for the greatest recovery would govern the calculation of damages. *Id.* at *12. The Court explained that an employer who violates the FLSA's overtime requirements is generally liable to its employee for the employee's "unpaid overtime compensation" as well as "an additional equal amount as liquidated damages." *Id.* at *13. The Court held that there could be no dispute that Plaintiffs were entitled to unpaid compensation as a result of Defendants' failure to comply with the FLSA and NYLL. However, Defendants argued that because they acted at all times in good faith, liquidated damages should not be imposed. The Court found that Defendants failed to meet their "difficult" burden of showing they acted in good faith. *Id.* at *14. Accordingly, the Court found that Plaintiffs were entitled to liquidated damages as well. However, the Court opined that Plaintiffs failed to carry their burden to show that Defendants' actions were willful. The Court stated that Plaintiffs merely alleged in conclusory fashion that Defendants' actions were willful, which was insufficient to meet their burden. Accordingly, the Court held that the statute of limitations for the FLSA claims would be two years. The Court therefore ruled that Plaintiffs established that Defendants violated the FLSA and NYLL, and the violations were not in good faith, thereby entitling Plaintiffs to liquidated damages, but that they were not willful, thereby confining the statute of limitations to two years.

***Farrow, et al. v. Ammari Of Louisiana,* 2017 U.S. Dist. LEXIS 100989 (E.D. La. June 29, 2017).** Plaintiff, a waiter, filed a collective action alleging that Defendant failed to pay minimum wages, overtime compensation, and tips in violation of the FLSA. Plaintiff claimed that Defendant willfully violated the FLSA's minimum wage provisions by failing to keep accurate records of hours and tips, failing to inform employees that it would apply a tip credit, and not permitting employees to retain all of the tips they received. *Id.* at *2-3. Further, Plaintiff alleged that Defendant improperly calculated his overtime pay rate and had a policy of unlawfully deducting wages for mistakes and customer walkouts. Defendant filed a motion for partial summary judgment maintaining that any alleged violation was not willful and, therefore, that Plaintiff's claims should be subject to a two-year statute of limitations. The Court granted the motion in part and denied the motion in part. Plaintiff submitted declarations that stated that Defendant did not want waiters to work more than 40 hours and that Defendant instructed managers to clock-out waiters and have them complete side work off-the-clock. *Id.* at *9. Plaintiff also suggested that two separate lawsuits filed against Defendant in 2013 – *Trammell, et al. v. Ammari of Louisiana, Ltd.,* Case No. 13-CV-4583, and *Scarborough, et al. v. Ammari of Louisiana, Ltd.*, Case No. 13-CV-6196 – notified Defendant of the FLSA violations *Id.* at *10. In *Trammell*, Plaintiffs alleged that they routinely worked more than 40 hours per week without overtime compensation and received less than the federally-mandated minimum wage. In *Scarborough*, Plaintiffs similarly alleged that they were required to work in excess of 40 hours per week without proper overtime compensation. *Id.* at *11. Based on this evidence, Plaintiff insisted that Defendant had notice in 2013 of two complaints that its company-wide policy violated the FLSA, but it continued to utilize the policy as late as 2017. *Id.* at *11-12. Defendant argued that Plaintiff did not assert during his deposition or in his complaint that his claim for a willful violation of the FLSA was based on working off-the-clock. Defendant also insisted that the complaints in *Trammell* and *Scarborough* did not provide notice to Defendant of a company-wide policy that violated the FLSA because: (i) neither action resulted in a judgment that Defendant violated the FLSA; (ii) the *Trammell* Plaintiffs did not allege that they were required to work off-the-clock; and (iii) the *Scarborough* complaint was the first notice that Defendant received regarding off-the-clock work or improper overtime rates, such mistakes were rectified months earlier, and such actions contradict any allegation that Defendant willfully continued paying an improper overtime rate. *Id.* at *13. The Court concluded that, because Defendant was notified by employees in 2013 that they believed Defendant's practices violated the FLSA's overtime provisions, and Plaintiff produced recent declarations from employees claiming that they were not

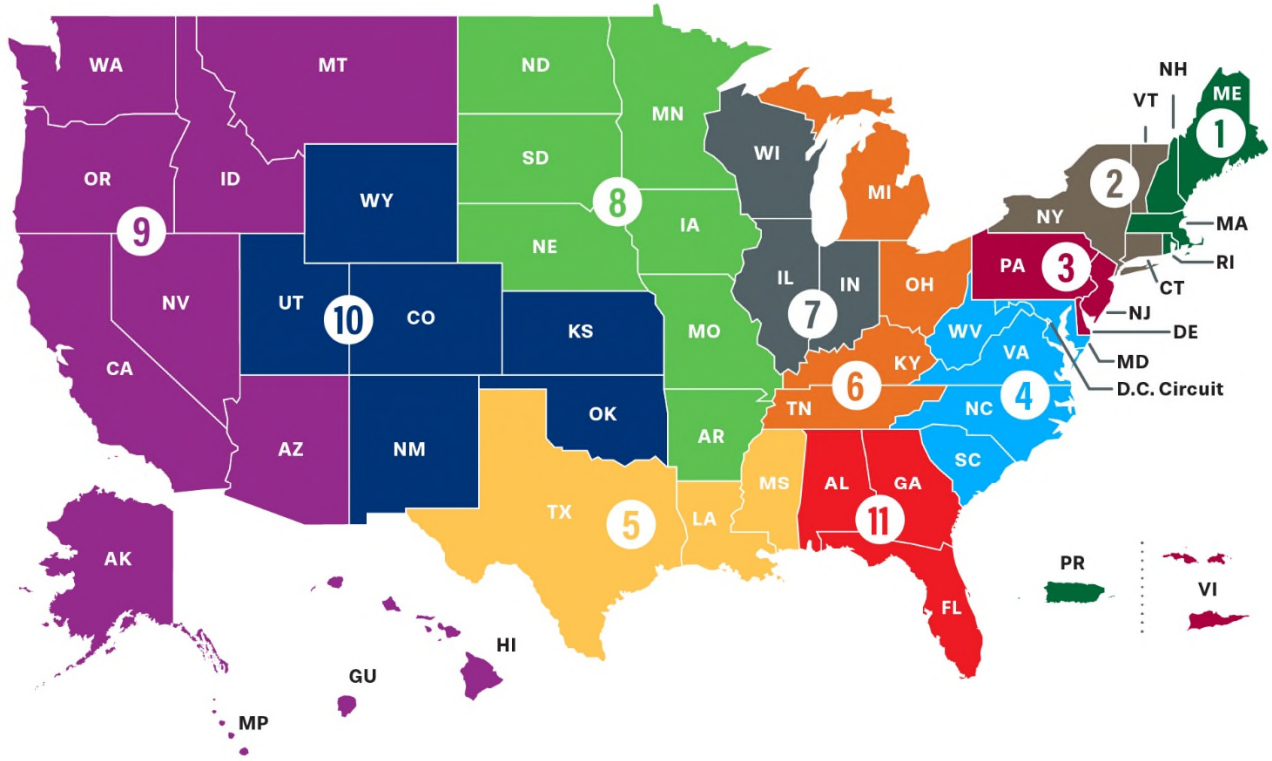
properly compensated for overtime work, Plaintiff provided some evidence that Defendant ignored complaints brought to its attention. The Court, therefore, found sufficient evidence to create a genuine issue of material fact regarding whether Defendant willfully violated the FLSA's overtime provisions. *Id.* at *14. The Court, however, held that Plaintiff failed to present any evidence to suggest that Defendant willfully made unlawful deductions, failed to maintain records of the tips received, deprived employees of tips earned, failed to provide advance notice of the tip credit, or failed to pay minimum wage. Based on this evidence, the Court concluded that Defendant was entitled to summary judgment that Plaintiff's cause of action for unpaid minimum wage was subject to the two-year statute of limitations.

VI. Significant Class Action Rulings Under The Employee Retirement Income Security Act Of 1974

Class action settlements and decisions in 2017 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	6	0	2	0	1	0	1	5	0	2	0
Certification Motions Denied	0	1	0	1	1	0	0	1	0	0	1	0

Total: 17 Granted / 5 Denied

A. Cases Certifying Or Refusing To Certify ERISA Class Actions

(i) First Circuit

No reported decisions.

(ii) Second Circuit

***Barnes Group, Inc., et al. v. International Union United Automotive Aerospace & Agricultural Implement Workers Of America*, 2017 U.S. Dist. LEXIS 59761 (D. Conn. April 19, 2017).** Plaintiff negotiated with Defendant over changes to medical benefits for certain retirees who were not covered by a prior class action settlement. Following these negotiations, Defendant determined that it could not implement the changes because it was concerned that its authority to do so was ambiguous. Plaintiff sought a declaratory judgment that the UAW and its affiliated locals had authority to agree to the negotiated changes for affected class members. The parties filed a joint motion to certify a stipulated class for the applicable retirees. The Court granted the motion and certified the class. As to numerosity, the Court held that the class had approximately 640 people, well over the 40-member threshold of impracticable joinder identified by the Second Circuit. The Court also noted that joinder was impracticable because class members lived in 22 different states. As to commonality and typicality, the Court stated that those requirements were met because Plaintiff sought a declaratory judgment that would allow the negotiated changes to apply equally to all class members, and evidence from the class members themselves demonstrated that they were similarly-situated. The Court concluded that the class representatives were adequate because all class members had signed "nearly identical" collective bargaining agreements and all class members had the same interest in protecting against changes to the collective bargaining agreements. As to the Second Circuit's "ascertainability" requirement, the Court opined that the parties could identify the class members from their respective records. Finally, as to Rule 23(b), the Court held that the class could be certified under Rule 23(b)(1)(A) because Plaintiff sought declaratory relief.

***Caufield, et al. v. Colgate-Palmolive Co.*, 2017 U.S. Dist. LEXIS 118022 (S.D.N.Y. July 27, 2017).** In this class certification decision, the Court granted certification to a group of pension plan participants and beneficiaries who asserted denial of benefits claims against Defendants based on their allegedly erroneous calculation of benefits. Neither numerosity nor commonality were in dispute. *Id.* at *9-10. Plaintiffs proposed a class of approximately 1,200 people, whose claims turned on whether Defendants erred in calculating benefits under the plan. *Id.* Defendants argued against typicality, asserting that the proposed class representative was not adequately motivated to pursue each of the alleged calculation errors, because the complaint focused on one error more than the other three asserted. *Id.* at *11. The Court rejected this argument, finding that where Defendants determined benefits using a "better of two" formulas approach and the alleged errors impacted each formula differently, the class representative's desire to maximize her benefits would incentivize her to investigate each error. *Id.* The Court also rejected Defendants' arguments based on the statute of limitations, noting that even though the proposed class representative failed to file suit within 180 days of the administrative denial, they forestalled a limitations claim by pleading a colorable argument for waiver of the limitations period. *Id.* at *12-13. The Court was also unpersuaded that the proposed class representative was "inadequate" because she could "not understand the case" and "deferred to her lawyer." *Id.* at *13-14. The Court found that the proposed representative had sufficient general knowledge of the claims. The Court reasoned that a non-lawyer would have difficulty answering questions about the technical issues in the case. *Id.* at *14. Combined with a lack of a conflict of interest between the proposed representative and the proposed class, the Court ruled that the adequacy requirement was satisfied. *Id.* Having determined that Rule 23(a) was satisfied, the Court examined certification under Rule 23(b). Defendants argued that the class could only proceed under Rule 23(b)(3) because Plaintiffs sought monetary benefits. The Court disagreed on the grounds that monetary benefits were incidental to the actual relief requested (*i.e.*, determination of the appropriate method for calculating benefits). *Id.* at *16. The Court opined that certification was appropriate under Rule 23(b)(1)(A) to avoid inconsistent rulings, noting that: "[t]he language of sub-division (b)(1)(A), addressing the risk of 'inconsistent adjudications,' speaks directly to ERISA suits, because Defendants have a statutory obligation, as well as a fiduciary responsibility, to 'treat the members of the class alike.'" *Id.* at *14-15. Finally, the Court found that the proposed class representative had standing to pursue claims for the entire class because all class members' benefits were determined under the same calculation formulas, and thus all members could claim to be injured by the same calculation errors. *Id.* at *17-18.

In Re JP Morgan Stable Value Fund ERISA Litigation*, 2017 U.S. Dist. LEXIS 59264 (S.D.N.Y. Mar. 31, 2017*). Plaintiffs, a group of investors, brought a class action alleging that Defendants breached their fiduciary duties and engaged in transactions prohibited by the ERISA. Plaintiffs invested in J.P. Morgan's ("JPM") 401(k) retirement plans, each overseen by a different employer plan sponsor, and allocated a portion of their retirement

savings through the plans into Stable Value Funds sold or managed by JPM. *Id.* at *2-3. Plaintiffs alleged that Defendants violated the ERISA by breaching their fiduciary duties when they caused the Stable Value Funds to invest in the Intermediate Bond Fund ("IBF") and the Intermediate Public Bond Fund ("IPBF"). *Id.* at *3. Plaintiffs' argument rested on their financial losses due to JPM's imprudent investment strategies resulting in a below average decline in market value. *Id.* at *9. Plaintiffs sought to certify one class and two sub-classes. Plaintiffs' proposed class included all participants and beneficiaries of the ERISA plans that were invested in the Stable Value Fund between January 1, 2009 and December 31, 2010 whose fund under-performed. *Id.* at *10-11. The first proposed sub-class, the "SAIF sub-class," was limited to plans invested in the JPM Stable Asset Income Fund ("SAIF") and the second sub-class, the "ACSAF sub-class," was limited to those plans invested in the American Century Stable Asset Fund ("ACSAF"). *Id.* Under Rule 23(a)'s numerosity requirement, both the class and sub-classes included thousands of participants and thus meet numerosity. Defendants attempted to oppose the commonality and typicality requirement by arguing that "the challenged investments predate certain Stable Value Funds" and that the funds must be evaluated on a fund-by-fund basis. *Id.* at *22-23. The Court was unpersuaded by Defendants' argument and found commonality and typicality were established by a preponderance of the evidence. *Id.* at *27-28. The Court reasoned that although there were differences in guidelines and risk-return profiles, such differences were irrelevant when the common thread linking the claims were the investments in IBF and IPBF. *Id.* at *27. As to the adequacy requirement, Defendants acknowledged that the named Plaintiffs each invested in a JPMC Stable Value Fund that was invested in IBF or IPBF during the relevant time period, but argued that the named Plaintiffs were inadequate class representatives because intra-class conflicts existed regarding: (i) the periods that optimized the alleged damages; and (ii) the fact that some putative class members were "winners" and others were "losers." *Id.* at *28-29. The Court rejected the first argument by relying on Ninth Circuit precedent that established that class certification is not precluded when issues involve periods of differing preferred damages. *Id.* The Court found that Defendants' second argument was moot because the classes only included participants whose investments under-performed. *Id.* at *30. Further, Defendants argued against adequacy because of affirmative defenses including statute of limitations and "releases pursuant to a settlement agreement as to certain named Plaintiffs." *Id.* at *30-31. The Court held that the affirmative defenses raised were not fundamental and could be addressed through sub-classes. *Id.* at *31. The Court further determined that Plaintiffs met the ascertainability requirement because Plaintiffs calculated damages from the same benchmark. *Id.* at *34-35. The Court opined that Plaintiffs met the predominance requirement with the theory of liability premised on allegedly imprudent investments common to the putative class members. Defendants also argued that Plaintiffs failed to demonstrate that causation could be proved on a class-wide basis and instead required a fund-by-fund analysis. The Court reasoned there was a causal link between the alleged breaches of fiduciary duties and the under-performance of the fund related to the objective benchmark. *Id.* at *42. The Court further held that a single class action was more judicially economical than having 300 plan fiduciaries bring claims. *Id.* at *45-46. Thus, the Court granted certification of the proposed class and sub-classes.

***Meidl, et al. v. Aetna, Inc.*, 2017 U.S. Dist. LEXIS 70223 (D. Conn. May 4, 2017).** In this ERISA class action, the Court certified a class of more than 1,000 insureds who received transcranial magnetic stimulation ("TMS") therapy for depressive disorders. Plaintiffs alleged that Defendant breached its ERISA fiduciary duties by denying claims for TMS coverage based on a clinical policy bulletin that categorized TMS as an experimental procedure. Plaintiffs sought reprocessing of the TMS claims and an order permanently enjoining Defendant from treating TMS as experimental. The Court granted the motion for class certification and certified the class to the extent that it sought an order forcing Defendant to reprocess individual claims for TMS coverage. However, the Court found that the named Plaintiff lacked standing to seek a remedy prohibiting Defendant from denying coverage in the future. The Court stated that the requirements for class action status were met because the proposed class members sought common relief for the same injury, *i.e.*, the reprocessing of their previously denied claims for coverage. That was true even though the class members participated in different health plans and received coverage denials on different dates. The Court found that class certification was appropriate under the requirements of Rule 23(b)(1)(A) because, where all putative class members' plans prohibited coverage for experimental treatments, separate actions challenging the determination that TMS was experimental could lead to inconsistent results. The Court also ruled that class certification was appropriate under Rule 23(b)(2) because injunctive relief ordering Defendant to reprocess the class' TMS claims would be appropriate respecting the class as a whole.

***Moreno, et al. v. Deutsche Bank American Holding Corp.*, 2017 U.S. Dist. LEXIS 143208 (S.D.N.Y. Sept. 5, 2017).** Plaintiffs brought an ERISA class action alleging that through Defendants' administration of the 401(k) plan (the "Plan") at issue, Defendants breached their fiduciary duties and engaged in prohibited transactions through their offering of mutual funds affiliated with the employer, which charged allegedly excessive fees that were collected by the employer's subsidiaries. On Plaintiffs' motion for class certification, the parties did not dispute numerosity of the putative class, which included 32,000 current and former plan participants. *Id.* at *11. Defendants asserted a lack of commonality due to deviations in participants' investment decisions, but the Court disagreed on the grounds that liability was determined based on the actions of Defendants, not individual investment decisions. *Id.* at *11-14. The Court also rejected Defendants' assertion that commonality was defeated because some of the named Plaintiffs' claims might be barred by releases and the statute of limitations, since those affirmative defenses did not defeat class certification. The Court found that there were numerous common questions, including whether Defendants' process for assembling and monitoring the investment options was tainted by a conflict of interest or imprudence. *Id.* at *12. The Court held that typicality was established because Plaintiffs made similar legal arguments arising from the same course of events. *Id.* at *19. As to adequacy, Defendants argued that Plaintiffs were not adequate class representatives because they did not fully understand the case. *Id.* at *20. However, the Court found that Plaintiffs' reliance on legal experts for their technical claims was understandable, and it concluded that there was adequate representation as to the class representatives and their counsel. *Id.* Relative to the Rule 23(b)(1)(B) requirements, the Court noted that because Plaintiffs challenged the investment lineup that the Plan offered to all participants, and the record-keeping fees imposed on the Plan as a whole, Defendants' conduct was uniform as to each participant, and therefore adjudicating Plaintiffs' claims would dispose of the interests of the other participants or substantially impair their ability to protect their interests. *Id.* at *22. Defendants argued that certification under Rule 23(b)(1)(B) was improper based on the U.S. Supreme Court decisions in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), and *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338 (2011). *Id.* at *23. The Court noted that although there was a circuit split in the wake of those decisions over whether Rule 23(b)(1)(B) certification was viable for fiduciary breach cases, a majority of circuits allowed certification of such claims under Rule 23(b)(1)(B). As to *LaRue*, Defendants contended that because *LaRue* held that participants can assert an individual claim based on "fiduciary breaches that impair the value of plan assets in a participant's individual account," resolution of the named Plaintiffs' claims would not foreclose an opportunity for others to assert their claims. *Id.* at *24. However, the Court noted that Plaintiffs were not asserting claims based on Defendant's misconduct in relation to their specific account, but rather Defendants' process for selecting and retaining investment options for all plan participants. *Id.* at *24-25. Further, Defendants argued that under *Wal-Mart*, class certification was unavailable because individualized monetary claims could only be certified under Rule 23(b)(3). *Id.* However, the Court found that in contrast to *Wal-Mart*, Plaintiffs' claims were derivative in nature, not individualized. *Id.* The Court also observed that case law authorities have regularly certified classes under Rule 23(b)(1)(B) in non-limited fund situations. The Court therefore certified the class under Rule 23(b)(1)(B).

***Leber, et al. v. Citigroup 401(k) Plan Investment Committee*, 2017 U.S. Dist. LEXIS 194293 (S.D.N.Y. Nov. 27, 2017).** In this action alleging that Defendants – the fiduciaries of Citigroup's 401(k) retirement plan (the "Plan") – breached their duties of prudence and loyalty under the ERISA, the Court granted Plaintiffs' motion for class certification. Plaintiffs were three Plan participants who alleged that Defendants engaged in self-dealing and imprudent fiduciary conduct by selecting mutual funds offered and managed by Citigroup's subsidiaries, by failing to monitor the investment options they offered or to remove or replace imprudent options, and by causing the Plan to suffer losses through high fees. Plaintiffs sought to represent a class of all participants who invested in the challenged funds during the applicable statute of limitations period. After dismissing one of the named Plaintiffs on timeliness grounds, the Court found that the two remaining Plaintiffs had standing to assert their claims, despite never having invested in some of the funds at issue. Specifically, the Court found that, under Second Circuit case law authority, individual investment in Plan investment options was not necessary to establish injury-in-fact when suing derivatively on behalf of the Plan. *Id.* at *17. In addition, the Court opined that Plaintiffs satisfied the Second Circuit's class standing test, as they alleged that they personally suffered an injury-in-fact because of Defendants' conduct, and that the same concerns about that conduct was alleged to have caused injury to the other putative class members. Turning to the requirements of Rule 23(a), the Court found numerosity satisfied based on Plaintiffs' allegation that there were 189,470 participants, thousands of whom invested in the challenged funds. *Id.* at *30. While the Court found that some of the questions identified by

Plaintiffs were inadequate to establish commonality, the Court ultimately held that commonality was satisfied because there were questions about the prudence and loyalty of Defendants' conduct that were capable of class-wide resolution. *Id.* at *32. In doing so, the Court rejected Defendants' arguments that individual defenses destroyed commonality on the basis that Defendants mistakenly applied the predominance standard of Rule 23(b)(3) to their commonality challenge. *Id.* at *34. The Court further determined that Plaintiffs established typicality of their claims, because they arose from the same course of events as those of other class members and the claims were based on the same legal arguments. *Id.* at *38. The Court again rejected Defendants' arguments that Plaintiffs did not invest in all challenged funds, finding that, while Plaintiffs ultimately will have to prove causation and loss in analyses that could yield different results for each fund, the primary disputed areas of law and fact were essentially the same for all class members and were sufficient to satisfy the typicality requirement. *Id.* at *39. With respect to adequacy, the Court explained that by sticking with the case for over ten years of litigation, Plaintiffs demonstrated that they were committed to pursuing the action, and that no clear conflicts existed between their interests and those of the class. *Id.* at *43-44. Because Plaintiffs had competent and experienced counsel, the Court found the adequacy requirement to be satisfied. As to the Rule 23(b) factors, the Court held that Defendants' alleged mismanagement of the Plan was the same as to all Plan participants, such that resolution of one of their claims would necessarily affect others. Finding the case appropriate for certification under Rule 23(b)(1)(B), the Court opined that it was unnecessary to consider the alternate arguments advanced by the parties with respect to other sub-sections of Rule 23. Having found that Plaintiffs had standing and the requirements of Rules 23(a) and (b) were satisfied, the Court granted Plaintiffs' motion for class certification.

***Wood, et al. v. Prudential Retirement Insurance & Annuity Co.*, 2017 U.S. Dist. LEXIS 123128 (D. Conn. Aug. 4, 2017).** In this putative ERISA class action, the Court denied Plaintiff's motion to certify a class of benefit plan participants whose assets were invested in one of two of Defendant's guaranteed income plans. The Defendant's plans guaranteed participants' principals and accumulated interest at crediting rates set by Defendant. Plaintiff alleged that Defendant set the crediting rate below the internal rate of return on invested capital, therefore guaranteeing profits for itself regardless of plan performance. *Id.* at *2-4. Noting that Defendant did not challenge numerosity, the Court first assessed commonality. *Id.* at *6. Plaintiff first identified that whether Defendant acted as a plan fiduciary was a common question for all proposed class members, and that this question was capable of common resolution because all of the plan contracts provided for a minimum guarantee. *Id.* The Court, however, noted that answering the fiduciary question would turn on whether the Defendant's plans provided a reasonable rate of return, and the reasonableness of the return would depend on the individually negotiated terms of the contracts between the benefit plans and Defendant. *Id.* at *8. Therefore, the proposed common question was not suitable for class-wide resolution. *Id.* at *9. In addition, the Court considered Plaintiff's arguments for typicality. Plaintiff argued that her claims were typical of the class because she participated in one of the plans at issue and further argued that variations between the benefit plans did not defeat typicality to the extent that they would only affect the allocation of damages among class members rather than the fact of injury. *Id.* at *11. The Court rejected Plaintiff's position. It reasoned that the terms of the class members' plans were too varied to find in the Plaintiff's favor. *Id.* at *12. Finally, the Court addressed adequacy, and analyzed whether any conflicts might exist between Plaintiff and the benefit plans she sought to represent. *Id.* at *14. On the adequacy issue, Defendant argued Plaintiff was unfit to represent the class because she was a benefit plan participant rather than a benefit plan fiduciary. *Id.* The Court declined to hold that plan participants can never represent the interests of participants in plans of which they are not members, but found that in this case, the interests of the benefit plans may be adverse to the interest of the benefit plan participants. As a result, Plaintiff could not adequately represent the interests of the benefit plans. *Id.* at *15. The Court also found that Plaintiff could not adequately represent the proposed class because she was no longer a member of her benefit plan, and therefore lacked standing to seek prospective injunctive relief. *Id.* This fact also defeated adequacy because Plaintiff failed to demonstrate that prospective injunctive relief would "never advance the interests of any class member." *Id.* at *16. Although not required to do so in light of its negative Rule 23(a) findings, the Court proceeded to address whether the proposed class could satisfy Rule 23(b). *Id.* at *17. First, the Court determined that certification under Rule 23(b)(1) would be inappropriate because the proposed class would have included thousands of individual retirement plans with varying guaranteed minimums, crediting rates, and fees, "individual adjudications would not necessarily be dispositive of the interests of the other members." *Id.* at *18. The Court also found the proposed class too diverse for certification under Rule 23(b)(2),

reasoning that the Court would not be able to calculate the total amount of Defendant's improper profits for the entire class without individualized assessments of the substance of each plan. *Id.* at *19. The Court concluded its assessment by finding that the class could not be certified under Rule 23(b)(3) for the same reasons articulated in finding a lack of commonality. *Id.* at *20. The Court also opined that allowing the class to proceed would require individualized and fact-sensitive inquiries into thousands of plans, making class proceedings unmanageable, and thus inferior to other forms of adjudication *Id.*

(iii) Third Circuit

No reported decisions.

(iv) Fourth Circuit

***Di Biase, et al. v. SPX Corp.*, 2017 U.S. Dist. LEXIS 162465 (W.D.N.C. Sept. 30, 2017).** Plaintiffs, a group of retirees, filed suit after the Defendant announced that it was replacing their health care benefits – provided by an ERISA plan established pursuant to a settlement agreement from a prior litigation – with health care reimbursement accounts. Plaintiffs filed a motion for class certification. The Court denied Plaintiff's motion, finding that while Plaintiffs could establish Rule 23(a)(1)'s numerosity requirement, Plaintiffs could not establish the remaining requirements of Rule 23(a). As to the commonality requirements of Rule 23(a)(2), the Court found that while the lawsuit presented a common question, the question could not be resolved by a common answer. Rather, individual determinations with respect to damages for each class member would need to be made because the retirees had different benefits. The Court concluded for the same reasons that Plaintiffs could not establish typicality, because given the variety of benefits at issue, it was possible that some class members could have contrary interests in the outcome of the suit than others. Finally, as to adequacy of representation, the Court found that Plaintiffs could not establish that their interests were aligned with the rest of the class. Thus, the Court denied Plaintiff's motion and did not consider whether Plaintiffs could establish any of the requirements set forth in Rule 23(b).

***Sims, et al. v. BB&T Corp.*, 2017 U.S. Dist. LEXIS 137738 (M.D.N.C. Aug. 28, 2017).** Plaintiffs, a group of current and former participants in Defendant's 401(k) Plan (the "Plan"), filed a putative class action alleging that Defendant BB&T and other Defendants breached their fiduciary duties under the ERISA for alleged wrongdoing under the Plan, including charging excessive fees and engaging in prohibited transactions. Plaintiffs filed a motion for class certification, which the Court granted. Defendants did not contest numerosity of the proposed class, which included anywhere between 30,000 and 67,000 individuals. *Id.* at *11. As to commonality, the Court found that there were common questions as to whether Defendants were fiduciaries, the scope of the fiduciary duties, whether there was a fiduciary breach, whether Defendants engaged in prohibited transactions, and as to damages. *Id.* at *12. Defendants argued that commonalty was defeated due to intra-class conflicts, since some class members benefitted from the alleged wrongdoing depending on their investment strategy. *Id.* However, the Court found that Defendants failed to demonstrate that varying investment strategies created a conflict, much less a fundamental one. The Court observed that there was no indication that the participants who benefited from the alleged imprudent actions would have to forfeit the investment gains resulting from the alleged breaches. The Court also noted that speculative intra-class conflicts did not defeat commonality because the ultimate question would be the extent of the Plan's losses as opposed to individual losses. On the issue of typicality, Defendants argued that named Plaintiffs' claims were atypical of the class claims because the named Plaintiffs did not invest in all of the alleged imprudent funds. The Court rejected this argument, noting that the Fourth Circuit does not require that members of the class have identical factual and legal claims in all respects. *Id.* at *16. The Court reasoned that typicality was established because the theories of liability were the same among the named Plaintiffs and the class members. Defendants also challenged adequacy of representation, arguing that the named Plaintiffs lacked knowledge of the facts of the case outside of what they learned through their attorneys. *Id.* at *18. The Court did not consider this a barrier to class certification, noting that the complex nature of the claims required reliance on attorneys and hired experts, which did not make the representatives inadequate. The Court noted, however, that the behavior of the three named Plaintiffs who paid limited attention to the case, including their own interrogatories, did raise concerns. According to the Court, this did not preclude a finding of adequacy of representation because the other Plaintiffs would adequately represent the class. As to adequacy of counsel, Defendants objected to the use of two law firms, asserting that only one firm should be

appointed class counsel to prevent duplication of effort. *Id.* at *19. The Court also stated there was no reason to believe class counsel would not cooperate with each other in effectively dividing the work. *Id.* Thus, the Court found there was adequate representation. Accordingly, the Court granted Plaintiffs' motion for class certification.

***West, et al. v. Continental Automotive, Inc.*, 2017 U.S. Dist. LEXIS 87382 (W.D.N.C. June 7, 2017).** In this class action alleging that Defendants violated the ERISA by miscalculating benefits under an employee pension benefit plan for a period of time where Plaintiffs were laid off with recall rights, the Court granted Plaintiffs' motion for class certification. Specifically, the Court found that Plaintiffs demonstrated, without objections from Defendants, that their proposed class of approximately 60 members satisfied the numerosity requirement of Rule 23, and that commonality existed because the claims of Plaintiffs and the putative class members "all [arose] under the same statute, 29 U.S.C. § 1001 et seq., and the same plan document." *Id.* at *3-4. With respect to the commonality requirement, the Court further noted that all class members' claims stemmed from the theory that Defendants violated the ERISA by misinterpreting the terms of the benefit plan and improperly excluding the lay-off period in the vesting and eligibility service calculations. *Id.* at *4. The Court found that typicality was satisfied because the named Plaintiffs and putative class members presented the same factual allegations, asserted the same legal claims against the Defendants, and sought only injunctive relief. *Id.* at *4-5. Finally, the Court found Plaintiffs to be adequate class representatives because they demonstrated an absence of conflicts between their interests and the interests of the proposed class and showed a willingness to prosecute the claims, as evidenced by their participation in the discovery process. *Id.* at *6. In reaching this conclusion, the Court rejected Defendants' argument that Plaintiffs could not meet the typicality and adequacy requirements because individualized inquiries were required to determine whether Plaintiffs had filed benefits claims within the applicable limitations period. *Id.* at *8. The Court rejected this argument, noting that under Fourth Circuit precedent, the statute of limitations begins to run only when a fiduciary gives a claimant a "clear repudiation" of benefits. *Id.* Because Defendants failed to present evidence of a clear repudiation, they could not successfully assert arguments based on the timeliness of Plaintiffs' claims. *Id.* Having found the requirements of Rule 23(a) satisfied, the Court also held that Plaintiffs could maintain a class action under Rule 23(b)(1). The Court specifically found that as the case challenged the computation methodology of plan benefits, individual adjudications of the putative class members' claims could lead to conflicting interpretations of the same benefits plan and impose conflicting standards of conduct on the Defendants. *Id.* at *8. The Court therefore granted Plaintiffs' motion and certified the proposed class.

(v) Fifth Circuit

***Mallory, et al. v. Lease Supervisors, LLC,* 2017 U.S. Dist. LEXIS 70712 (W.D. Tex. Jan. 13, 2017).** Plaintiff brought a class action for alleged breaches of fiduciary duty under the ERISA. Plaintiff participated in a 401(k) plan sponsored by his employer and overseen by another company. Participants contributed between 1% and 10% of their eligible pay to the plan. The employer made matching contributions in the form of company stock. Plaintiff alleged the employer breached its fiduciary duties by failing to make timely matching contributions to the plan. Plaintiff moved under Rule 23(b)(2) to certify a class of all persons who were participants or beneficiaries of the plan during the relevant time period and who made or maintained investments in plan funds. The Magistrate Judge denied the motion. The Magistrate Judge first addressed Rule 23(a). The Magistrate Judge concluded that Plaintiff could not establish numerosity because the proposed class consisted of only 23 to 25 people who were easily ascertainable through employment records. The Magistrate Judge also addressed commonality and found common questions of: (i) whether the employer's allegedly untimely contributions breached its fiduciary duties; and (ii) whether the allegedly untimely contributions violated any of the ERISA's other provisions. The Magistrate Judge also found typicality, noting that all members of the proposed class were participants in the plan, and all suffered from the same alleged conduct by the employer. Regarding adequacy of representation, the employer argued that Plaintiff might have an opposing interest to the class because some members might have benefitted from the alleged delay in contributions. The Magistrate Judge rejected this argument as speculative, finding that the employer failed to show that any participant benefitted from the contribution delay. The Magistrate Judge further addressed certification under Rule 23(b)(2), noting that certification under that rule is only appropriate where declaratory or injunctive relief would apply equally to all class members and where any individual monetary damages were incidental to that relief. The Magistrate Judge concluded that Plaintiff failed to make this showing because he sought monetary damages that would require an individualized assessment of each participant's investment portfolio, investment decisions, the duration of

participation, and the timing of contributions in relation to lost interest due to the alleged delay. Accordingly, the Magistrate Judge held that the monetary damages at issue were not incidental because they did not flow from liability to the class as a whole. The Magistrate Judge therefore recommended that Plaintiff's motion for class certification be denied because Plaintiff failed to meet the numerosity requirement of Rule 23(a)(1) and the requirements of Rule 23(b)(2).

(vi) Sixth Circuit

***Wilson, et al. v. Anthem Health Plans Of Kentucky, Inc.*, 2017 U.S. Dist. LEXIS 572 (W.D. Ky. Jan. 3, 2017).** Plaintiffs sought class certification of all previous and current beneficiaries who participated in Anthem Health Plans of Kentucky, alleging the plan placed unlawful limits on coverage of Applied Behavior Analysis ("ABA") treatment for Autism Spectrum Disorder ("ASD") in violation of the Mental Health Parity and Addiction Equity Act ("MHPAEA") and the ERISA. *Id.* at *2-3. The Anthem Plan limited "coverage for ASD treatment to 1,000 hours per year for members ages one through their seventh birthday and 20 hours per month for members ages seven through twenty-one." *Id.* at *4. Plaintiffs alleged an unlawful dollar or hour limit policy on the treatment for ASD, including individuals who were denied coverage or reimbursement of ABA treatment for ASD on the grounds that the policy's dollar or hour limits have been exceeded. The Court determined that Plaintiff successfully established the numerosity requirement with 27 class members. *Id.* at *12. Plaintiff explained that without certification, "it is highly unlikely that other members would bring their own case or even know about Anthem's illegal benefit caps….and would avoid the filing of separate lawsuits throughout the state." *Id.* The Court agreed and noted "the core claim for each class member is essentially the same…[and] is 'a substantially more efficient use of judicial resources than joinder of the parties at the onset of the litigation.'" *Id.* at *15. As to commonality, the Court was persuaded by Plaintiff's position that "whether the MHPAEA preempts the [Kentucky] Autism Mandate and prohibits Anthem's…limits on ABA coverage" is a common issue to the class. *Id.* at *26. Turning to typicality, Defendants argued that each claim was unique to the individual member's treatment and thus not typical to the class. *Id.* at *29. Plaintiff contended that Defendant engaged in a "single course of conduct" – to cap "benefits for ABA therapy, a mental health benefit, as a treatment for ASD, a mental health condition" because Defendant "does not place corresponding limits on its coverage of medical benefits, this practice violates MHPAEA." *Id.* at *31. The Court concluded that the putative members' claim stemmed from the same legal theory typical to the class. *Id.* For the adequacy requirement, the Court held that Plaintiff had a "clear common interest with members of the proposed class; that is, she had the same benefit limits applied to her expenses for the treatment of ASD applied to her claims as other class members." *Id.* at *33. At the same time, the Court found that certification under Rule 23(b)(2) was improper because Defendant would have the right to show that cap limitations on other varieties of benefits did not constitute mental health benefits under the MHPAEA. *Id.* at *38. The Court stated that the inquiry was far too individualized for determining damages and thus not proper for certification under Rule 23(b)(2). *Id.* As to predominance, the Court determined that Defendant's "highly individualized inquiries" argument was directed toward the merits of Plaintiff's claim, and was therefore inappropriate at the certification stage. *Id.* at *43. The Court held that Plaintiff successfully alleged a strong unlikelihood for other members to discover or individually vindicate their claims and there are threshold issues common to the class, which served the superiority element. *Id.* at *47-48. Accordingly, the Court granted Plaintiff's motion for class certification.

(vii) Seventh Circuit

No reported decisions.

(viii) Eighth Circuit

***In Re Target Corp. Securities Litigation*, 2017 U.S. Dist. LEXIS 120055 (D. Minn. July 31, 2017).** The Court dismissed a putative class action brought by Plaintiffs, a group of participants in Target's 401(k) Plan. The plan was funded in part with Target stock. Plaintiffs asserted breaches of the ERISA duties of prudence, loyalty, and monitoring, based on Defendants maintaining the stock in the Plan at the time the stock value fell in connection with the failed launch of Target Canada. *Id.* at *45. Defendants argued that Plaintiffs had failed to meet their burden to plead a breach of the duty of prudence under *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). *Id.* at *47. Specifically, Defendants contended that Plaintiffs failed to plausibly allege suitable alternatives Defendants could have pursued in lieu of keeping the stock in the Plan. *Id.* Plaintiffs had pleaded several

alternatives, including, among others, opting not to include Target stock in the Plan, disclosing relevant non-public information, advising participants to diversity their holdings, and/or resigning as fiduciaries. *Id.* at *50. However, the Court rejected these premises, stating that a freeze on stock purchases might send a negative signal to the markets. The Court likewise found that a prudent fiduciary could have concluded that these alternatives would do more good than harm, and hence these "alternatives" were not viable. *Id.* at *52-53. The Court further held that Plaintiffs were impermissibly relying on hindsight when they argued that the fiduciaries should have known that Target Canada was "doomed." *Id.* at *54-56. The Court likewise dismissed Plaintiffs' claim for breach of the duty of loyalty, finding that Plaintiffs' claims were derivative of their claim for breach of the duty of prudence, and it rejected the proposition that the duty of loyalty imposes a broad duty of disclosure on corporate insiders who act as fiduciaries. *Id.* at *66. Under the misrepresentation theory, the Court concluded that Plaintiffs failed to plead any non-conclusory allegations that Defendants made improper statements while performing their fiduciary functions. *Id.* at *68. Finally, the Court dismissed Plaintiffs' claim for breach of the duty to monitor because Plaintiffs had failed to plead the requisite underlying breach of fiduciary duty. *Id.* at *70. Absent an underlying breach, there was no failure to monitor.

***Wildman, et al. v. American Century Services, LLC,* 2017 U.S. Dist. LEXIS 200574 (W.D. Mo. Dec. 6, 2017).** In this action brought by two 401(k) Plan participants alleging that Defendants breached their fiduciary duties and caused the Plan to engage in prohibited transactions in violation of the ERISA, the Court granted Plaintiffs' motion to certify a class consisting of all participants and beneficiaries of the Plan since June 30, 2010, excluding Defendants, those responsible to the Plan's investment or administrative functions, and members of Defendant Plan sponsor's board of directors. *Id.* at *4-5. Relative to the requirements of Rule 23(a), the Court found that numerosity was satisfied based on Plaintiffs' uncontested assertion that there were between 2,000 and 2,500 class members. *Id.* at *9. While characterizing the parties' arguments on the point as "sparse," the Court also found that Plaintiffs met the commonality requirement, "but minimally." *Id.* The Court criticized Plaintiffs' counsel for failing to identify the common questions in the case, but ultimately found that there were numerous such questions at issue and that answers to them would be common to all class members. *Id.* at *10-11. After characterizing the test for typicality as "not onerous," the Court also held that Plaintiffs established this requirement because Plaintiffs and the class members were all Plan participants, the alleged breaches were directed at the Plan, and Defendants failed to show that Plaintiffs would need to spend any significant time or effort on individual issues. *Id.* at *12-13. Noting that Defendants' counsel did not address the adequacy requirement separately from the points raised with respect to typicality, the Court determined that Plaintiffs had satisfied the adequacy requirement because there were no known conflicts of interest with class members, and Plaintiffs asserted that they had an interest in pursuing recovery on behalf of the Plan. *Id.* at *13. Further, the Court noted that Defendants made no challenge to the adequacy of Plaintiffs' counsel as proposed class counsel, and that they had significant experience serving as lead counsel in class actions under the ERISA. *Id.* at *13-14. Finally, the Court also concluded that Plaintiffs satisfied the requirements of Rule 23(b)(1) because individual adjudications of the claims presented would establish incompatible standards of conduct for Defendants, thereby rejecting Defendants' argument that certification of a mandatory class was impermissible where Plaintiffs seek monetary relief. *Id.* at *14. Having found that Plaintiffs satisfied all requirements of Rule 23, the Court granted Plaintiffs' motion and certified a class under Rule 23(b)(1).

(ix) Ninth Circuit

***Cryer, et al. v. Franklin Templeton Resources, Inc.*, 2017 U.S. Dist. LEXIS 150683 (N.D. Cal. July 26, 2017).** In a putative ERISA class action, the Court granted Plaintiff's motion to certify a class consisting of approximately 5,000 participants of Defendant's 401(k) plan over a 5 year period. *Id.* at *12. Given the size of the putative class, the Court found numerosity and noted Defendant had not argued to the contrary. As to commonality, Defendant had advanced three main arguments opposing commonality, including: (i) that the case required individualized analysis of participants' choices of funds, the timing of those choices, investment decisions, and the funds' relative performance; (ii) that § 502 (a)(2) claims did not qualify for class certification by default; and (iii) that the determinative question was not whether Plaintiff raised common questions, but whether they were susceptible to common proof. The Court rejected Defendant's arguments. The Court found that the named Plaintiff had identified multiple common questions of law and fact, including that all proposed class members participated in the Plan, their participation was governed by the same written document, and they were presented with the same investment options. The Court also held that the fiduciaries' alleged conflicts

of interest affected those investment options, and the allegedly excessive fees, and that the fiduciaries owed the same duty to all participants. *Id.* at *13. The Court noted that any recovery would be on behalf of the Plan as a whole, and the common focus would be on whether the fiduciaries breached their duties to the Plan by paying excessive fees and making prudent investment decisions. Defendant also argued that the named Plaintiff's claims were not typical of the proposed class, because he had withdrawn from the Plan, and would be "preoccupied with establishing the imprudence of the specific funds in which he invested" and demonstrating his losses. *Id.* The Court found that the named Plaintiff had sufficiently alleged that both he and the proposed class members were allegedly injured by the same conduct, and that Defendant failed to identify any defenses unique to the named Plaintiff. *Id.* Thus, the Court held that typicality was satisfied. The Court also rejected Defendant's challenges as to the adequacy of Plaintiff as a class representative, finding that the named Plaintiff's deposition testimony satisfied the relatively low bar of showing a basic understanding of the claims. *Id.* at *17. Having found the requirements of Rule 23(a) satisfied, the Court considered, under Rule 23(b)(1), whether separate actions would create the risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." *Id.* The Court determined that, if each of the thousands of proposed members were permitted to adjudicate their claims individually, there would be a significant risk of inconsistent judgments, which would be inconsistent with the requirement that ERISA fiduciaries treat beneficiaries consistently. *Id.* For these reasons, the Court granted Plaintiffs' motion for class certification.

***Des Roches, et al. v. California Physicians' Services*, 320 F.R.D. 486 (N.D. Cal. 2017).** In this class action, a group of insureds seeking coverage for "residential and intensive outpatient treatment for mental illnesses and substance use disorders" alleged that Defendants breached their ERISA fiduciary duties and improperly denied benefits based on Defendants' use of overly restrictive medical necessity criteria guidelines ("Guidelines"), which were incompatible with generally accepted standards, to evaluate their claims. *Id.* at 491. Plaintiffs sought injunctive relief ordering Defendants to reform the Guidelines and reprocess their claims. The Court granted Plaintiffs' motion for class certification and approved the class to seek retrospective injunctive relief, but concluded that Plaintiffs lacked standing to seek prospective injunctive relief where Defendants had discontinued use of the Guidelines. *Id.* at 511. In considering Plaintiffs' certification motion, the Court assessed whether the proposed class satisfied the requirements of Rule 23(a). Plaintiffs' proposed class exceeded 7,000 members, so the Court found, and Defendants did not contest, that Plaintiffs had established numerosity. *Id.* at 496. Turning to commonality, Plaintiffs identified as common questions of law and fact: (i) "whether Defendants were ERISA fiduciaries;" (ii) whether the Guidelines conformed to broadly accepted professional standards; (iii) whether Defendants breached their fiduciary duties by creating the Guidelines and applying them to class members' claims; (iv) whether Defendants improperly relied on the Guidelines to deny claims; and (v) whether the class was entitled to relief. *Id.* at 497. Plaintiffs established that Defendants had applied the Guidelines to all putative class members' claims and that all of the relevant plans contained a "standard definition of 'medical necessity.'" *Id.* at 498. The Court thus concluded that Plaintiffs satisfied the commonality requirement because resolving all class members' claims turned on whether the Guidelines conformed to generally accepted professional standards for determining medical necessity. *Id.* at 503. The Court rejected Defendants' arguments that Plaintiffs' claims were not typical of the class because many class members' claims were decided under different versions and varying provisions of the Guidelines. *Id.* at 504. However, the Court noted that under Ninth Circuit law, when a challenged practice affects all class members, identical injuries between the named Plaintiffs and class members are not required for typicality. *Id.* Here, Plaintiffs satisfied typicality by identifying Defendants' consideration of claims under the standards provided for in the Guidelines as a common injury. *Id.* Finally, the Court concluded that Plaintiffs satisfied the adequacy requirement. The Court reasoned that no conflicts existed where Plaintiffs, like the other putative class members, sought reprocessing of claims as a remedy. *Id.* at 505. Finding each prerequisite satisfied, the Court then assessed certification under Rule 23(b). The Court found that individual adjudications of the putative class members' claims presented a risk that different lawsuits would reach different conclusions about what the standard for determining medical necessity should require. *Id.* at 507. This outcome could put Defendants in a position of trying to comply with conflicting rulings, making certification appropriate under Rule 23(b)(1). *Id.* The Court also found that Plaintiffs' request for reprocessing, a form of injunctive relief, also made the class appropriate for certification under Rule 23(b)(2), since both within and outside of the ERISA context, "reprocessing" injunctions routinely qualify for certification under Rule 23(b)(2). *Id.* at 509. Specifically the Court found the Rule 23(b)(2) requirements were met because a

reprocessing injunction would apply to the entire class and would not require the Court to individually assess the class members' claims. *Id.* The Court thus certified the class.

***Marshall, et al. v. Northrop Grumman,* Case No. 16-CV-6794 (C.D. Cal. Nov. 2, 2017).** Plaintiffs, a group of participants in Defendant's employee pension benefits plans, filed a class action alleging that Defendant's Benefits Administration Committees failed to comply with the terms of the Administrative Services Agreements and thereby violated their fiduciary duties to operate the plan solely in the interest of plan participants in violation of the ERISA. Plaintiffs filed a motion for class certification, which the Court granted. As to the Rule 23(a) elements, the Court noted that the class was sufficiently numerous as there were at least 100,000 active participants in the plan. *Id.* at 10. Plaintiffs asserted that there were common questions on which all class members' claims depended, including: (i) whether Defendant was a fiduciary; (ii) the extent and nature of the duties Defendant's Committees owed the plan; (iii) whether Defendant's Committees breached their fiduciary duties or engaged in a prohibited transaction; (iv) whether the plan suffered losses from the breaches; (v) how to calculate plan losses; and (vi) what, if any, equitable relief should be imposed. *Id.* at 11. The Court concluded that Plaintiffs met the commonality requirement because they identified multiple questions of fact and law that were common to all plan participants. *Id.* at 12. Given that Plaintiffs' complaint specifically alleged plan-wide fiduciary breaches and prohibited transactions, the Court found that Plaintiffs met the typicality requirement. *Id.* at 14. The Court also held that Plaintiffs were adequate class representatives because they actively participated in discovery, met with counsel, sat for depositions, and monitored the proceedings in the case, and their interests were not atypical of the class. *Id.* at 18. Plaintiffs sought to certify their class pursuant to Rule 23(b)(1), or in the alternative, Rule 23(b)(3). *Id.* The Court determined that because the issue was the plan's damages, the determination must be the same for every participant and beneficiary, and forcing class members to adjudicate their claims individually would pose a significant risk of inconsistent judgments. *Id.* at 19-20. Given that Plaintiffs asserted § 502(a)(2) and (3) claims on behalf of the plan and alleged breaches of fiduciary duty that would, if proven, affect every plan participant, the Court concluded that certification under Rule 23(b)(1) was proper. *Id.* at 22. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Urakhchin, et al. v. Allianz Asset Management Of America, L.P.*, 2017 U.S. Dist. LEXIS 144369 (C.D. Cal. June 15, 2017).** Two participants in the Allianz Asset Management of America, L.P., 401(k) Savings and Retirement Plan brought a putative class action alleging breaches of fiduciary duty against Allianz and the plan's investment management committee. Plaintiffs brought suit on behalf of the plan and all similarly-situated participants, alleging that Defendants breached their fiduciary duties by: (i) selecting high-cost Allianz-affiliated investment options to benefit Allianz; (ii) failing to monitor the high fees imposed on participants; (iii) failing to investigate lower-cost investments; and (iv) retaining high-cost investment options. Based on that conduct, Plaintiffs sought relief for breach of the duties of loyalty and prudence, failure to monitor fiduciaries, and equitable relief for ill-gotten proceeds. Plaintiffs moved to certify a class of current and former plan participants. The Court determined that Plaintiffs adequately established standing. The Court agreed that numerosity was met as there were approximately 4,000 participants as of 2016, with another 1,637 who had closed their accounts. With respect to commonality, the Court was persuaded by Plaintiffs' contention that there were common questions of law or fact, including: (i) whether Defendants imprudently selected investment options for the plan; (ii) whether those options charge excessive fees compared to other options; (iii) whether Defendants managed the plan with the requisite skill, care, and prudence; and (iv) whether Defendants' actions constituted a breach of fiduciary duties. The Court found Plaintiffs' claims were typical of the proposed class because of the common allegations that the selected funds were chosen based on whether they would benefit Defendants rather than participants and that selected investment options charged higher fees than those available outside the Allianz family. The Court noted that the fact that participants may have separate accounts, invest in different funds, and obtain different returns on investment did not destroy typicality because the legal arguments to prove Defendants' liability were the same. Similarly, the fact that some participants may have profited from the selected investments options did not defeat typicality. Moreover, while Defendants argued that conflicts existed between class members based on their individualized investment options, the Court found those concerns too speculative. The Court then turned to the adequacy requirement and found that Plaintiffs showed sufficient knowledge of and participation in the case to satisfy the requirement. The Court, however, reserved judgment on whether class counsel should be appointed because Plaintiffs had requested that law firms be appointed, rather than specific attorneys. The Court reserved judgment pending submission of declarations identifying the

attorneys who were to serve as class counsel. The Court also found that Plaintiffs satisfied Rule 23(b)(1)(B) because a judgment in one individual action against Defendants in their roles as fiduciaries of the plan would necessarily affect the rights and interests of the other class members. Certification under this provision was proper because Plaintiffs sought injunctive relief and monetary relief for the plan, and not for individual participants. However, in light of the injunctive relief sought, the Court ordered that the class definition be modified. It defined Plaintiffs' proposed class under Rule 23(b)(1)(B) as only one for monetary relief. A sub-class excluding former participants was required to seek injunctive relief because those individuals were not threatened by any future breaches of fiduciary duty. Accordingly, the Court certified both a monetary relief class, and an injunctive relief class, with the latter excluding former plan participants.

***Wit, et al. v. United Behavioral Health*, 2017 U.S. Dist. LEXIS 33998 (N.D. Cal. Mar. 9, 2017).** Following an earlier decision granting Plaintiffs' motion to certify three classes in this ERISA class action and related action, the parties filed a joint motion for approval of a notice plan and to amend class definitions to provide an end date for new class members to be added. The Court granted the motion to amend the class definitions consistent with that limitation, and considered the parties' disputes regarding the form of the notices to be mailed to each class member. First, Plaintiffs asserted that Defendant's proposed notice "improperly suggest[ed] that [Plaintiffs] must prove that each class member was owed benefits." *Id.* at *11. Siding with Plaintiffs, the Court rejected Defendant's argument that the description was critical to the class member's understanding of the claims, finding that the language was potentially confusing and unlikely to aid class members' understanding of the claims, and that Defendant's proposed language regarding actual harm was inconsistent with the Court's certification order, in which the Court found that the harm alleged was procedural in nature and involved the application of faulty guidelines to claims for benefits. *Id.* at *12. Second, the Court agreed with Plaintiffs that Defendant's attempt to identify the specific remedies sought in each of Plaintiffs' claims was confusing, and was unlikely to be useful to class members. Specifically, Defendant had proposed language informing class members that the reprocessing remedy that Plaintiffs sought could result in fewer benefits than had been previously approved, and that "they may be precluded from asserting other claims that are not being pursued by the class under the doctrine of *res judicata*." *Id.* at *16. The Court rejected both arguments, finding that Plaintiffs' proposed description of the reprocessing remedy was clearer and that, under the doctrine of *res judicata*, adjudication of claims to the class would not preclude subsequent litigation of individual claims. *Id.* at *18. Finally, the Court considered the parties' dispute over the implications of remaining in the class instead of opting-out. Having certified a hybrid class action without creating separate classes differentiated by remedy sought, the Court denied Plaintiffs' request to modify the basis for certification to remove any ability to opt-out, finding that the reprocessing and surcharge remedies sought provided sound reasons to allow class members to opt-out. Despite Plaintiffs' suggestion that these remedies could be awarded on a class-wide basis, the Court concluded that there may be reasons for a class member to prefer opting-out and pursuing claims relating to the denial of benefits on an individual basis. *Id.* at *20-21. While the Court, therefore, found that neither the surcharge nor reprocessing remedies were mandatory, it determined, because of "the manageability problems (and potential confusion) that may arise from giving class members multiple options for opting-out of specific remedies, there should be only a single option offered to class members for opting-out of the case as a whole." *Id.* at *22. The Court therefore ordered the parties to meet and confer regarding a draft notice along the terms in its order.

(x) Tenth Circuit

No reported decisions.

(xi) Eleventh Circuit

***Hoak, et al. v. Plan Administrator Of The Plans Of NCR Corp.*, Case No. 15-CV-3983 (N.D. Ga. Sept. 27, 2017)**. In this putative ERISA class action, former executives who were participants in Defendant's top hat retirement plans sought class certification to pursue breach of fiduciary duty and benefit denial claims arising out of Defendant's decisions to terminate the plans and pay out participants' benefits as lump sums rather than annuities. Plaintiffs alleged the Plan Administrator inappropriately applied a 5% discount rate to the lump sum payout, which was too high. Plaintiffs also alleged the Plan Administrator illegally interpreted the terms "spouse" and "eligible spouse," resulting in inappropriate denials of benefits claims. The Court granted class certification

as to the annuity claim, finding that a sub-class should be certified, but denied class certification for the "spousal" eligibility claims. *Id.* at *20. Addressing the annuity claim, the Court found each Rule 23(a) prerequisite satisfied. A proposed class of 193 plan participants satisfied numerosity; Plaintiffs established commonality and typicality where the 5% discount rate applied to all of the putative class members' lump sum payments; and because the proposed class members all stood to benefit from the application of a lower discount rate, adequacy was satisfied. The Court held that class certification was appropriate under Rule 23(b)(2) because, when calculating the discount rate, Defendant acted on grounds that apply generally to the class. However, as to the "spousal" eligibility claim, the Court found that Plaintiffs failed to satisfy numerosity where the record identified only two possible "spouses" who had been denied benefits.

***Owens, et al. v. Metropolitan Life Insurance Co.*, 2017 U.S. Dist. LEXIS 207454 (N.D. Ga. Sept. 29, 2017).** In this putative ERISA class action, a beneficiary of an ERISA life insurance plan asserted that Defendant breached its fiduciary duties by holding life insurance payments in a retained asset account, rather than immediately disbursing those benefits to Plaintiff. Plaintiff alleged that the benefits in the account accrued interest at a rate of 0.50% while Defendant earned a higher rate on that money for its own benefit. Plaintiff alleged that this conduct violated Defendant's duty of loyalty and constituted prohibited transactions under the ERISA. Plaintiff filed a motion for class certification, which the Court granted. Plaintiff sought to represent a class of similarly-situated life insurance beneficiaries for whom a retained asset account was set up. The Court determined that Plaintiff's proposed class was ascertainable because it was adequately defined by objective criteria. Plaintiff also proposed an administratively feasible method for determining class members. As to the Rule 23(a) requirements for class certification, the Court found that numerosity was satisfied because Defendant had set up over 400,000 retained asset accounts, making joinder of all potential class members impracticable. The Court determined that the commonality requirement was met because there were questions common to each class member, including those related to Defendant's business practices, Defendant's status as a fiduciary or party in interest under the ERISA, and the amount, if any, in which Defendant was unjustly enriched through its challenged conduct. The Court also opined that typicality was met because Plaintiff's claims arose from the same acts of Defendant and were based on the same legal theory. In analyzing the adequacy prong of Rule 23(a), the Court held that this requirement was satisfied because Plaintiff's interests did not conflict with those of potential class members and because class counsel was qualified and experienced in class actions brought under the ERISA. Finding that the Rule 23(a) requirements were satisfied, the Court evaluated the class claims under Rule 23(b)(3). The Court held that Plaintiff satisfied her burden to show that common issues predominated over any potential individualized issues, including issues involving Defendant's implementation of retained asset accounts across all potential plans. The Court rejected Defendant's arguments that individual issues predominated. In particular, the Court noted that issues of state contractual interpretation would not apply because the ERISA standards were based on federal law. Similarly, there were no individualized issues to be resolved regarding plan-specific summary plan descriptions because those documents could not contradict the common language contained in the plan that Plaintiff challenged. Finally, in addressing Rule 23(b)(3)'s superiority requirement, the Court noted that where predominance is found, it would be difficult to conclude that a class action was not the superior method of adjudicating a dispute. The Court referenced its analysis on the predominance factor and concluded that a class action was the only fair method for adjudicating Plaintiff's claims. Accordingly, the Court granted Plaintiff's motion for class certification.

***Pledger, et al. v. Reliance Trust Co.,* Case No. 15-CV-4444 (N.D. Ga. Nov. 7, 2017).** Plaintiffs, a group of participants in and beneficiaries of Defendant Insperity, Inc.'s 401(k) plan, brought a putative class action alleging breach of fiduciary duty and prohibited transactions. The parties stipulated to a class under Rule 23(b)(1) that included "all participants and beneficiaries of the Insperity 401(k) plan from December 22, 2009 through September 30, 2017, excluding Defendants." *Id.* at 4. The stipulation stated that class certification was appropriate because: (i) members of the class in the thousands made joinder impractical; (ii) common questions of law and fact existed with respect to all members of the class, including whether Defendants were fiduciaries of the Plan with respect to conduct alleged, whether Defendants breached any applicable fiduciary duties or caused prohibited transactions in each respect alleged, and whether the plan suffered losses from the alleged breaches; (iii) Plaintiffs' claims were typical of the claims of the class members; (iv) Plaintiffs were committed to fairly, adequately, and vigorously representing and protecting the interests of the class; and (v) Plaintiffs' class counsel was adequate to represent the class. *Id.* The parties further stated that certification was appropriate

under Rule 23(b)(1) because the prosecution of separate actions would create a risk of inconsistent or varying adjudications. *Id.* at 5. The Court agreed that the Rule 23 requirements for class certification were satisfied. Accordingly, the Court approved the parties' stipulations and certified the proposed class.

(xii) District Of Columbia Circuit

No reported decisions.

B. Other Federal Rulings Affecting The Defense Of ERISA Class Actions

Throughout 2017, federal courts issued a wide variety of rulings on procedural and substantive matters in ERISA class action litigation. These rulings included administrative fee issues in ERISA class actions; attorneys' fees and costs in ERISA class actions; breach of fiduciary duty issues in ERISA class actions; damages issues in ERISA class actions; discovery issues in ERISA class actions; DOL and PBGC ERISA enforcement litigation; ERISA 401(k) class actions; ERISA class action litigation over retiree/employee benefits; ERISA stock drop class actions; ESOP issues in ERISA class actions; independent contractor issues in ERISA class actions; judgments in ERISA class actions; preemption, procedural, and coverage issues in ERISA class actions; and tolling, statute of limitations, and exhaustion requirements in ERISA class actions.

(i) Administrative Fee Issues In ERISA Class Actions

***Chendes, et al. v. Xerox HR Solutions*, 2017 U.S. Dist. LEXIS 172997 (E.D. Mich. Oct. 19, 2017).** Plaintiffs were participants in three Ford Motor Co. 401(k) retirement plans and Defendant provided platform and record-keeping services for the administration of those plans. Plaintiffs alleged that Defendant charged excessive fees for investment advice provided by robo-adviser Financial Engines Advisors LLC, a third-party advisor not named as a Defendant in the lawsuit. Specifically, they alleged that Defendant breached its ERISA fiduciary duties, undertook various prohibited transactions in violation of the ERISA, and failed to disclose its fee sharing arrangement under 29 C.F.R. § 2550.408b-2(c). Defendant moved to dismiss Plaintiff's first amended complaint, which the Court granted. The Court found that: (i) Defendant had no discretion over the amount of its own compensation as it related to the participants and thus was not acting as a fiduciary in collecting fees from Financial Engines; and (ii) Defendant was not a fiduciary based on a theory that it exercised control over the agreement between Ford and Financial Engines – which Plaintiffs claimed was a "plan asset" – because the agreement did not amount to a "plan asset" under the ERISA. Because Plaintiff did not plead sufficient facts to show that Defendant was a fiduciary, the Court dismissed the breach of fiduciary duty and prohibited transaction claims without prejudice. The Court also found that there was no private right of action under 29 C.F.R. § 2550.408b-2(c) and dismissed the disclosure claim with prejudice. The Court, however, gave Plaintiffs the opportunity to re-plead their breach of fiduciary duty and prohibited transactions claims.

(ii) Attorneys' Fees And Costs In ERISA Class Actions

***Thole, et al. v. U.S. Bank, National Association*, 873 F.3d 617 (8th Cir. 2017).** Plaintiffs, participants in a defined benefit pension plan, appealed the dismissal of their putative class action in which they alleged that Defendants breached their fiduciary duties and caused the plan to engage in prohibited transactions in violation of the ERISA, which resulted in the Plan suffering losses and becoming under-funded. *Id.* at 621. Defendants' original motion to dismiss Plaintiffs' complaint asserted that Plaintiffs lacked standing to bring the suit, that their claims were time-barred, and that the pleading failed to state a claim for which relief could be granted. *Id.* Although it found that the Plaintiffs had standing, as participants, to bring suit for the under-funding of Plan, the District Court granted the original motion in part, finding that the fiduciary breach claim, which challenged Defendants' decision to invest 100% of the Plan's assets in equities, was barred by the ERISA's six-year statute of repose. However, the District Court allowed Plaintiffs to proceed with their prohibited transaction claims. Defendants subsequently filed a second motion to dismiss, again asserting that Plaintiffs lacked standing, and arguing that a change in circumstances had caused the Plan to become over-funded. In response to the second motion, the District Court dismissed the action, finding that the over-funding of the Plan had mooted Plaintiffs' claims. The District Court further rejected Plaintiffs' request for attorneys' fees, finding that Plaintiffs had achieved no success on the merits, and that the change in the Plan's circumstances was not a response to the litigation. On appeal, Plaintiffs argued that the District Court erred by: (i) dismissing the case as moot; (ii)

dismissing the fiduciary breach claim on statute of limitations and pleading grounds; and (iii) denying their motion for attorneys' fees and costs. The Eighth Circuit affirmed the District Court's decision, finding that because of the Plan's over-funded status, there was no actual or imminent injury to the Plan and Plaintiffs' suit was not one for appropriate relief under the ERISA. In reaching this conclusion, the Eighth Circuit rejected Plaintiffs' argument that the issue should be determined as of the commencement of the suit, without regard to subsequent changes in circumstance. The Eighth Circuit also affirmed the District Court's denial of Plaintiffs' request for attorneys' fees, finding that, although Defendants made $311 million dollars in voluntary contributions to the Plan after the suit was commenced, the evidence before the District Court did not support the notion that the contributions were made because of the suit, nor were they made because of an order or in response to an indication that the District Court was likely to grant summary judgment to Plaintiffs. Accordingly, the Eighth Circuit affirmed the judgment of the District Court.

***Tussey, et al. v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017).** In this 401(k) fees class action, the Eighth Circuit reversed the District Court's ruling on the amount of damages owed as a result of a breach of fiduciary duty and vacated a corresponding award of attorneys' fees. Although the case originally involved many more claims, at this stage of the litigation, only one remained. Plaintiffs argued that the fiduciaries breached their duty of loyalty by deciding to replace the Vanguard Wellington Fund with investments in Fidelity's Freedom Funds out of a desire to benefit Fidelity or the plan's sponsor. The Eighth Circuit affirmed the District Court's ruling that the fiduciaries had breached their duties, but reversed the District Court's damages ruling. *Id.* at *958-59. The Eighth Circuit determined that the District Court had not performed a proper comparison between how the investments in the Freedom Funds had performed and how investments in alternative funds might have performed. The Eighth Circuit remanded the damages question with instructions for the District Court to reconsider that issue for itself, and not based upon a perception that its analysis was constrained by statements in the Eight Circuit's prior opinion in the case. In prior proceedings, the District Court had awarded more than $12.2 million in attorneys' fees for work through trial. Based upon its rulings on the initial remand, it reduced that award by $2.2 million. The District Court also awarded only two thirds of the amount of fees requested for work on the initial appeal, which totaled $900,000. Defendants argued on appeal for the second time that these awards were still too high. While the Eighth Circuit vacated and remanded the fee award for trial work, based on its remand of the underlying damage question, it did consider the fee award for appellate work. Because Defendants did not offer evidence to support alternative fee calculations, the Eight Circuit affirmed the award, finding that it was not an abuse of discretion. *Id.* at *961-62. Finally, the Eighth Circuit reversed the District Court's ruling that class representative's incentive awards should be paid by Defendants on top of other damages. Instead, the Eighth Circuit ruled that those awards should be paid out of the class' overall recovery. *Id.* at *962.

***Waldbuesser, et al. v. Northrop Grumman Corp.*, Case No. 06-CV-6213 (C.D. Cal. Oct. 24, 2017).** Plaintiffs, a group of current and former participants in the Northrop Grumman Savings Plan and Financial Security and Savings Program, moved for final approval of a class action settlement, attorneys' fees, reimbursement of expenses, and incentive awards. The Court granted Plaintiffs' motions, approving the settlement in the amount of $16.75 million for approximately 210,000 participants, and ordered payment of $5,583,333 in attorney fees, $1,159,114 in expenses, and $25,000 as an incentive award for the class representatives. The Court reasoned that it "has long been recognized that a private Plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Id.* at 2. The Court noted that it had discretion to apply the lodestar method or the percentage-of-the-fund method in calculating a fee award. First, the Court held that an attorneys' fee award of one-third of the settlement fund was appropriate in this case. In making its determination regarding the fee award, the Court considered: "(i) the results obtained for the class; (ii) the effort expended by counsel; (iii) counsel's experience; (iv) the skill of counsel; (v) the complexity of the issues; (vi) the risk of non-payment assumed by counsel; (vii) the reaction of the class; and (viii) comparison with counsel's lodestar." *Id.* at 3. The Court held that the award was appropriate because: (i) the result obtained for the class was exceptional because the attorneys were able to obtain 40% of the class' net loss, after deducting the amount class counsel requested in fees; (ii) class counsel "expended significant effort on behalf of the class in prosecuting this action" by devoting 26,000 hours of attorney, paralegal, and law clerk time, spending 11 years on the case conducting numerous litigation tasks; (iii) the firm was "highly experienced in representing Plaintiffs in class action litigation, particularly ERISA class actions" due to it investigating and preparing 401(k) fiduciary breach cases for over ten

years; (iv) "the prosecution and management of complex national class action requires unique legal skills and abilities;" (v) "ERISA 401(k) fiduciary breach class actions involve complex questions of law that have not been widely litigated to this point;" (vi) the firm assumed a great risk of non-payment and non-reimbursement of expenses by taking the case on a contingent basis; (vii) only 2 of the 300 class members that the firm had been in contact with objected to the firm's request for attorneys' fees; and (viii) it was reasonable even if the lodestar method were to be used in calculating the fees. *Id.* at 4-9. Second, the Court held that it was reasonable for class counsel to seek reimbursement of expenses in the amount of $1,159,114. The Court reasoned that reimbursement for expenses was proper because the expenses were for depositions, experts and consultants, filings, transcripts, subpoena services, mediation and settlement costs, copies, postage, phone, fax, data development and document organization, research and investigation, travel, lodging, parking, and in trial costs, which "are typically recoverable." Finally, the Court held that an incentive reward in the amount of $25,000 each for the four named Plaintiffs was proper. The Court reasoned that awarding the incentive payment was proper because most factors weighed in favor of doing so. Accordingly, the Court granted Plaintiffs' motions for settlement approval.

(iii) Breach Of Fiduciary Duty Issues In ERISA Class Actions

***Hannan, et al. v. Hartford Financial Services*, 2017 U.S. App. LEXIS 7436 (2d Cir. April 25, 2017).** Plaintiffs appealed from a District Court judgment dismissing their ERISA claims pursuant to Rule 12(b)(6) for failure to state a claim against Defendants Family Dollar Stores Inc., Family Dollar Stores Inc. Group Insurance Plan ("Plan"), and Plan Administrators (together, "Family Dollar "), and Hartford Financial Services, Inc. ("Hartford"). According to the complaint, Hartford issued a group life insurance policy to Family Dollar Stores Inc. under the Plan. The Plan automatically enrolled all employees in basic life insurance and offered them the option to purchase supplemental life insurance. Plaintiffs alleged in their complaint that they received enrollment materials representing that basic life insurance would be "non-contributory," indicating that Family Dollar would pay all costs, and supplemental life insurance would be "contributory," meaning that employees would be required to contribute toward the cost. *Id.* at *2. The enrollment materials also stated that all employees would receive basic life insurance "at no cost" and that the optional supplemental life insurance premiums were "surprisingly affordable" and "without high cost." *Id.* at *2-3. Plaintiffs claimed this information materially misled them into thinking supplemental life insurance would be a prudent investment. Plaintiffs alleged that Defendants breached their fiduciary duties and engaged in a prohibited transaction when they engaged in a "cross-subsidization" scheme to charge supplemental life insurance premiums at prices higher than warranted, that Family Dollar applied part of the employee-paid premiums toward its cost for basic life insurance, that Family Dollar benefited by avoiding the full cost of basic life insurance, that Hartford benefited by receiving the insurance contract, and that employees who bought supplemental life insurance were overcharged for premiums. *Id.* The District Court dismissed Plaintiffs' claims. On appeal, the Second Circuit affirmed on the basis that the complaint failed to plausibly allege that Hartford was a fiduciary under the ERISA, that Family Dollar made any fraudulent misrepresentations or omissions, or that Defendants engaged in a prohibited transaction. First, as to whether Hartford was a fiduciary, the Second Circuit reasoned that an "entity that negotiates a contract with an ERISA benefits plan at arm's length and has no other relationship to the plan, for example, is not a fiduciary with respect to the selection of the contract terms governing the plan, . . . because it "has no authority over or responsibility to the plan and presumably is unable to exercise any control over the Plan trustees' decision whether or not, and on what terms, to enter into an agreement with it." *Id.* at *6. The Second Circuit concluded that Plaintiffs' complaint identified only negotiations conducted by Hartford and did not allege that Hartford had or exercised any discretionary authority over the Plan or its assets, and therefore was insufficient to establish that Hartford was a Plan fiduciary. As a result, the Second Circuit also affirmed the dismissal of the related co-fiduciary claim against Family Dollar. As to the claim of material misrepresentations or omissions against Family Dollar, the Second Circuit concluded that the "non-contributory" statement was not false or misleading because Plaintiffs did not incur any costs for receiving basic life insurance. *Id.* at *8-9. The Second Circuit also reasoned that Family Dollar's failure to disclose that it would apply part of the employee premiums for supplemental life insurance toward its own cost for basic life insurance was not misleading because the enrollment materials accurately disclosed the cost that employees were required to pay for supplemental life insurance, and there was no obligation to disclose how premium proceeds would be applied. The Second Circuit further concluded that "surprisingly affordable" and "without high cost" statements were not false or misleading because the enrollment materials did not describe the cost of supplemental life insurance as involving favorable or below-

market rates. *Id.* at *9. Finally, the Second Circuit held that the complaint failed to state a prohibited transaction claim against Family Dollar because working to minimize its cost of providing employees with basic and supplemental life insurance did not constitute a transfer for its own benefit or self-dealing.

***Henderson, et al. v. Emory University,* 2017 U.S. Dist. LEXIS 142411 (N.D. Ga. May 10, 2017).** Plaintiffs, on behalf of participants and beneficiaries of employer-sponsored retirement plans (the "Plans"), alleged that the Plans' fiduciaries breached their fiduciary duties under the ERISA and engaged in prohibited transactions. Defendants moved to dismiss the six-count complaint. The Court granted the motion in part and dismissed it in part. In Count V, Plaintiffs plead the Plans' investment management fees were excessive and that the selection process for certain investment options was imprudent. Defendants argued the Court should dismiss this claim as the allegations did not evince that the fees were excessive nor that it was imprudent to retain the allegedly underperforming funds. The Court found the allegations that certain plan options charged excessive fees was sufficient to survive a motion to dismiss. The Court also allowed to survive the claim that the selection of funds offered by the Plans' record-keepers was imprudent and flawed, and the claim that the plans imprudently retained under performing funds after periods of underperformance and higher costs compared to similar options. The Court dismissed the claim that it was imprudent for the Plans to maintain 111 investment options, noting that "having too many options does not hurt the Plans' participants, but instead provides them opportunities to choose the investments that they prefer." *Id.* at *8. Count III alleged that the Plans charged unreasonable administrative fees. The Court denied this portion of the motion. It held that Plaintiffs stated a claim by alleging "the absence of competitive bidding for the record-keeping services was imprudent" and by alleging that Defendants failed "to monitor and mak[e] sure that the record-keepers charged appropriate fees and did not receive overpayments for their services." *Id.* at *19. Count I challenged the prudence of a specific investment option in the Plans. The Court granted Defendants' motion to dismiss this count on timeliness grounds, but only to the extent it raised challenges as to this investment option from over six years before the filing of the lawsuit. The Court allowed to proceed as timely any claim within the past six years that challenged the prudence of the decision to maintain this option in the Plans. The Court last addressed Counts II, IV and VI, which alleged that Defendants acted disloyally and engaged in prohibited transactions by agreeing to "lock-in" certain funds as Plan options. *Id.* at *20. The Court found the loyalty claims sufficient to survive a motion to dismiss. Defendants argued this claim was time-barred. The Court found this contention premature, noting that at the motion to dismiss stage it could not assess when the alleged prohibited transaction occurred. The Court further held as premature the arguments relating to whether certain actors were parties in interest (except to find that a mutual fund was not a party in interest) and whether certain conduct rose to the level of prohibited transactions. The Court also found premature a decision on whether any prohibited transaction exemptions exempted the challenged conduct.

***Jacobs, et al. v. Verizon Communications, Inc.*, 2017 U.S. Dist. LEXIS 162703 (S.D.N.Y. Sept. 28, 2017).** Plaintiff brought a class action alleging that Defendants: (i) breached their fiduciary duties in violation of the ERISA by providing 401(k) plans that were overly complex, overly risky, and layered with excessive fees; (ii) failed to monitor investment options offered to participants; and (iii) failed to disclose sufficient information to enable participants to effectively manage their accounts and exercise their rights under the Plans and the ERISA. Defendants moved to dismiss for failure to state a claim. *Id.* at *2-3. Defendants argued that Plaintiff failed to plead facts sufficient to demonstrate that the offered investment choices were imprudent, that the fees for those funds were excessive, or that the disclosures regarding those funds were inadequate. The Court held that Plaintiff's assertion that Defendants breached their fiduciary duty by including "risky" investment options was insufficient to maintain a claim, because the ERISA does not require fiduciaries to include any particular mix of investment vehicles in their plan, and the inclusion of "risky" investment options is not *per se* imprudent. *Id.* at *15. Further, the Court held that Plaintiff could not maintain a claim for breach of the duty of prudence because Plaintiff did not allege self-interest and made only hindsight allegations that other funds "fared better" than those offered by Defendants. *Id.* at *19. However, the Court held that Plaintiff could maintain a claim that Defendants breached their duty to monitor the performance of an investment option ("fund") in the Plan, based on Plaintiff's allegations that: (i) Defendants continued offering "a fund that had wildly under-performed its benchmark over a ten-year period" as a "core asset;" (ii) the fund "also barely surpassed the return of a money market investment, which offered much less risk;" and (iii) the fund featured an expense ratio higher than any other investment option available to participants despite its poor performance. *Id.* at *25-26. Third, the Court dismissed Plaintiff's

claims that Defendants failed to make sufficient disclosures to participants, because an "ERISA fiduciary has no duty to disclose to plan participants information additional to that required" by the ERISA, and Defendants had made all disclosures actually required by the statute and regulations. *Id.* at *36-37. Finally, the Court dismissed Plaintiff's allegation that the Defendants misrepresented information regarding the record-keeper's compensation on the Plan's Form 5500 annual report. The Court found that Plaintiff lacked standing to bring this claim because Plaintiff had "no legally protected interest" in a plan's Form 5500. *Id.* at *40. Furthermore, Plaintiff's claim relating to Form 5500 also would not be successful because Plaintiff did not assert "that she relied on the allegedly inaccurate Form 5500." *Id.* at *42. Accordingly, the Court dismissed Plaintiff's complaint in part, but allowed Plaintiff to proceed with claims regarding Defendants failure to monitor investment options.

***Johnson, et al. v. Fujitsu Technology & Business Of America, Inc.*, 2017 U.S. Dist. LEXIS 73132 (N.D. Cal. April 11, 2017).** Plaintiffs, a group of current and former participants in the Fujitsu Group Defined Contribution and 401(k) Plan ("Plan"), filed a class action against the Plan fiduciaries, including its Administrative Committee, Investment Committee, Plan Sponsor Fujitsu Technology and Business of America, Inc. and former Plan Administrator Shepherd Kaplan. Plaintiffs alleged the Plan was the most expensive "mega plan" in the country in 2013 and 2014, with significantly higher record-keeping expenses than similarly-sized plans. Plaintiffs also alleged that Fujitsu received payments of $100,000 per year to oversee the Plan, and that the fiduciaries failed to obtain the least expensive share class of mutual funds offering in the Plan. Plaintiffs further asserted that Fujitsu failed to investigate or consider other lower-priced investment options, and that it was a fiduciary breach for the fiduciaries to retain Shepherd Kaplan to design the Plan's target date funds, which were alleged to be imprudent. Plaintiffs amended their initial complaint, and Defendants moved to dismiss the second amended complaint. The Court denied the motion to dismiss. First, on Defendants' argument that Plaintiffs' claims were time-barred under the ERISA's three-year statute of limitations, the Court found that at this early stage in the case, it could not make a factual finding that Plaintiffs "must or could have known of the transaction at issue on the date of the issuance of the relevant Form 5500." *Id.* at *8. The Court also rejected Defendants' arguments that Plaintiffs lacked standing to bring claims regarding investment options in which they did not invest; the Court explained that those issues would be resolved in addressing the adequacy of Plaintiffs as class representatives. Regarding Plaintiffs' breach of fiduciary duty and failure to monitor claims against the Plan Sponsor and Committees, the Court opined that Plaintiffs' allegations stated plausible claims for relief. As to the breach of fiduciary duty of prudence and loyalty as to Shepherd Kaplan, the Court concluded that Plaintiffs' allegations regarding Plan expenses greatly exceeding those of similar-sized plans were sufficient to state a claim, and the Court declined to limit its liability to the period during which it was named as the Plan Administrator, noting that the complaint alleged that its breaches continued to harm the Plan.

***Kelly, et al. v. Johns Hopkins University*, 2017 U.S. Dist. LEXIS 161547 (D. Md. Sept. 28, 2017).** In this putative class action, Plaintiffs alleged that Defendant violated the ERISA in connection with its 403(b) pension plan by failing to manage the plan for the exclusive benefit of the participants and beneficiaries. The Court granted in part, and denied in part, Defendant's motion to dismiss Plaintiff's claims that Defendant violated §§ 404 and 406 of the ERISA. The Court noted that this case was similar to many cases filed across the country "by the same counsel who bring virtually identical claims to the ones in the instant action." *Id.* at *2. In its decision, the Court relied on four recently issued decisions, including *Henderson v. Emory University*, 2017 U.S. Dist. LEXIS 142411 (N.D. Ga. May 10, 2017); *Clark v. Duke University*, 2017 U.S. Dist. LEXIS 164370 (M.D.N.C. May 11, 2017); *Sacardote v. New York University*, 2017 U.S. Dist. LEXIS 137115 (S.D.N.Y. Aug. 25, 2017); and *Sweda v. University of Pennsylvania*, 2017 U.S. Dist. LEXIS 153958 (E.D. Pa. Sept. 21, 2017). These four cases similarly addressed motions to dismiss in relation to the same issues of university pension plans. First, persuaded by *Henderson*, *Sacerdote*, and *Swada*, the Court held that allegations "that offering Plan participants too many investment options is imprudent" and "that including higher-cost share classes in the Plan, instead of available lower-cost share classes of the same funds, is imprudent" failed to state a claim. *Id.* Second, relying on *Henderson*, *Sacerdote*, and *Clark*, the Court held that allegations that "a university offering actively managed funds was imprudent" and that a prudent fiduciary "would have chosen fewer record-keepers and run a competitive bidding process for the record-keeping services" were sufficient to constitute claims of a breach of fiduciary duty. *Id.* at *3-4. Third, by relying on the reasons set forth in *Henderson* and *Clark*, the Court held that Plaintiffs could not bring "prohibited transaction claims as to mutual funds included in the Plan." *Id.* at *4. Fourth, persuaded by reasons set forth in *Henderson* and *Sacerdote*, the Court held that "allegations that revenue

sharing from a mutual fund is a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D) fail to state a claim." *Id.* at *4-5.

***Pioneer Centres Holding Co. ESOP & Trust, et al. v. Alerus Financial, N.A.*, 858 F.3d 1324 (10th Cir. 2017).** In this action stemming from the failure of a proposed sale of stock to an employee stock ownership plan ("Plaintiff" or "the Plan"), the Tenth Circuit affirmed a decision granting summary judgment for Defendant on Plaintiff's breach of fiduciary duty claims under the ERISA. The Plan sponsor, who was not a party to the action, was a company that owned and operated car dealerships. *Id.* at 1327. In 2009, the company's owners, who also acted as the Plan's trustees, proposed a stock transaction that would make the Plan the 100% owner of the company. *Id.* Due to the fact that the named trustees' interests were adverse to the Plan's interests relative to the proposed transaction, Defendant was hired to act as a "transactional trustee" to manage the transfer of the owner-trustees' stock to the Plan. *Id.* The company's dealership agreement prohibited it from making any ownership changes without approval from the manufacturer, who indicated it was unlikely to approve 100% Plan ownership. *Id.* When one of the owner-trustees subsequently refused to make unqualified representations in the transaction documents, Defendant determined that the Plan should not proceed with the purchase. *Id.* at 1333. The company later sold the shares it had proposed to sell to the Plan to another party for more than $10 million above what the Plan would have paid, at which point the Plan sued Defendant, in its role as transactional trustee, for breach of fiduciary duty for preventing the original transaction. The District Court granted Defendant's motion for summary judgment, finding that, even if the Plan could prove Defendant breached its fiduciary duties, the Plan could not establish that the breach caused a loss, since there was nothing more than speculative evidence that the manufacturer would have ever approved the proposed deal and allowed the sale to the Plan to be consummated. *Id.* at 1332. On appeal to the Tenth Circuit, the Plan argued that the District Court erred by requiring the Plan to prove causation, rather than shifting the burden to Defendant and that, even if it properly bore the burden of proving causation, it presented sufficient evidence to create a genuine issue of material fact on that element. *Id.* The Tenth Circuit rejected the Plan's argument and found that the District Court correctly determined that the Plan, as Plaintiff, bore the burden of proof as to all elements of its *prima facie* case. *Id.* at 1335-36. The Tenth Circuit further found that the undisputed evidence in the case demonstrated that the manufacturer consistently opposed any change in the company's ownership structure that gave a majority of control to an ESOP. *Id.* at 1338. The Tenth Circuit held that, in light of this evidence, no reasonable fact-finder could rule in the Plan's favor. *Id.* at 1339-40. While the Plan argued that the manufacturer's refusal to approve the transaction would have violated state law, the Tenth Circuit found that the manufacturer maintained its position even after the Plan informed it of the potential illegality, and that the Plan therefore could not rely on an assumption that the manufacturer would have followed the law, and determined that the Plan could not establish that Defendant's actions prevented the transaction. Accordingly, the Tenth Circuit affirmed summary judgment for the Defendant.

***Price, et al. v. Strianese*, 2017 U.S. Dist. LEXIS 165450 (S.D.N.Y. Oct. 4, 2017).** Plaintiffs, participants in L-3 Communications Corp.'s retirement savings plan, brought a class action alleging that Defendants breached their fiduciary duties of prudence under the ERISA because they knew or should have known that L-3's share price was artificially inflated, but did nothing to protect participants from the allegedly imprudent investment in the stock. Defendants move to dismiss the complaint pursuant to Rule 12(b)(6), and the Court granted Defendants' motion. It held that Plaintiff failed to plausibly allege that Defendants knew or should have known that the L-3 stock had become an imprudent investment. The Court held further that even if Plaintiffs had adequately alleged that the Defendants knew or should have known that the L-3 stock had become an imprudent investment, Plaintiffs had not alleged a duty of prudence claim because they had failed to plausibly allege "an alternative action that the Defendant could have taken that would have been consistent with the securities laws and 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 *15. The Court stated that this standard is "incredibly difficult to satisfy." *Id.* The Court rejected Plaintiffs' alleged alternative investments, stating that halting investment in L-3 stock or issuing a corrective disclosure were not plausible because both could further damage the stock price, and that Plaintiffs' alleged hedge was not plausible because Plaintiffs had not identified any actual hedge.

***Saginaw Chippewa Indian Tribe, et al. v. Blue Cross Blue Shield*, 2017 U.S. Dist. LEXIS 109366 (E.D. Mich. July 14, 2017).** Plaintiffs filed a class action asserting that Defendant, the plan's third-party administrator

of health benefits, breached its fiduciary duties to the plan by charging hidden fees associated with its management of the plan. On the parties' respective cross-motions for partial summary judgment, the Court noted that the Sixth Circuit's decision in *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan,* 751 F.3d 740 (6th Cir. 2014), conclusively had established Defendant's liability as an ERISA fiduciary for charging hidden fees. Thus, two questions were before the Court, including: (i) whether the plan at issue was governed by the ERISA (if it was, there was no issue as to liability); and (ii) whether Defendant violated its duties to the plan. The Court answered the first question in the negative because the plan was established to provide coverage to tribal members, not employees. Thus, the plan did not meet the definition of an ERISA plan. The Court also concluded that Defendant did not breach any fiduciary duties because the alleged wrongdoing, which centered on negotiation of fees to service providers, was not a fiduciary function. Rather, following Sixth Circuit precedent, the Court held that negotiation of fees constituted a business decision that had an effect on an ERISA plan not subject to fiduciary standards.

***Sweda, et al. v. University Of Pennsylvania*, 2017 U.S. Dist. LEXIS 153958 (E.D. Pa. 2017).** Plaintiffs, a group of participants and beneficiaries in the University of Pennsylvania Matching Plan, brought a lawsuit against the University of Pennsylvania and its Vice President of Human Resources. Plaintiffs alleged that Defendants violated the ERISA when they allegedly breached their fiduciary duty and engaged in prohibited transactions by enabling third-party service providers to collect excessive fees, increased costs by including duplicative investments in the Plan, and retained under performing funds in the Plan." *Id.* at *2. More specifically, Plaintiffs alleged that: (i) Defendants breached their fiduciary duty by "locking in" Plan investment options into two investment companies; (ii) the administrative services and fees were unreasonably high due to Defendants' failure to seek competitive bids to decrease administrative costs; (ii) the fiduciaries charged unnecessary fees while the portfolio underperformed; and (iv) the plan administrators engaged in prohibited transactions by paying third-party providers and receiving services form the providers. *Id.* at *3. The Court held that Plaintiffs' allegations were insufficient to support a breach of fiduciary duty claim. First, the Court reasoned that Plaintiffs' allegation that Defendants "locked in" the plan to specific third-party providers was "insufficient to create a plausible inference that this was a breach of fiduciary duty," noting that locking in rates and plans is a common practice used across the business and personal world." *Id.* at *19. Second, the Court found that the fact that the third-party providers "operated as their own record-keepers" was also insufficient to establish a breach of fiduciary duty. *Id.* at *21. The Court opined that it was "not inconsistent with lawful, free market behavior in the best interest of those involved, including beneficiaries" for the third-party providers to bundle their services by operating as their own record-keepers. *Id.* Third, noting that Plaintiffs did not plead that "there was no reasonable alternatives given to plan participants to choose from," the Court held that allegations that "the plan administrators breached their fiduciary duty by allowing record-keepers to charge 'excessive asset based' fees rather than cheaper 'per-participant fees'" were insufficient to maintain a claim. *Id.* at *22, 24. The Court reasoned that while a fiduciary is required to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries as a whole," a Court cannot "second-guess how fiduciaries allocate that cost." *Id.* at *24. Fourth, the Court determined that allegations that there were unnecessary fees, participant confusion, and poor market performance were insufficient to maintain a claim of breach of fiduciary duty. The Court held that claiming that there were "unnecessary or duplicative" fees was insufficient because Plaintiffs did not plead that "reductions in expenses could be achieved without changing the variety of benefits to participants." *Id.* at *26. The Court also found that there was no participant confusion because "providing 78 different investment options satisfied the reasonable mix and range of investment options . . . without being unduly overwhelming." *Id.* at *28. Further, because only seven more funds under performed than what would be expected, which is generally about half of funds, the claim of breach of fiduciary duty did not cross the line "from conceivable to plausible." *Id.* at *30. Finally, the Court rejected Plaintiffs' argument that the plan administrator payments to the third-party providers and the providers' services constituted "prohibited transactions" under the ERISA because, as a matter of law, the transactions "were not done to benefit other parties at the expense of the plans' participants and beneficiaries but were simply operating expenses necessary to operate the plan on behalf of the plan beneficiaries." *Id.* at *32-33.

***Tracey, et al. v. Massachusetts Institute Of Technology*, 2017 U.S. Dist. LEXIS 165070 (D. Mass. Oct. 4, 2017).** Plaintiffs, a group of participants in the MIT Supplemental 401(k) Plan, brought various claims under the ERISA relating to the investment management and record-keeping fees paid to Fidelity Investments, the Plan's

record-keeper and primary investment provider. Defendants moved to dismiss. The Court adopted the report and recommendation of the Magistrate Judge, granting the motion in part. Count I alleged that Defendants breached their fiduciary duties of prudence and loyalty by providing investment options for plan participants that charged higher investment management fees than other identical and available options. The Court dismissed Plaintiffs' breach of loyalty claim because it was wholly speculative, since Plaintiffs had not alleged any facts showing that Fidelity and MIT were acting together in selecting investment options. The Court permitted Plaintiffs' claim of breach of the duty of prudence related to investment management fees to proceed. It noted that if identical investment options with lower fees were available but not selected, this would have constituted a breach. Count II alleged that Defendants overpaid Fidelity for record-keeping. The Court dismissed the breach of loyalty component of this claim because Plaintiffs' allegations did not rise above mere speculation. The Court, however, allowed the breach of prudence component to proceed. The Court found Defendants' argument that an ERISA fiduciary need not solicit competitive bids for fees unpersuasive and concluded that Plaintiffs had pled sufficient facts to make this claim plausible. Count III alleged that the overpayment of investment management and record-keeping fees constituted a prohibited transaction under the ERISA. This count involved claims under both § 1106(a)(1)(D) regarding the distribution of plan assets to a party in interest and § 1106(a)(1)(C) regarding the furnishing of good or services to a party in interest. The Court concluded that the 1106(a)(1)(D) claim failed because Plaintiffs had not pled that Defendants subjectively intended to benefit Fidelity as a party-in-interest. The Court denied Defendants' motion with respect to the 1106(a)(1)(C) claim, but only to the extent it related to investments in non-mutual funds. The Court reasoned that § 1002(21)(B) exempts mutual funds from liability under that provision so Count III failed with respect to investments in mutual funds. Finally, Count IV alleged that Defendants breached their duties to monitor other fiduciaries. The Court noted that these claims were derivative of Plaintiffs' other claims.

***White, et al. v. Chevron Corp.*, 2017 U.S. Dist. LEXIS 83474 (N.D. Cal. May 31, 2017).** In this ERISA class action, participants in the Chevron Employee Savings Investment Plan (the "Plan"), alleged that Defendants breached their ERISA fiduciary duties by failing to select investment options with higher returns and lower fees. *Id.* at *10. The Court dismissed Plaintiffs' ERISA claims for failure to state a claim. *Id.* at *71. In analyzing Plaintiffs' breach of the duty of loyalty claim, the Court found that Plaintiffs' complaint contained only "summary and conclusory" allegations that Defendants "imprudently and disloyally" selected specific funds. *Id.* at *20-21. The Court also dismissed Plaintiffs' claims that Defendants breached the duty of loyalty in connection with selecting Vanguard as the Plan's record-keeper. *Id. at* *25. Plaintiffs alleged that Defendants retained Vanguard as a record-keeper, because Vanguard, a Chevron shareholder, regularly voted in Chevron's favor on shareholder resolutions. *Id.* at *24. However, the Court found that absent facts showing Plan fiduciaries were aware of Vanguard's voting position, Plaintiffs' allegations were merely speculative. *Id.* at *25. The Court also considered Plaintiffs' claims that Defendants breached the duty of prudence by investing in a money market fund rather than a stable value fund to satisfy the Plan's low-risk fund requirement. *Id.* at *28. The Court dismissed this claim, finding that Plaintiffs failed to allege facts showing that Defendants did not adequately evaluate the risks and benefits of selecting the money market fund over other low-risk options. *Id.* at *29. In addition, the Court discounted facts that related to the performance of money market and stable value funds during the period at issue because Plaintiffs' arguments based on these metrics rested on hindsight. *Id.* The Court further dismissed Plaintiffs' claims that Defendants breached the duty of prudence by selecting certain higher-cost retail-class funds when lower-cost institutional-class funds were available. *Id.* at *44. The Court held that the availability of allegedly lower-priced funds alone could not support a breach of the duty or prudence claim. *Id.* at *45. Plaintiffs' complaint addressed only the availability of lower-priced funds and did not contain allegations that Defendants failed to make their selections through a reasoned decision-making process. *Id.* at *40, 44. In addition, the Court dismissed Plaintiffs' breach of the duty of prudence claims alleging that Defendants' asset-based revenue-sharing arrangement with Vanguard for its record-keeping expenses caused the Plan to pay excessive administrative fees. *Id.* at *57. The Court determined that Plaintiffs failed to allege facts showing that the "Plan fiduciaries should have anticipated an increase in Plan assets such that asset-based fees should have been abandoned." *Id.* at *57. The Court also found that the claims related to the administrative fees were time-barred because Plaintiffs received notice of the challenged fee arrangement in February 2012 when Chevron issued a detailed disclosure explaining that the Plan would shift from the revenue-sharing fee to a flat fee arrangement. *Id.* at *58-60. Accordingly, the Court dismissed Plaintiffs' claim that Defendants breached the duty of prudence by delaying the removal of an "under-performing fund." *Id.* at *66.

The Court held that Plaintiffs relied solely on the fund's purportedly poor performance to support their claim, but again failed to allege necessary facts showing that the fiduciaries failed to conduct an adequate investigation when they selected the fund or as they observed its performance. *Id.* at *64-66. Turning from Plaintiffs' breach of the duty of prudence claims, the Court assessed Plaintiffs' allegations that Defendants violated § 1106 when they engaged Vanguard to serve as record-keeper in 2012. The Court stated that the claim was time-barred by the ERISA's six-year statute of repose and it rejected Plaintiffs' arguments that an on-going duty to monitor applied to § 1106 transactions. *Id.* at *68-69. The Court reasoned that § 1106 violations occur at a singular point in time and it concluded "it makes no sense to assert a claim of duty to monitor a past occurrence." *Id.* at *70.

(iv) Damages Issues In ERISA Class Actions

***Knowlton, et al. v. Anheuser-Busch Co. Pension Plan,* 849 F.3d 422 (8th Cir. 2017).** Former salaried employees of a subsidiary of Anheuser-Busch Co. LLC brought suit against the Anheuser-Busch Co. Pension Plan under § 502(a)(1)(B) of the ERISA, seeking enhanced pension benefits under the terms of the Plan. The Plan stated that an employee would receive enhanced benefits in the form of five years of additional service credit, if within three years of a "change in control," his or her "employment with the Controlled Group is involuntarily terminated." *Id.* at 425. The parties did not dispute that a "change of control" occurred when Anheuser-Busch combined with or was acquired and became Anheuser-Bucsh InBev, N.V. *Id.* Shortly thereafter, the new entity sold the subsidiary for which Plaintiffs worked. Plaintiffs submitted claims under the Plan's claim procedures, arguing that the subsidiary sale constituted an involuntary termination from the Controlled Group of Co. and that they were thus entitled to enhanced pension benefits. The plan administrator denied the claims, interpreting the enhanced benefit provision to require an actual break in employment, rather than a change in the owner employing the individual during a period of continuous employment. After Plaintiffs filed suit, the Sixth Circuit issued an opinion in *Adams v. Anheuser-Busch Co.,* 758 F.3d 743 (6th Cir. 2014), a separate case involving the same provision of the Plan.. Based on that opinion, Plaintiffs moved for judgment on the pleadings. Applying the Sixth Circuit's reasoning, the District Court granted the motion, concluding that the administrator abused its discretion in denying Plaintiffs' claims. It ordered the plan administrator to pay enhanced benefits and denied Plaintiffs' request that it calculate and award benefits. The Plan appealed the decision. Plaintiffs cross-appealed the District Court's decisions not to calculate and award benefits owed. Plaintiffs also moved to dismiss the appeal for lack of jurisdiction because the District Court had not issued a final order by calculating benefits owed. The Eighth Circuit found that the District Court had issued a final order because it determined liability and ordered declaratory relief, purporting to address and resolve all issues in the case. The Eighth Circuit then upheld the District Court's finding that the plan administrator abused its discretion in denying Plaintiffs' claim for benefits. It reasoned that the plan administrator could not reasonably have interpreted the enhanced benefit provision to preclude an award of enhanced benefits to Plaintiffs, thereby echoing the Sixth Circuit's analysis. With respect to Plaintiffs' cross-appeal, the Eighth Circuit reversed the District Court, holding that Plaintiffs had made a sufficient request for an actual award of enhanced benefits in addition to a request for declaratory relief. It remanded the case to the District Court with instructions to calculate and award benefits owed, and to reconsider whether discovery should be compelled to assist with the calculation.

(v) Discovery Issues In ERISA Class Actions

***Wildman, et al. v. American Century Services*, *LLC*, 2017 U.S. Dist. LEXIS 140666 (W.D. Mo. July 27, 2017).** In this putative class action brought under the ERISA by two former participants in an employer sponsored 401(k) plan, Plaintiffs alleged that Defendants breached their fiduciary duties of loyalty and prudence and acted in their own self-interest by almost exclusively limiting the investment options available to Plan participants to mutual funds offered by the Plan sponsor. The Court granted Plaintiffs' motion to compel production of reports created under provisions of the Investment Company Act (known as 15(c) reports) which related to the performance, expense, and profitability of certain Plan investment options. Plaintiffs argued that the reports were relevant to Defendants' motive for including the mutual funds as investment options, and that the data contained in them was relevant to calculation of damages by Plaintiffs' expert. Defendants opposed Plaintiffs' motion, arguing that the reports sought were not relevant, that producing the reports would be unduly burdensome, and the request was disproportionate to the needs of the case because the Plan's investment committee did not rely on the reports in making decisions regarding which investment option to include and

because Plaintiffs' expert had already been able to calculate damages without the reports. Plaintiff argued that production would not be unduly burdensome because federal law required the reports to be maintained, and that the requests were proportional because Defendants alone had access to the data. Defendants responded that the reports were not their records, but those of the individual mutual funds; that production would require manual review of approximately 72,600 pages of documents, which was expected to take hundreds of hours; and that the funds' performance and fee information was publicly available and already otherwise produced in discovery. Noting that Plaintiffs' motion to compel was more narrowly defined than their original discovery request, the Court found that Plaintiffs had made a threshold showing of relevance under Rule 26, and that Defendants had not sufficiently demonstrated that production would pose an undue burden or be disproportionate to the needs of the case. Accordingly, the Court granted Plaintiffs' motion to compel, and ordered production of the 15(c) reports.

(vi) DOL And PBGC ERISA Enforcement Litigation

***U.S. Department Of Labor v. AEU Benefits LLC,* Case No. 17-CV-7931 (N.D. Ill. Nov. 3, 2017).** The U.S. Department of Labor ("DOL") moved for an *ex parte* temporary restraining order ("TRO") and preliminary injunction to enjoin Defendants "from causing further harm to the AEU Holdings, LLC Employee Benefit Plan ("AEU Plan") and all welfare plans covered by" the ERISA. *Id.* at 1. The Court granted the motion and entered a 14-day TRO. *Id.* at 14. The Court held that granting the TRO was proper because the DOL had "shown a reasonable likelihood of success on the merits of the ERISA claims, irreparable harm absent this injunction, and the balance of harm to the parties and the public interest weighed in favor of an injunction." *Id.* at 1. Accordingly, the Court ordered that Defendants and "anyone acting on their behalf, including their officers, agents, employees, assigns, subsidiaries, affiliates, service providers, accountants, and attorneys" be removed as and enjoined from acting as fiduciaries, service providers, trustees, and administrators of the AEU Plan or Participating Plans, and be enjoined from moving the AEU Plan's assets or the Participating Plans' assets, except at the direction of an independent fiduciary appointed by the Court. *Id.* at 2-3. The Court further ordered Defendants to notify the independent fiduciary of trust accounts, bank accounts, and receipts of monies relating to the AEU Plan or the Participating Plans. The Court also enjoined Defendants from disposing any assets of the Participating Plans materials or the AEU Plan, and from destroying or changing the Participating Plans' materials or the AEU Plan's documents, books, records, or electronic files, and to provide these to the independent fiduciary. It also ordered that the independent fiduciary be transitioned into its role as the full fiduciary and successor Trustee and Plan Administrator of the AEU Plan's administration, and having the full authority to act as such. Finally, the Court ordered that the independent fiduciary fully cooperate with the DOL "in the exercise of … enforcement responsibilities under the ERISA." *Id.* at 10. The Court reasoned that this was proper because the DOL showed that "immediate and irreparable injury, loss, or damage will result to the movant, the Participating Plans and the AEU Plan and their participants . . . before the adverse party can be heard in opposition." *Id.* at 13. The Court held that the irreparable injury justifying the TRO was "the continued incurrence of unpaid medical claims of the Participating Plans' and the AEU Plan's participants and to prevent the dissipation of the Participating Plans' assets and AEU Plan's assets to service providers and to accounts in Bermuda." *Id.* The Court decided this was irreparable because the funds were being distributed to both known and unknown sources, including accounts in Bermuda.

***U.S. Department Of Labor v. Belanger,* 2017 U.S. Dist. LEXIS 71101 (E.D. Pa. May 10, 2017).** The U.S. Department of Labor ("DOL") initiated this action alleging that fiduciaries of various employer-sponsored 401(k) plans breached their ERISA fiduciary duties in administering and managing the plans. Defendants moved to dismiss the complaint. The Court denied Defendants' motion. The DOL alleged that Defendants mixed plan assets with general corporate assets and failed to disclose all fees charged to plan participants in government filings. In moving to dismiss, Defendants argued that the claims were time-barred under the ERISA's six year limitations period, as the initial breaches occurred more than six years before the DOL filed the lawsuit. The Court rejected this argument. The Court found that as the transfer of plan assets from two different plans to a corporate account occurred within six years of the lawsuit's filing, those claims were not time-barred. Likewise, the Court held that the claim that Defendants failed to properly disclose expenses in government filings were timely asserted within six years of the lawsuit's filing.

***U.S. Department Of Labor v. Preston*, 873 F.3d 877 (11th Cir. 2017).** In this interlocutory appeal, the Eleventh Circuit determined that the ERISA's statute of repose was waivable pursuant to an express agreement between the parties. The U.S. Department of Labor ("DOL") had brought an action against Defendant, the owner and CEO of TPP Holdings. TPP Holdings established an ESOP to provide retirement income for TPP's employees. *Id.* at 879. The DOL brought an ERISA action against the Plan's trustee for allegedly breaching his fiduciary duties and engaging in prohibited self-dealing when he knowingly caused the Plan to purchase his own TPP stock at an inflated price. *Id.* Prior to filing suit, the parties unsuccessfully attempted to negotiate a settlement. While the negotiations were on-going, the parties entered into various tolling agreements. *Id.* One day before the expiration of the tolling period, but after six years from the date of the alleged wrongdoing, the DOL filed its action. Defendants moved to dismiss on the ground that all claims were foreclosed by the ERISA's statute of repose, which Defendants asserted was not waivable. *Id.* at 880. The District Court agreed that the tolling agreements were invalid and unenforceable, and subsequently it dismissed the action. *Id.* On appeal, the DOL asserted "that the District Court's 'categorical' rule that statutes of repose cannot be waived contradicts governing precedent, which instead requires a determination whether the applicable time-bar is 'jurisdictional.'" *Id.* The Eleventh Circuit held that the ERISA's six-year statute of repose was not jurisdictional because the ERISA does not contain the clear textual indication required to characterize the time-bar limitation as such. *Id.* at 882. The Eleventh Circuit also held that, contrary to Defendant's argument, there was well-established precedent that statutes of repose are subject to express waiver. As a result, it rejected Defendant's comparison to equitable tolling. *Id.* at 886. The Eleventh Circuit thus answered the interlocutory appeal in the affirmative, finding that the ERISA's statute of response was waivable by express agreement of the parties.

(vii) ERISA 401(k) Class Actions

***Brotherston, et al. v. Putnam Investments, LLC*, 2017 U.S. Dist. LEXIS 48223 (D. Mass. Mar. 30, 2017).** Plaintiffs alleged that Defendant loaded its 401(k) plan exclusively with its own mutual funds, without investigating whether plan participants would be better served by investments managed by unaffiliated companies. On behalf of a class of participants in Defendant's 401(k) plan, Plaintiffs accused Defendant of violating the ERISA's prohibited transaction rules, which bars plan fiduciaries from transacting with interested parties and from handling plan assets for their own benefit. Following a hearing – based on a largely undisputed record where there are minimal factual disputes – on the prohibited transactions claims, the Court ruled that the allegations against Defendant did not constitute a violation of the ERISA's prohibited transaction rules. The Court explained that: (i) management and servicing fees were paid out of mutual fund assets rather than plan assets and therefore the fees did not constitute a plan asset; (ii) comparing Defendant's actively managed mutual fund fees to Vanguard's passively managed index fund fees "compares apples to oranges" and therefore Plaintiffs failed to carry their burden that Defendant's fees were unreasonable; and (iii) as to a number of the investment funds at issue, Plaintiffs' claims were barred by the three-year statute of limitations because all of the relevant information was clearly disclosed in the Plan's enrollment kit and therefore Plaintiffs had actual knowledge of these issues. *Id.* at *17-18. Accordingly, the Court entered judgment in favor of Defendant.

***Brotherston, et al. v. Putnam Investments, LLC*, 2017 U.S. Dist. LEXIS 93654 (D. Mass. June 19, 2017).** Plaintiffs alleged that Defendant acted imprudently and breached its fiduciary duties under the ERISA by putting Defendant-affiliated funds in its 401(k) plan when other large retirement plans on the market did not include these types of funds. Plaintiffs, a class of participants in Defendant's 401(k) plan, alleged that this comparison was evidence that the funds were chosen not for their intrinsic merit, but because they earned fees for Defendant. After a seven-day bench trial, the Court concluded that Plaintiffs failed to identify any specific circumstances in which Defendant put its own interests ahead of Plaintiffs. Specifically, the Court explained that the prudence of the plan's investments should be measured against what a prudent investor would do in Defendant's shoes, and therefore it was irrelevant whether Defendant's competitors invested in Defendant's funds. The Court also concluded that Plaintiffs failed to show how Defendant's allegedly imprudent actions – which included failing to monitor plan investments and remove those that were imprudent – caused Plaintiffs losses. The Court adopted a burden-shifting framework, which mandated that, after an ERISA fiduciary is shown to have breached its duties, the legal burden shifts to the fiduciary to show that the breach was harmless. Under this analysis, the Court concluded that Plaintiffs failed to show a loss in the first instance and that their fiduciary breach claim also failed for this reason. Accordingly, the Court entered judgment in favor of Defendant.

***Creamer, et al. v. Starwood Hotels & Resorts Worldwide*, 2017 U.S. Dist. LEXIS 169115 (C.D. Cal. May 1, 2017).** In a putative class action brought on behalf of participants in an employer-sponsored 401(k) plan alleging that Defendants breached their fiduciary duties under the ERISA, the Court granted Defendants' motion to dismiss. Plaintiffs alleged that Defendants failed to ensure reasonable record-keeping and administrative fees, failed to offer a stable value fund, failed to follow participants' investment instructions, failed to provide adequate disclosures regarding revenue sharing, and failed to exclude an investment option that allegedly charged excessive fees. The Court dismissed as time-barred the claim relating to the investment option that allegedly charged excessive fees, finding that Plaintiffs had actual knowledge of this claim more than three years prior to filing suit. The Court denied Defendants' statute of limitations defense regarding the remaining claims, as it was not apparent when Plaintiffs learned of these claims. Hence, the Court denied the remainder of the motion. The Court also held that Plaintiffs stated a viable claim that Defendants failed to ensure reasonable record-keeping and administrative fees. The Court, however, ruled that Plaintiff could amend the dismissed claims to attempt to address their deficiencies.

***Insinga, et al. v. United Of Omaha Life Insurance Co.*, 2017 U.S. Dist. LEXIS 178753 (D. Neb. Oct. 26, 2017).** Plaintiff, a participant in the Safe Auto Insurance Co. 401(k) Plan, brought a class action against Defendant, United of Omaha Life Insurance Co., which provided investment services under the Plan, alleging that: (i) Defendant breached its fiduciary duty of loyalty by setting a guaranteed interest rate for its own benefit, retaining the spread, and charging excessive fees; and (ii) Defendant engaged in prohibited transactions in its capacity as a party-in-interest. Specifically, Plaintiff alleged Defendant's guaranteed account – which purported to be a conservative retirement investment that safeguards principal and guarantees interest – was a misnomer, because it provided no guaranteed minimum rate of return and Defendant had discretion to change the interest rate unilaterally and did so in a way that allowed it to reap profits that consistently dwarfed the returns received by investors. Plaintiff alleged that Defendant was an ERISA fiduciary because, by setting the contract's monthly interest rate, it had discretion to set its own compensation. Defendant brought a motion to dismiss. The Court dismissed Plaintiff's breach of fiduciary duty claim because it found Defendant was not a fiduciary. The Court concluded that the connection between compensation and setting interest rates was "too attenuated" to give Defendant discretion over its own compensation. *Id.* at *10-11. In addition, the Court dismissed Plaintiff's prohibited transaction claim. Plaintiff was seeking an accounting for profits that Defendant received from the allegedly prohibited actions and the Court found Plaintiff did not meet the requirements for a constructive trust as an equitable remedy because the money was comingled among Defendant's general funds.

***Lorenz, et al. v. Safeway, Inc.*, 2017 U.S. Dist. LEXIS 35731 (N.D. Cal. Mar. 13, 2017).** Plaintiff, on behalf of a proposed class of participants in Safeway's 401(k) plan, alleged that Defendants breached their fiduciary duties by selecting investment options that had higher fees than other available funds and that superior performance did not justify the higher fees, and that Defendants caused the plan record-keeper to receive excessive compensation through a revenue-sharing arrangement. Plaintiff also claimed that the plan's revenue sharing arrangement with the record-keeper constituted a prohibited transaction with the record-keeper under the ERISA. After concluding that Plaintiff had standing to sue because he did not allege merely technical violations of the ERISA, the Court addressed Defendants' arguments that the lawsuit was untimely. The Court found that the breach of fiduciary duty claims were timely because Defendants had an on-going duty to insure that the funds selected for the plan were appropriate. Therefore, the claims were not untimely simply because the funds had been selected more than six years before the suit was filed. *Id.* at *16. The Court also rejected the argument that mandatory fee disclosures were sufficient to put the Plaintiff on notice of his claim so as to trigger the ERISA's three-year "actual knowledge" statute of limitations. *Id.* at *17. In contrast, the Court found that the prohibited transaction claim as to the engagement of the record-keeper was untimely because the fee disclosures and other materials issued by the plan administrator put Plaintiff on notice of the fact that the claim was more than three years before he filed suit. *Id.* at *18-19. Turning to Defendants' argument that the complaint failed to state a plausible breach of fiduciary duty claim, the Court noted that it was not enough to simply allege that the fiduciaries had not offered the least expensive funds available. However, the Court found that Plaintiff offered enough factual support to make it plausible that the fiduciaries' selection process was flawed. *Id.* at *23-38. With respect to Plaintiff's attack on the revenue sharing compensation of the record-keeper, the Court found sufficient facts to support a plausible claim that the record-keeper received excessive compensation. *Id.* at *48.

***Main, et al. v. American Airlines, Inc.*, 2017 U.S. Dist. LEXIS 96924 (N.D. Tex. Mar. 31, 2017).** Plaintiffs brought a putative class action suit under the ERISA alleging that Defendants violated their fiduciary duties of loyalty and prudence. AMR Corp., American Airlines' parent company, created a line of mutual funds that were managed by another subsidiary of AMR Corp. This fund manager was later renamed American Beacon Advisors, Inc. in 2005 and the mutual funds were American Beacon Funds. *Id.* at *4. AMR Corp. sold American Beacon Advisors, Inc. in 2008 to Lighthouse Holdings, Inc. As a part of this deal, AMR Corp. received an equity stake in Lighthouse Holdings, Inc. Plaintiffs argued that this sale was premised on American Airlines' continued use of American Beacon Funds in the Plan. Plaintiffs claimed that Defendants breached their fiduciary duties because a prudent fiduciary would not retain the American Beacon Funds since: (i) American Beacon Funds were more expensive than similar alternatives; (ii) American Beacon Funds under performed compared to other similar investments; and (iii) American Beacon Funds were not included in other 401(k) plans. *Id.* at *6. Plaintiffs also alleged that Defendants breached their duty of loyalty by not removing the overly expensive and underperforming American Beacon Funds. Defendants filed a motion to dismiss, which the Court denied in part and granted in part. Defendants argued that Plaintiffs failed to show that they breached the duty of loyalty, as the use of an independent third-party fiduciary established compliance with their fiduciary duty. The Court rejected this argument, holding that it could not say at this stage in the litigation that engaging a third-party fiduciary established that Defendants acted loyally during the entire time period of Plaintiffs' complaint, as such a conclusion would require the Court to draw an impermissible inference against Plaintiffs. *Id.* at *11-12. Accordingly, the Court refused to dismiss the complaint on this basis. Defendants also argued that none of Plaintiffs' imprudence theories supported a valid claim. First, Plaintiffs alleged that Defendants were imprudent by including American Beacon index funds that were more expensive than nearly identical index fund alternatives. The Court noted that other case law authorities had denied motions to dismiss where Plaintiffs alleged that Defendants failed to consider lower-cost funds with identical styles and stocks. Thus, drawing all reasonable inferences in favor of Plaintiffs, the Court concluded that Plaintiffs plausibly stated a claim. Plaintiffs also argued that "Defendants breached their duty of prudence by failing to consider low-cost separate accounts and collective trusts as alternatives to mutual funds." *Id.* at *15. Defendants asserted it was not imprudent to offer mutual funds, instead of separate accounts or collective trusts, in the Plan. The Court agreed, noting the Seventh Circuit has held that offering mutual funds instead of other lower-cost alternatives is not imprudent. Accordingly, the Court held Defendants had not breached their duty of prudence by offering the mutual funds, and granted Defendants' motion to the extent that Count I relied on the argument that Defendants breached their duty of prudence by not considering alternatives to mutual funds. *Id.* Defendants also argued that Plaintiffs failed to allege sufficient facts to hold Defendants American Airlines, the PBAC, and the BSC liable as fiduciaries. However, the Court found Plaintiffs sufficiently alleged these Defendants were either named fiduciaries or had control over management of the Plan. Accordingly, the Court held that dismissal was inappropriate. Defendants also moved to dismiss Plaintiffs' failure to monitor claim, arguing the Fifth Circuit has never recognized a duty to monitor claim. *Id.* at *16. The Court disagreed and determined that Plaintiffs adequately alleged sufficient facts to support a duty to monitor claim. Accordingly, the Court granted Defendants' motion to dismiss to the extent that Count I relied on the claim that Defendants were imprudent for not considering low-cost alternatives to mutual funds, and denied it as to all other claims.

***Martone, et al. v. Robb*, 2017 U.S. Dist. LEXIS 122014 (W.D. Tex. Aug. 2, 2017).** In this putative ERISA class action, employees of Whole Foods Market asserted that Defendants breached their fiduciary duties by allowing the employees to continue to invest their 401(k) funds in the company's stock fund while the stock was allegedly artificially inflated due to a widespread overpricing scheme that Defendants knew or should have known about. The Court analyzed the relevant pleading requirements for ERISA fiduciary breach claims for stock drop cases established in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). Under *Dudenhoeffer*, a Plaintiff who alleges that a fiduciary acted imprudently by failing to act on non-public information must plausibly allege: (i) an alternative action that Defendant could have taken that would have been consistent with securities laws; and (ii) that a prudent fiduciary in the same circumstances would not have viewed the alternative act as more likely to harm the fund than to help it. On Defendants' motion to dismiss Plaintiff's amended complaint, Defendants asserted that Plaintiff failed to meet that pleading standard. As with his original complaint, Plaintiff's amended complaint alleged that Defendants should have taken alternative action through disclosure of the non-public information and by freezing trading of the company stock. Plaintiff added new allegations to cite to investment research to support his allegation that Defendants should have concluded that more harm than good to the plan

could not possibly have been done by continuing to let the alleged artificial inflation of the alleged overpricing scheme go undetected. Under Plaintiff's theory, this "reputational damage" increased the longer the fraud continued. *Id.* at *6. The Court found that Plaintiff's new allegations as to the alternative action pled in the original complaint did not change the fact that the likely outcome of either proposed action was a lowered stock price. *Id.* As to Plaintiff's allegation that the plan lost more money than it gained during the class period, the Court found that this allegation was insufficient to meet the pleading burden. *Id.* at *11. Relative to Plaintiff's new allegation that the hedging product that Defendants should have utilized was a low-cost hedging product, the Court concluded that this could have led to public disclosure of the fraud, which could have resulted in a stock drop. *Id.* at *18-19. Ultimately, the Court concluded that Plaintiff failed to carry his burden of showing a plausible alternative course of action, and granted the motion to dismiss. The Court concluded that amendment would be futile, and denied leave to amend.

***Mendenhall, et al. v. Out Of Site Infrastructure, Inc.*, 2017 U.S. Dist. LEXIS 124341 (E.D. Pa. 2017).** In this putative class action, Plaintiff alleged Defendants breached their fiduciary duties to him and to the relevant 401(k) plan participants by failing to pay money into his account. The plan required the sponsor/employer to pay 25% of a participant's compensation into the plan for each year the employee worked for the employer. Participants made no contributions and were 100% vested in the plan at all times. Participants, however, could self-direct their accounts' investments. Defendants filed a motion for judgment on the pleadings, arguing that Plaintiff's claims under § 502(a)(2) of ERISA could not be brought on behalf of the plan because Plaintiff failed to comply with Rule 23 in that Plaintiff pled only a claim for individual relief. Plaintiff argued that § 502(a)(2) allows a litigant to assert claims on behalf of the entire plan and that he could move forward individually with a claim for all plan members. The Court concluded that Plaintiff could not proceed in a representative capacity on behalf of the plan because he failed to allege that he was an adequate representative of absent plan participants. Specifically, the Court noted that Plaintiff did not allege that: (i) he was bringing any claims in a representative capacity; or (ii) that he sought relief on behalf of the plan. The Court also stated that the facts surrounding Plaintiff's employment status, enrollment, disenrollment, and withdrawal of funds could differ substantially from others who were currently enrolled, disenrolled, or have remained in the plan. The Court also expressed concern about the potential for a self-serving settlement because settlement of Plaintiff's claim could divert funds from others with greater or different rights.

***Patrico, et al. v. Voya Financial, Inc.*, 2017 U.S. Dist. LEXIS 95735 (S.D.N.Y. June 20, 2017).** In this putative class action brought under the ERISA, Plaintiff was a participant in a 401(k) plan sponsored by a non-Defendant. The sponsor was the named fiduciary, and had contracted with Defendant ("VRA") to provide investment advice services. *Id.* at *3. Pursuant to the contract with the sponsor, VRA was compensated based on a fixed platform fee per year for each participant, which began at $8 per participant per year and decreased as participation increased, and a management fee based on the value of each participant's account, which began at 50 basis points and declined based on increasing value of the plan assets. *Id.* Although VRA offered the advice programs, it did not render the advice itself. Rather, VRA employed a non-party sub-contractor to provide the actual investment advice. *Id.* Plaintiff alleged that VRA breached its fiduciary duties and engaged in self-interested transactions by receiving excessive compensation. *Id.* at *1. In dismissing the action, the Court found that Plaintiff had not adequately alleged that VRA was a fiduciary. The Court reasoned that when "a service provider has no relationship to an ERISA plan and is negotiating a contract with that plan, the service provider is not an ERISA fiduciary with respect to the terms of the agreement for its compensation." *Id.* at *7. Because Plaintiff had not alleged that VRA had "requisite control over its compensation," the Court concluded that VRA was not an ERISA fiduciary. *Id.* at *8. The Court further held that VRA was not a fiduciary with respect to its compensation after the agreement was executed. VRA's compensation was based on the number of plan participants and the total value of the plan assets in the advice program, neither of which were under VRA's control. *Id.* at *10. The Court also dismissed the prohibited transaction claim because Plaintiff had not alleged that any fiduciary had actual or constructive knowledge of the allegedly excessive compensation. *Id.* at *12. Although the plan sponsor was a named fiduciary, the complaint did not allege that it had actual or constructive knowledge that the compensation was allegedly excessive. *Id.* Hence, the Court held that Plaintiff could not sustain an equitable claim for a prohibited transaction against a non-fiduciary. *Id.*

***Pender, et al. v. Bank Of America Corp.*, 2017 U.S. Dist. LEXIS 38771 (W.D.N.C. Mar. 17, 2017)**. Plaintiffs, a group of employees who transferred their 401(k) assets to a cash balance defined benefit plan, filed a class action alleging that through the transfer, Defendant violated the ERISA by depriving participants of a "separate account" feature of their 401(k) plan. Following a week-long bench trial, Defendant prevailed as to Plaintiffs' claims. Plaintiffs sought to recover the difference between the investment earnings they would have received in the 401(k) plan and the earnings that the company credited them with following the transfer of assets to the company's cash balance plan. At issue at trial was whether – after it restored the separate account feature and paid a $10 million fine (as a result of a separate IRS proceeding) – Defendant profited from its transfer strategy. The Court concluded that Plaintiffs failed to establish that Defendant retained any profit as a result of the transfer, and it entered judgment in favor of Defendant. The Court agreed with Defendant that the plan experienced a net investment loss because it had invested more in equities during a period when equity markets were significantly outperformed by fixed-income investments. The plan's heavy concentration in equities during this time compelled a finding that it experienced a loss, not a profit. In issuing this ruling, the Court credited Defendant's expert witness, who said the plan lost $272 million as a result of the transferred assets, over Plaintiffs' expert.

***Pledger, et al. v. Reliance Trust Co.*, 2017 U.S. Dist. LEXIS 39745 (N.D. Ga. Mar. 7, 2017).** In this 401(k) fee class action against Insperity, a professional employer organization, various related entities, and Reliance, the plan's record-keeper, the Court partially granted Defendants' motion to dismiss. The Court found that Plaintiffs had alleged sufficient facts to make their breach of fiduciary duty and prohibited transaction claims plausible. The Court rejected as premature various arguments that Defendants were not fiduciaries as to certain challenged actions or transactions. The Court found that it was too early at the pleadings stage to determine whether Defendants had acted as fiduciaries. In contrast, the Court granted the motion to dismiss with respect to part of Plaintiffs' challenge to the plan's record-keeping fees, finding that to the extent Plaintiffs sought to challenge the initial selection of the record-keeper, their claim was untimely. The Court also dismissed Plaintiffs' claim alleging that it was improper to select and retain a money market fund of the plan, instead of a stable value fund. The Court opined that Plaintiffs were simply challenging the selection of one fund over another, with no allegation of facts to support that the selection was improper. *Id.* at *21-22.

***Sacerdote, et al. v. New York University*, 2017 U.S. Dist. LEXIS 173599 (S.D.N.Y. Oct. 19, 2017).** Plaintiff, on behalf of a class of benefit plan participants, alleged that Defendant breached its fiduciary duties under the ERISA by allegedly failing to make prudent investment decisions and failing to monitor the plan. *Id.* at *3. On Defendant's motion, the Court dismissed Plaintiff's claims. Subsequently, Plaintiff sought reconsideration of the Court's order of dismissal. *Id.* In denying the motion to reconsider, the Court held that "the inclusion of retail class shares in a plan despite the alleged availability of identical institutional class does not, on its own, support a cognizable prudence claim." *Id.* at *4. Instead, the Court held that the proper inquiry was whether the inclusion of such shares rendered the mix of options imprudent and, judged against this standard, the Court found the complaint failed to allege sufficient facts to support a plausible claim that the inclusion of retail class shares, rather than specific institutional class shares, breached the duty of prudence under the ERISA. *Id.* at *9. The Court also rejected Plaintiff's request to reconsider its decision to dismiss the failure to monitor claim. Plaintiff claimed that discovery had uncovered evidence of Defendant's failure to monitor, and thus requested reinstatement of that cause of action. *Id.* at *12. However, the Court held that the evidence cited was not new, and even if it were, Plaintiff failed to meet his burden of demonstrating that it might reasonably be expected to alter the conclusion reached by the Court. *Id.* Accordingly, the Court denied Plaintiff's motion.

***Terraza, et al. v. Safeway Inc.*, 2017 U.S. Dist. LEXIS 35725 (N.D. Cal. Mar. 13, 2017).** In this class action, Plaintiffs alleged that the fiduciaries of the Safeway 401(k) plan caused the plan to incur excessive fees, retained imprudent investment options, and did not make adequate disclosures regarding the fees and nature of the investment options. Defendants brought a motion to dismiss, and the Court granted in part and denied in part Defendants' motion. Plaintiffs alleged that the plan incurred excessive record-keeping fees through a revenue sharing agreement and that the investment fees charged were excessive considering the nature of the investments offered. Plaintiffs also alleged that the plan made improper use of collective investment trusts and that the fees and investment options were not adequately explained by the plan fiduciaries. The Court rejected Defendants' argument that the complaint was untimely, finding that Plaintiffs had alleged that the plan offered

imprudent investments during the six years prior to the filing of the lawsuit and that the statute of limitations did not run exclusively from when the investments were first offered. *Id.* at *15-16. The Court also denied Defendants' motion to dismiss claims for breach of the duty of loyalty, since Plaintiffs had plausibly alleged such violations based upon potentially self-interested actions of the plan's trustee. *Id.* at *19-20. In contrast, the Court was largely unwilling to permit Plaintiffs to proceed with their claim for breach of fiduciary duty based upon a failure to make adequate disclosures. It found that the plan had complied with the ERISA's disclosure regulations, which by their own terms satisfied any disclosure obligation. *Id.* at *24-34. The Court also agreed with Defendants that the alleged over-concentration of the plan in "opaque" collective trusts did not state a plausible claim because no facts were alleged showing that such funds were in fact imprudent. *Id.* at *33-34. The Court, however, rejected Defendants' attempt at dismissal of the excessive fee allegations. Although the plan offered 22 different investment options with fees ranging from 0.15% to 1.54%, the Court declined to find that this made the plan's fees inherently prudent. Instead, it found that the complaint alleged sufficient facts to plausibly show that at least certain of the investment options were excessively priced considering their performance. *Id.* at *47-48. Finally, the Court denied the motion to dismiss as to Plaintiffs' claim that revenue sharing resulted in excessive compensation for the record-keeper. It found that the complaint plausibly alleged that at least certain provisions of the record-keeping agreement may have permitted the record-keeper to receive excessive pay. *Id.* at *57.

***Troudt, et al. v. Oracle Corp.*, 2017 U.S. Dist. LEXIS 22194 (D. Colo. Feb. 16, 2017).** In this putative class action brought by participants in the Oracle Corp. 401(k) Savings and Investment Plan, Plaintiffs – a group of Plan participants – alleged breaches of the duty of loyalty and prudence based on Oracle's selection and retention of Fidelity Management Trust Co. as the Plan trustee. Plaintiffs alleged that Fidelity's fees were excessive, that Oracle failed to engage in a prudent process to select and retain investment options due to its revenue sharing arrangement with Fidelity, and Oracle failed to monitor Fidelity. Oracle moved to dismiss the entire complaint, and the Magistrate Judge recommended that the motion be denied. The Magistrate Judge concluded that the complaint sufficiently alleged the causes of action, and that it would be improper on a motion to dismiss to perform a highly contextualized analysis that would need to be done in order to determine whether Oracle had in fact breached its fiduciary duties.

***Troudt, et al. v. Oracle Corp.,* 2017 U.S. Dist. LEXIS 41344 (D. Colo. Mar. 22, 2017).** In this putative class action, the Court approved and adopted the Magistrate Judge's recommendation to deny Defendant's motion to dismiss. The Court noted that Count I, a count alleging that the revenue sharing model adopted by the 401(k) plan was reasonable, was too fact intensive to be resolved on a motion to dismiss. The Court explained that to decide this claim, it could not merely look at the total fees paid, but instead had to assess all the factors which informed the fiduciaries' decision to adopt this model. As not all of these factors were known at the complaint stage, the Court found that a decision on this issue was premature. The Court upheld Count II, noting that the complaint set forth sufficient allegations of a fiduciary breach. Defendants had argued this claim should be dismissed as it was solely, and thus impermissibly, based on hindsight. The Court rejected this argument, noting Plaintiffs alleged that two of the funds in the plan had inadequate performance histories to warrant investment in them at all, and a third fund greatly under-performed its benchmark in four out of five years before it was removed from the plan. The Court reasoned that these allegations were sufficient to suggest a lack of prudence in the selection of the first two funds and in the retention of the third. The Court found Count III derivative of Counts I and II, and thus it also was viable. As to Count IV, Defendants contended that the claim failed as the compensation paid to Fidelity was not unreasonable as it fell under an ERISA exemption, revenue sharing is not an asset and thus similarly exempt, and the claim was time-barred. The Court rejected each argument. The Court held that the issue of an ERISA exemption was an affirmative defense that Plaintiff did not have the burden to disprove. The Court further found that the plain language of the ERISA did not support the argument that revenue sharing was not a plan asset, and it finally noted that as Plaintiff pled a lack of actual knowledge, the claim was not time-barred.

(viii) ERISA Class Action Litigation Over Retiree/Employee Benefits

***Baleja, et al. v. Northrop Grumman Space And Mission System Corp. Salaried Pension Plan*, Case No. 17-CV-235 (C.D. Cal. Oct. 30, 2017).** Plaintiff filed a class action against Defendants – Northrop Grumman Space and Mission Systems Corporation Salaried Pension Plan, Northrop Grumman Benefit Plans

Administrative Committee, Northrop Grumman Corporation, and Does 1 through 10 – on behalf of himself and all others similarly-situated requesting relief pursuant to 29 U.S.C. §§ 1132(a), (a)(1)(B), and (a)(3). Plaintiff alleged that he was working for ESL, a subsidiary of TRW, and joined the ESL plan, which was later terminated. After receiving a distribution from the ESL Plan, Plaintiff joined the TRW Plan, which was allegedly later amended by Defendants. When Plaintiff contacted Defendants to redeem his benefits, Defendants allowed him to do so with a reduction in his monthly pension benefits, which Defendants explained was due to the distribution from the ESL Plan acting to off-set his current pension benefits. Plaintiff maintained that he was never advised that his retirement benefits under the Plan would be off-set due to his participation in the ESL Plan or because of the receipt of a distribution. Plaintiff argued that the reduction was in violation of the anti-cutback rule under the ERISA, which provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." *Id.* at 5. The Court dismissed Plaintiff's claim because Plaintiff's assertions – that: (i) he joined a plan after the ESL Plan was terminated; (ii) he thereafter became a participant in the TRW Plan and was guaranteed pension benefits at the age of 65, among other things, pursuant to that Plan; and (iii) Defendants later attempted to amend the plan – were insufficient to maintain a claim. The Court reasoned that without attaching "the original plan, describing its contents (other than the promise that he would receive pension benefits), or alleging the benefits included," the complaint "lacked sufficient allegations regarding the existence and terms" of the unamended plan. *Id.* at 6. Second, Plaintiff argued that he did not receive "proper notice for plan amendments that reduced the rate of future benefits accruals," in violation of 29 U.S.C. § 154(h), "which prohibits amendment to the plan unless the plan administrator provides notice as required by the ERISA." *Id.* The Court dismissed Plaintiff's claim with leave to amend because the claim rested "on the premise that there was an earlier plan and Plaintiff had not provided sufficient allegations to suggest the existence of such a plan." *Id.* Third, Plaintiff argued that because the unamended TRW Plan "did not provide an off-set as great as the ESL off-set" Defendants applied to Plaintiff. *Id.* at 7. Similarly, the Court dismissed this claim with leave to amend because this claim also relied on "whether there was an earlier plan, which Plaintiff had failed to sufficiently allege." *Id.* Finally, Plaintiff argued that the summary plan description ("SPD") did not fully disclose the ESL off-set and Defendants did not disclose the off-set in a way that the average person could understand. Pursuant to § 102(a) of the ERISA, the plan administrators are required to provide SPDs, which must be written in a manner to be understood "by the average participation." *Id.* The Court, however, "without deciding whether the SPD met the disclosure requirement," dismissed Plaintiff's claim, because "this claim, as, similar to earlier claims, was dependent, at least in part, on whether there was an earlier plan." *Id.* at 8. The Court therefore granted Defendants' motion to dismiss but allowed Plaintiff leave to amend his complaint.

***Caufield, et al. v. Colgate-Palmolive Co.*, 2017 U.S. Dist. LEXIS 26287 (S.D.N.Y. Feb. 24, 2017).** Plaintiffs, a group of pension plan participants and beneficiaries, brought suit against their former employer Colgate-Palmolive Co., the retirement plan in which they participated, and the plan's benefit committee. Plaintiffs asserted various claims under the ERISA, including claims for plan benefits, breach of fiduciary duty, failure to provide requested documents, and failure to describe benefits in a summary plan description. Plaintiffs also brought a claim for contempt, alleging that Defendants had violated a prior order approving a class settlement in which Plaintiffs participated. Plaintiffs' claims stemmed from the Residual Annuity Amendment ("RAA") to the plan, which was made in 2005 to correct for under-payments to certain participants who elected lump sum payments. Plaintiffs claimed that additional benefits were due under the RAA and that Defendants failed to provide and actively concealed information regarding the RAA. Defendants moved to dismiss under Rule 12(b)(6). Defendants argued that the claim for benefits was barred by a previously executed release and settlement agreement. Plaintiffs had previously been parties to a class action lawsuit against the plan in which they challenged the amount of benefits due under another theory of liability. That case settled in 2013, with the Court entering an order approving the settlement in 2014. The settlement agreement excluded any claims "that are based upon, or arise under" the RAA. *Id.* at *10. The Court found that the settlement release unambiguously excluded Plaintiffs' claims for benefits under the RAA and it denied the motion to dismiss on that count. Defendants further argued that several of Plaintiffs' claims were barred by applicable statutes of limitation. The Court found that Plaintiffs' claims for benefits under the RAA were timely. Those claims could not have accrued earlier than 2011, when Plaintiffs first learned of the RAA's existence in the prior lawsuit. Plaintiffs filed their complaint within six years of that earliest possible accrual date. The Court similarly concluded that, at least at the pleading stage, Plaintiffs' claim for failure to provide a summary plan description also survived. Plaintiffs filed suit more than three years after one named Plaintiff learned of the RAA's existence, which was beyond the

relevant limitations period. The Court, however, opined that the complaint contained plausible allegations that the accrual of that claim should be tolled based on Defendants' alleged intentional concealment of the existence of the RAA. Finally, Defendants argued that two counts should be dismissed for failure to state a claim. The first concerned Plaintiffs' claim for failure to provide relevant documents upon request. The Court found that it failed because Defendants produced all relevant documents to Plaintiffs as required by the ERISA's regulations. Defendants also argued that Plaintiffs' claim for contempt failed to state a claim. That count alleged that Defendants violated the Court's 2014 order approving settlement in the prior case. That order prohibited Defendants from asserting that claims under the RAA were released by the settlement agreement. The Court held that the complaint sufficiently alleged the elements of a contempt claim. Accordingly, the Court denied Defendants' motion to dismiss as to each claim.

***Felker, et al. v. USW Local 10-901*, 2017 U.S. App. LEXIS 10982 (3d Cir. June 21, 2017).** Plaintiffs, a group of mobile workforce employees ("MWF employees"), brought a benefits recovery action under the ERISA against Defendant Sunoco's Marcus Hook Refinery Workers Involuntary Termination Plan (the "Plan"). *Id.* at *1. The MWF employees were maintenance employees assigned to perform duties at the Marcus Hook Refinery, the Philadelphia Refinery, and two of Sunoco's refineries. In 2012, Sunoco decided to idle the main processing unit of the Marcus Hook Refinery. Sunoco and USW Local 10-901, which represented the MWF employees, thereafter engaged in bargaining and entered into a settlement agreement in February 2012. Pursuant to that agreement, the MWF employees would be "afforded the opportunity to be assigned on a temporary basis to work at the Philadelphia Refinery and work until laid off from such temporary assignment as determined by management." *Id.* at *2. Additionally, a severance benefit plan (the "Plan") was established to "alleviate financial hardships which may be experienced" by Sunoco employees in connection with the idling of the [Marcus Hook] Refinery." *Id.* The MWF employees were assigned to the Philadelphia Refinery. In July 2012, Sunoco entered into a contribution agreement to sell the Philadelphia Refinery to Philadelphia Energy Solutions, LLC ("PES"), in which Sunoco was a minority owner. PES and Local 10-1 entered into a memorandum of understanding and agreement ("MOU") and "agree[d] to hire all maintenance employees from the Marcus Hook mobile workforce who have been working temporarily at the Philadelphia Refineries." *Id.* at *4-5. Sunoco sold its Philadelphia Refinery to PES and the MWF employees were terminated by Sunoco. That same day, PES hired the MWF employees to work at the Philadelphia Refinery pursuant to the terms of the contribution agreement and the MOU. USW Local 10-901 sent a letter to Sunoco's Vice President of Labor Relations seeking severance benefits on behalf of the MWF employees. The Plan Administrator determined that the MWF employees "were not terminated from employment in connection with the idling of the [Marcus Hook Refinery]," and therefore, were not eligible for severance benefits under the Plan. *Id.* at *5. The MWF employees filed this lawsuit, and the District Court granted summary judgment to the Plan. On appeal, the Third Circuit affirmed the District Court's ruling. First, the Third Circuit found that the MWF employees had a smooth transition to PES employment, and they did not experience any period of unemployment. *Id.* at *7. The Third Circuit opined that the MWF employees thus suffered no financial hardship in connection with the idling of the Marcus Hook Refinery and were awarded the same or better compensation as a result of the transfer to employment at PES. Further, the Third Circuit noted that the Plan Administrator's interpretation did not render the language in the Plan meaningless, nor did the interpretation conflict with the requirements of the ERISA. The MWF employees argue that there was a structural conflict of interest because benefits would be paid out of Sunoco's assets, and the Plan Administrator was tasked with adjudicating both the initial claim and the appeal. However, the Third Circuit found that as the District Court concluded, there were sufficient safeguards in place to comply with the ERISA requirements, such as the fact that the Plan Administrator understood his fiduciary role and reviewed appeals as if they were new claims. The Plan specified that several categories of employees were ineligible for benefits. The MWF employees argued that they do not fall into any of these categories because there was an explicit exception for "employees who are part of the Mobile Force, as designated by [Sunoco] in its sole discretion, and who are transferred to a position at [Sunoco's] Philadelphia Refinery for a limited period of time." *Id.* at *8. The Third Circuit found that this argument ignored that the MWF employees' status was converted to permanent assignment and therefore provisions of the Plan applying to employees of the "Philadelphia Refinery for a limited period of time" had no applicability to the MWF employees and were not rendered meaningless by the Plan Administrator's interpretation. Finally, the Third Circuit found that the Administrator's interpretation was consistent with the clear language of the Plan, which was intended to benefit only those negatively affected by the idling of the Marcus Hook Refinery. *Id.* Accordingly, the Plan Administrator's denial of benefits was not

arbitrary or capricious. Therefore, the Third Circuit affirmed the District Court's order granting summary judgment in favor of the Plan.

***Gould, et al. v. University Of Miami*, 2017 U.S. Dist. LEXIS 151348 (S.D. Fla. Sept. 19, 2017).** Plaintiff, a former voluntary faculty member of Defendant, brought this lawsuit pursuant to the ERISA, on behalf of himself and similarly-situated employees. Plaintiff claimed that "the University failed to provide certain ERISA plan benefits" to the voluntary faculty members and "failed to advise those employees that such benefits were available to voluntary faculty members" even though they were paid full-time (40 hour per week) employees. *Id.* at *3. Defendant moved to dismiss Plaintiff's complaint, arguing that "as a voluntary faculty member, he was not eligible to participate in the ERISA plans at issue, save one supplemental retirement plan, in which Plaintiff elected to not participate." *Id.* The Court denied Defendant's motion to dismiss without prejudice. The Court reasoned that Plaintiff's complaint "as drafted is ambiguous and confusing" because "Plaintiff has failed to set forth allegations pertaining to each plan in a manner that makes clear which plans Plaintiff contends that he and other members of the class are entitled to participate." *Id.* at *18. The Court was thus "unable to determine which facts support which claims and whether Plaintiff has stated any claims upon which relief can be granted" because Plaintiff did not allege any facts about which plans he purportedly should have been offered, and which plans the putative class of participants would have been eligible for. *Id.* at *18-20. The Court decided it had "inherent authority to require a Plaintiff to file a more definite statement, even if the responding party has not requested such relief." *Id.* at *20-21. The Court ordered Plaintiff to file a more definite statement, which identified the University benefit plans that Plaintiff claimed he and other similarly-situated employees should have been able to participate in as employees; described other similarly-situated University employees and the ERISA and other benefit plans that those persons claimed they were entitled to participate in as employees; and provided a clear recitation of the relief Plaintiff sought, including whether Plaintiff and other potential class members sought to receive specific benefits under the plans at issue, sought to be enrolled in particular plans, and/or sought to restore losses to the relevant plans. *Id.* at *23. The Court also allowed leave for Defendant to file another motion to dismiss after Plaintiff filed his amended complaint.

***Laurent, et al. v. PricewaterhouseCooper LLP*, 2017 U.S. Dist. LEXIS 115067 (S.D.N.Y July 24, 2017).** Plaintiffs were former employees of Defendant who elected a lump sum distribution of fully vested benefits under Defendant's Retirement Benefit Accumulation Plan ("RBAP"). Plaintiffs argued that Defendant's lump sum calculation, which used the 30-year Treasury rate, resulted in an unlawful forfeiture of their accrued benefits in violation of the ERISA because it undervalued the future interest credits allegedly promised by the RBAP. Specifically, invoking § 502(a)(1)(B) or, in the alternative, § 502(a)(3) of the ERISA, Plaintiffs asked the Court to strike the RBAP's projection rate, the 30-year Treasury rate, and replace it with a rate that the Court determined would have been "the most reasonable projection rate" to estimate future investment credits. *Id.* at *10. Instead, the Court granted Defendant's motion for judgment on the pleadings. Relying on *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), the Court concluded that reformation was not permitted as a remedy under § 502(a)(1)(B). Given that *Amara* and other case law authorities indicated that reformation of a contract is appropriate only in instances of mutual mistake or fraud, the Court concluded that reformation was not permitted as a remedy under § 502(a)(3) because Plaintiff did not allege mistake, fraud, or other inequitable conduct.

***Lehman, et al. v. Nelson*, *et al.*, 2017 U.S. App. LEXIS 12619 (9th Cir. July 14, 2017).** Plaintiff, an electrician, was a participant in a multi-employer pension fund. That plan collected employer contributions for all union-covered work performed in the applicable geographical area. Because electricians often performed work outside their own region, the pension plans for each region entered into reciprocal agreements whereby contributions received for an electrician's work performed outside of his home region would be transferred to his home region's fund. Plaintiff brought a class action against one of the pension funds that was a party to the agreement and that received contributions for Plaintiff's work outside his home region. Plaintiff challenged an amendment made to that plan's trust agreement due to severe under-funding that prohibited the transfer of all contributions. The pension plan thus retained a portion of the contributions that should have been remitted to Plaintiff's home fund under the reciprocal agreement. Plaintiff sought benefits due to him under the terms of the plan (without the amendment) and alleged breaches of fiduciary duty by the plan trustees. The District Court certified a class and granted Plaintiffs' motion for summary judgment on his claim for benefits, finding that the trustees abused their discretion in withholding contributions. The District Court denied Plaintiff's motion on his claims for breach of

fiduciary duty because Plaintiff had an adequate remedy through the receipt of benefits due. After subsequent briefing, the District Court applied the summary judgment order to a similar later amendment to the plan. On appeal, the Ninth Circuit held that the District Court erred in entering judgment for Plaintiff with respect to the second plan amendment because the legality of that amendment was not raised in the complaint and not litigated. The Ninth Circuit affirmed summary judgment for Plaintiff on his remaining claim for benefits. The Ninth Circuit found that the trustees abused their discretion in applying the amendment to withhold employer contributions that should have been returned to Plaintiff's home fund because the trustees' interpretation of the amendment was inconsistent with the remainder of the pension plan, the reciprocal agreement as incorporated into the plan, and the ERISA's goals. The Ninth Circuit also addressed the District Court's finding, in the alternative, that the trustees' application of the amendment constituted an abuse of discretion because it violated the ERISA's provision prohibiting a plan in "critical status" from entirely eliminating future benefit accruals. *Id.* at *40. The Ninth Circuit reversed that ruling because the provision at issue applied only to funds that have declared being in "critical status," but the pension fund had not been. *Id.*

***Medina, et al. v. Catholic Health Initiatives*, 2017 U.S. App. LEXIS 25563 (10th Cir. Dec. 19, 2017).** Plaintiff, an employee of Defendant, a non-profit entity created by the Catholic Church that operates hospitals and healthcare facilities in 18 states, filed a class action claiming that Defendant's health plan was not an exempt ERISA church plan and that even if it were, the exemption violated the First Amendment's establishment clause. *Id.* at *3-4. The District Court rejected these claims, and granted summary judgment for Defendant. On appeal, the Tenth Circuit affirmed. It that Defendant's plan was a church plan and that the exemption did not violate the establishment clause. As to the status of the health plan as a church plan, the Tenth Circuit found that Defendant was sufficiently associated with the Catholic Church, because of its status as a part of the Church in canon law and the resultant "close integration" of Defendant with the Catholic Church. *Id.* at *13. The Tenth Circuit reasoned that the sub-committee running the plan was an organization with a principal purpose of administering/maintaining the plan and rejected Plaintiff's arguments that the sub-committee could not be an organization and that it did not maintain the plan. As to the final element of the church plan designation, the Tenth Circuit held that the sub-committee was associated with a church because of the sub-committee's bonds with the Catholic Church. The Tenth Circuit stated that that even though some participants were employed by an entity that was a joint venture between the Catholic and Adventist churches, the exemption required only that substantially all of the employees be employed by some church, not the same church, and thus the plan and its employees met all of the elements for the ERISA's exemption. The Tenth Circuit also rejected Plaintiff's establishment clause challenge to the exemption, holding that the exemption has a secular purpose of avoiding potential entanglement with religion, does not advance religion, and does not foster excessive entanglement. *Id.* at *40. Accordingly, the Tenth Circuit affirmed the District Court's order granting summary judgment in its entirety.

***Roe, et al. v. Arch Coal, Inc.*, 2017 U.S. Dist. LEXIS 122918 (E.D. Mo. Aug. 4, 2017).** Plaintiffs, a group of former employees and participants in the company's retirement plan, brought a putative class action on behalf of plan participants and the plan. Plaintiffs brought claims against Defendant Arch Coal, Inc., the plan's retirement committee, and the plan's trustee. Plaintiffs claimed that Defendants breached various fiduciary duties under the ERISA by maintaining the plan's investment in Arch Coal stock despite negative public information regarding the company's future and the decline of the coal industry. Plaintiffs brought four counts, which Defendants moved to dismiss. First, the Court granted Defendants' motion to dismiss Count I, which alleged that Defendants breached their duty of loyalty to participants by failing to monitor the plan's investment in Arch Coal stock and by continuing to allow investment in it. Plaintiffs claimed that Defendants should have recognized that Arch Coal stock was overvalued based on publicly available information. Plaintiffs failed to allege, however, that special circumstances existed to require Defendants to question the reliability of the stock's market price. Without such allegations, the claim failed. Count II alleged that Defendants breached their duty of loyalty to participants by maintaining the investment in company stock. Their theory relied on the fact that some Defendants' compensation was tied to Arch Coal stock, but the Court dismissed that claim because Plaintiffs were required to allege more than that. The Court explained that Plaintiffs failed to allege that Defendants knowingly misled, deceived, or acted adversely to the interests of plan participants. Count III alleged that Defendants failed to monitor their appointees in administering the plan. The Court noted that this claim was derivative of Plaintiffs' other claims. Because Plaintiff failed to plausibly allege an underlying breach of fiduciary duty, this claim also

failed. Finally, Count IV alleged that the trustee, acting as a co-fiduciary or directed trustee, breached its duties of prudence and loyalty to manage the plan's assets. Because Plaintiffs failed to adequately plead a breach of fiduciary duty by the other Defendants, there could be no co-fiduciary liability for the trustee. Further, the Court held that Plaintiffs failed to allege sufficient facts showing any breach of fiduciary duty as a directed trustee. It noted that a directed trustee is required to follow instructions from the named fiduciary except when contrary to the ERISA. Plaintiffs alleged no facts showing that a duty to question the named fiduciary's instructions had been triggered. Accordingly, the Court dismissed Count IV as well. As a result, the Court dismissed Plaintiffs' complaint in its entirety.

***Teets, et al. v. Great-West Life & Annuity Insurance Co.*, Case No. 14-CV-2330 (D. Colo. Dec. 14, 2017).** Plaintiff, a California resident, participated in a 401(k) plan that contracted with Defendant for "record-keeping, administrative, and investment services." *Id.* at 2. Additionally, the plan offered the Great-West Key Guaranteed Portfolio Fund as an investment option, which actually was a fund operated by Defendant (though this option was chosen by the plan trustees). As part of its operation of the fund, Defendant aggregated all contributions into its MLTN portfolio (an internal asset allocation used to track yield on investments with fund contributions), set a credited rate (the guaranteed interest rate for participants in a given quarter), and earned a profit on the margin between the Credited Rate and the actual return on the MLTN portfolio. *Id.* at 4-5. Plaintiff, on behalf of a class of similarly-situated individuals, brought claims alleging that Defendant breached its fiduciary duties and that even if it was not a plan fiduciary, that it improperly participated in a party-in-interest transaction. The Court granted Defendant's motion for summary judgement, though it did not agree as to all legal points raised in the motion. On the breach of fiduciary duty claims, the Court held that Defendant was not a fiduciary, but rejected Defendant's claim that its status as a guaranteed benefit policy ("GBP") foreclosed any fiduciary breach claims. The Court held that the GBP status simply freed Defendant from the requirement to manage its general account solely for the benefit of plan participants (*i.e.*, making prudent investment decisions), but did not free it from other fiduciary responsibilities. *Id.* at 11-12. Nevertheless, the Court held that because plan participants could reject the credited rate, the fact that Defendant set the rate did not make it a fiduciary. The Court also reasoned that setting the credited rate did not allow Defendant to set its own compensation because Defendant did not have authority to establish fees or authority to approve or disapprove transactions from which it collected a fee. Additionally, because plan participants could withdraw funds, Defendant did not set its own compensation and was not a fiduciary. *Id.* at 20-21. The Court also granted Defendant's motion for summary judgment as to the party-in-interest claims. Though the Court did not reach Defendant's argument that Plaintiffs' asserted remedy of disgorgement of profits (claimed to be equivalent to an accounting) sought legal rather than equitable relief, it found that Plaintiffs could not show a violation of the ERISA's party-in-interest provisions. In particular, the Court determined that a non-fiduciary must have "actual or constructive knowledge of the circumstances that rendered the transaction unlawful," rather than the lower fiduciary standard of "actual or constructive knowledge of the facts underlying" a prohibited transaction. *Id.* at 25-26. Because Plaintiffs could not show that Defendant knew or should have known that the complained-of transaction violated the ERISA, their party-in-interest claims failed. *Id.* at 27-28. The Court therefore granted Defendant's motion for summary judgment.

(ix) ERISA Stock Drop Class Actions

***In Re BP PLC Securities Litigation*, 2017 U.S. Dist. LEXIS 33302 (S.D. Tex. Mar. 8, 2017).** In the aftermath of the BP oil spill, BP's 401(k) Plan participants brought suit against the Plan fiduciaries alleging breaches of duties of prudence and loyalty by allowing the participants to invest in the BP stock at an artificially inflated price. The participants filed a motion for leave to file an amended complaint, which BP opposed on the basis that the proposed amended complaint failed to state a claim. This motion was made upon remand from the Fifth Circuit, which held that the District Court had erred in granting Plaintiffs' first motion for leave to amend because the proposed amended complaint did not contain sufficient factual allegations to state a claim, and thus, the amendment would be futile. In finding that the proposed amended complaint did not state a claim, the Fifth Circuit clarified the applicable standard announced in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), and ordered the District Court to apply that standard. In order to state a claim for breach of the duty of prudence on the basis of inside information, the District Court opined that Plaintiff must "allege an alternative course of action so clearly beneficial that a prudent fiduciary could not conclude that [the action] would be more likely to harm the fund than to help it . . . and offer facts that would support such an allegation." *Id.* at *75. The participants alleged five alternative courses of action in an attempt to satisfy the *Dudenhoeffer* standard. The

Court dismissed each of the participants' alternative courses of action in turn. Three of the alternative courses of action (*i.e.*, make a public disclosure prior to the oil spill that BP had not fully implemented its safety program, urge BP to make such a disclosure, and direct that all contributions to the Fund be held in cash and publicly disclose this action) rested on the unsupported premise that "a prudent fiduciary would have known that making an early disclosure would avert a massive oil spill and decline in stock price" because the oil spill was inevitable only in hindsight. *Id.* at *83-84. The other alternative courses of action (*i.e.*, freeze the stock fund pending an investigation after the spill and publicly disclose this action and report the fraud to the DOL and/or SEC) were also insufficient because a prudent fiduciary may have concluded that freezing the fund could cause more harm than good by sending a negative signal, and reporting the fraud to the SEC would only have shifted the question to a different party. On remand, the District Court found that the participants' second motion for leave to file an amended complaint also failed to state a claim, and thus, it denied the participants' motion.

***Saumer, et al. v. Cliffs Natural Resources, Inc*., 853 F.3d 855 (6th Cir. 2017).** Plaintiffs, a group of participants in Defendant's ESOP, filed a putative class action alleging breaches of fiduciary duties under the ERISA based on Defendant's decision to maintain plan investments in publicly traded company stock. The District Court dismissed the lawsuit following Defendant's motion to dismiss brought pursuant to Rule 12(b)(6). On appeal, the Sixth Circuit affirmed. The Sixth Circuit rejected the Plaintiffs' argument that the Defendant should have known that its stock price was artificially inflated due to market conditions. It found Defendant reasonably relied on the stock's market price. Further, the Sixth Circuit stated that Congress allowed for concentrating assets (and thus not diversifying assets) when it authorized creation of ESOPs. The Sixth Circuit also stated that the complaint contained no allegations as to what information Defendant could have gleaned from publically available information about the stock price that would have caused a different investment decision. The Sixth Circuit also rejected Plaintiff's theory that Defendant should have acted differently based on non-public information, finding it to be implausible. The Sixth Circuit agreed with Defendant that it was within its rights to not act on the non-public information because disclosing that information likely would have done even more damage to the price of the stock held in the ESOP.

***Tatum, et al. v. RJR Pension Investment Committee*, 855 F.3d 553 (4th Cir. 2017).** In this long-running class action under the ERISA, the Fourth Circuit held that the District Court did not commit clear error in finding that Defendants proved by a preponderance of the evidence that a hypothetical prudent fiduciary would have made the same decision to divest the Plan of non-employer Nabisco stock from the plan at the same time that the Plan Administrator did. This class action was brought by an employee who participated in the company's defined contribution pension and benefit plan against a Plan Sponsor, the Plan Administrator and its Investment Committee after they created a separate successor plan when the parent company split from its food and tobacco entities. The successor plan froze participant investments in Nabisco stock funds and divested those investment options within six months. The value of the Nabisco stock funds decreased significantly during that period, but then rebounded after investor Carl Icahn made a bid for the company that was accepted. After a bench trial, the District Court held that the company had breached its fiduciary duty of prudence when it decided to remove Nabisco stock funds from the plan "without undertaking a proper investigation into the prudence of doing so," but that it had met its burden to show that a hypothetical prudent fiduciary "could" have made the same decision. *Id.* at 557. On appeal, the Fourth Circuit reversed, indicating that Defendants' burden was "to prove by a preponderance of the evidence that a hypothetical prudent fiduciary would have made the same decision." *Id.* at 558. On remand, the District Court issued another opinion concluding that Defendants had met their burden to show that a hypothetical prudent fiduciary would have divested in the Nabisco funds in the manner and at the time that Defendants did. On a further appeal, the Fourth Circuit affirmed. First, the Fourth Circuit rejected Plaintiff's argument that the District Court focused too much on risk, pointing to the District Court's review of other factors, including value and expected returns, the diversity of the Plan's investments, the requirements contained in the Plan documents, and the timing of the divestment. Second, the Fourth Circuit found that the District Court had adequately considered whether a hypothetical fiduciary would have taken the same action regardless of what was provided in the Plan documents, finding no evidence that the fiduciaries intentionally disregarded Plan language or failed to disclose the divestment to participants. The Fourth Circuit also ruled that the District Court adequately considered the testimony of Plaintiff's expert, and considered the timing of the divestment. The Fourth Circuit rejected Plaintiff's contention that a different legal standard applied to a divestment as compared to an investment decision. In analyzing the ERISA, the Fourth Circuit found no

indication that divestment and investment decisions should be reviewed under a different legal standard. Finally, the Fourth Circuit concluded the District Court's decision was consistent with *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), in determining that a hypothetical prudent fiduciary would have properly relied on the market price of the Nabisco stock as the correct estimate of the stock's present value.

(x) ESOP Issues In ERISA Class Actions

***Brundle, et al. v. Wilmington Trust N.A*., 241 F. Supp. 3d 610 (E.D. Va. 2017).** Plaintiff, a former employee of Constellis Group, Inc. and a former participant in the company's Employee Stock Ownership Plan ("ESOP"), brought a class action against the ESOP's trustee, Defendant Wilmington Trust N.A., for breach of the ERISA's prohibited transaction provisions based on the creation of the ESOP. Plaintiff alleged that the stock purchase that created the ESOP resulted in an inflated purchase price, thereby harming the ESOP. A trial was held on a number of issues. First, in determining the fair market value of Constellis' stock that the ESOP was going to purchase, Wilmington Trust (via its financial advising firm, Stout Risius and Ross ("SRR")) adopted SRR's valuation that priced the fair market value of the stock quite highly. In adopting this valuation, Wilmington ignored a prior valuation report of the stock that factored in high risk due to the fact that the company's performance was highly dependent on a small number of major government contracts, which resulted in a lower valuation of the stock as compared to SRR's final valuation. The Court determined that a prudent trustee would at least have inquired as to the reasons for the significant difference in value. Second, Wilmington relied on SRR's choice to rely on Constellis management's own projections of its financial viability in determining the purchase price and ignored several red flags in doing so. The Court determined that Wilmington had an obligation to investigate SRR's choice to rely on these projections. Since the ESOP's only asset was its 100% ownership stake in Constellis, this left the ESOP with no external source of money to protect the participants in case the financial projections were inaccurate. Third, Wilmington did not investigate SRR's choice to apply a control premium to one version of its valuation and not to apply a control premium to another version in order to discount the valuation. When Wilmington approved the purchase, it was aware that the ESOP had no power to exercise control over Constellis, and thus, it should have inquired as to SRR's utilization of the control premium. Fourth, Wilmington failed to investigate SRR's consistent rounding up of numbers in its valuation reports. Lastly, the Court considered several pieces of circumstantial evidence of Wilmington's lack of prudence, including its failure to investigate Constellis' motivations for forming an ESOP in the first place, the short time-frame in which it approved the purchase price, the lack of sufficient meetings pertaining to the transaction, and authorizing an opening sale price at a number above the minimum amount per share. The Court held that overall, Wilmington was unable to show that "its reliance on SRR's report was 'reasonably justified' in light of all the circumstances because it has not shown that it thoroughly probed the gaps and internal inconsistencies in that report." *Id.* at 634. The Court determined Wilmington engaged in a prohibited transaction in violation of § 1106(a) of the ERISA because it did not demonstrate by a preponderance of the evidence that the ESOP paid no more than adequate consideration when it purchased Constellis' stock. The Court rejected Plaintiffs' party-in-interest claims, which were "not seriously pursued at trial," and held that the loans underlying the claim were "primarily" the benefit of the participants. *Id.* at 643-45. The Court found that Wilmington did not violate § 1106(b). The Court held there was no evidence Wilmington actually represented both the ESOP and the investment bank retained by Constellis to advise on the creation of the ESOP. The Court also held the $150,000 payment from Constellis was reasonable compensation for Wilmington's service to the Plan. *Id.* at 644-45. The Court found the ESOP had been damaged in the amount of $29,773,250 (the amount Wilmington agreed to overpay for the stock) and the Court thus entered judgment for Plaintiffs in that amount.

***Swain, et al. v. Wilmington Trust, N.A*., 2017 U.S. Dist. LEXIS 128376 (D. Del. Aug. 14, 2017).** Plaintiffs, a group of participants in ISCO Industries' ESOP, filed a class action claiming that Defendant, the ESOP trustee, engaged in a prohibited transaction under § 406(a)-(b) of the ERISA when it purchased 4 million shares of ISCO's common stock for a 25-year note of $98 million, with 2.4% annual interest, resulting in ISCO being fully owned by the ESOP. *Id.* at *4-5. Only 11 days after the sale, the stock was revalued by an independent appraiser as being worth only $39 million. *Id.* at *5. Defendant moved to dismiss the claims, alleging that Plaintiffs could not show an injury-in-fact, thus preventing the Court from exercising subject-matter jurisdiction and also arguing that even if Plaintiffs had standing, they failed to state a claim on which relief could be granted. *Id.* at *2, 6-7. As to the standing argument, the Court agreed with Defendant that Plaintiffs failed to show an injury-in-fact. The Court held that although the stock was purchased at an allegedly inflated price, there was no

subsequent sale and thus no economic injury to Plaintiffs as a matter of law. *Id.* at *12. The Court noted that this ruling was guided by U.S. Supreme Court precedent requiring both an inflated purchase price and subsequent sale; thus, the Court opined that the claims should be dismissed for lack of jurisdiction. The Court also noted that any claim of standing based on injunctive/declaratory relief also failed because Plaintiffs did not allege a sufficient threat of future injury. *Id.* at *12-13. In the alternative, the Court addressed Defendants' arguments that Plaintiffs failed to state a claim for prohibited transactions, holding that Plaintiffs failed to state a claim for impermissible acquisition of an employer security because the stocks purchased were not covered by the relevant statutory section. *Id.* at *15. Likewise, the Court held that Plaintiffs failed to plead sufficient facts to support their claims that Defendant acted on behalf of ISCO (which had adverse interests to the Plan) and failed to plead sufficient facts that Defendant impermissibly received compensation from ISCO. *Id.* at *17-19. The Court granted the motion as to claims for the impermissible acquisition, *i.e.*, acting on behalf of a party with adverse interests and impermissibly receiving compensation. However, the Court held that that Plaintiffs sufficiently pled their party-in-interest claims, holding that Plaintiffs, "despite not identifying which category ISCO falls into as a party-in-interest, provided sufficient facts to support that ISCO can be identified as such" and further held that discovery might reveal additional party-in-interest sellers. *Id.* at *16. The Court also rejected Defendant's argument that Plaintiffs were required to show that no exemptions to the prohibited transaction rules applied on the grounds that these were affirmative defenses, not something to be "pleaded around by Plaintiffs." *Id.* The Court thus denied the motion to dismiss as to the party-in-interest claims.

(xi) Independent Contractor Issues In ERISA Class Actions

***Jammal, et al. v. American Family Insurance*, 2017 U.S. Dist. LEXIS 120684 (N.D. Ohio Aug. 1, 2017).** Plaintiffs, a group of insurance agents, filed a putative class action alleging violations of the ERISA. Prior to trial, the Court granted a motion to bifurcate to allow an advisory jury to determine whether Plaintiffs were employees or independent contractors for purposes of the ERISA. *Id.* at *7. Although Defendant claimed that the agents were independent contractors, the advisory jury found by a preponderance of the evidence that Plaintiffs were employees and not independent contractors. *Id.* at *8. The Court ruled that the jury's determination comported with the weight of the evidence presented at trial. *Id.* The Court noted that a worker is an employee if the employer retains the right to direct or control the manner and means of work. *Id.* at *8. The Court stated that various factors are relevant to a determination of whether Defendant retained the right to control, including: (i) the skill required of the employee; (ii) the source of the instrumentalities and tools; (iii) the location of the work; (iv) the duration of the relationship between the parties; (v) whether the hiring party had the right to assign additional projects to the hired party; (vi) the extent of the hired party's discretion over when and how long to work; (vii) the method of payment; (viii) the hired party's role in hiring and paying assistants; (ix) whether the work is part of the regular business of the hiring party; (x) the provision of employee benefits; and (xi) the tax treatment of the hired party. *Id.* at *8-9. At trial, Plaintiffs presented evidence that they argued was key to showing that they were central to and at the core of Defendant's business. *Id.* at *10. Defendant taught Plaintiffs everything they needed to know to become licensed, run an agency, and sell insurance. *Id.* at *11. Further, there was no limit on the duration of the relationship. *Id.* at *15. Although the agreements indicated that the intent of the parties was that agents be treated as independent contractors, Defendant expected its managers to exercise a high degree of control whenever necessary to achieve compliance with Defendant's goals and standards. *Id.* at *45. Defendant trained its managers to exercise control over the means and manner of Plaintiffs' sales and duties and reprimanded managers who did not exercise such control. *Id.* at *64. The Court ruled that the degree of control that managers were encouraged to exercise was inconsistent with independent contractor status and more in line with the level of control a manager would be expected to exert over an employee, thereby supporting a finding that Plaintiffs were more properly classified as employees. *Id.* The Court concluded that Plaintiffs were employees of Defendant. However, the Court ruled that, pursuant to 28 U.S.C. § 1292(b), an interlocutory appeal may materially advance the ultimate termination of the litigation because: (i) there was evidence supporting both sides; (ii) prior case law had been nearly unanimous in finding that insurance agents generally should be classified as independent contractors; (iii) the repercussions of the findings were far-reaching; and (iv) the resolution of damages would be unusually complicated. *Id.* at *65. The Court therefore concluded that Plaintiffs were properly classified as employees but authorized the parties to take an interlocutory appeal from its order.

(xii) Judgments In ERISA Class Actions

***Moore, et al. v. Navillus Tile, Inc.*, 2017 U.S. Dist. LEXIS 160134 (S.D.N.Y. Sept. 28, 2017).** Following a seven day bench trial, the Court entered judgment in the amount of $76 million against Defendant. Subsequently, Defendant moved to stay the execution of the judgment and for the Court to waive the requirement for it to post a supersedeas bond to guarantee payment of the judgment. Defendant argued that, pursuant to Rule 8(a)(1) and Rule 62(d), "execution of the Judgment will render it insolvent and likely drive it into bankruptcy." *Id.* at *28. Plaintiffs opposed Defendant's motion, arguing that Defendant "had the resources to post a supersedeas bond" and that there was a "serious risk of its attempting to secret its assets while the appeal is pending, based on the conduct that was proven at the trial." *Id.* The Court denied Defendant's motion, reasoning that "the bond requirement is not designed to protect the judgment debtor's ability to continue in business; rather, it is designed to minimize or eliminate the risk that it will pay the judgment, only to find that it cannot get the money back pending appeal." *Id.* at 29. In making its determination, the Court applied a five factor test, in which the Court considered: "(i) the complexity of the collection process; (ii) the amount of time required to obtain a judgment after it is affirmed on appeal; (iii) the degree of confidence that the Court has in the availability of funds to pay the judgment; (iv) whether Defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (v) whether Defendant is in such a precarious financial situation that the requirement to post a bond would pace other creditors of Defendant in an insecure position." *Id.* at *30. First, the Court found that Defendant's statement "that it cannot satisfy the judgment entered against it and cannot obtain a supersedeas bond in the amount of the judgment from any source" was determinative as to factors two, three, and four in favor of requiring imposition of a bond. *Id.* at *32. Second, the Court determined that the fact that Defendant's net worth "is tied up in hard assets" supported imposing a bond because the Court "can fairly infer that collection of its judgment would be complicated and time consuming." *Id.* Finally, in regards to the fifth factor, the Court reasoned that Defendant's creditors were not imperiled because of the bond, although they were "without a doubt imperiled" by the judgment itself. *Id.* at *33. The Court further stated, that even if Defendant proved the fifth factor, that fact would not outweigh the other factors.

***Tibble, et al. v. Edison International*, 2017 U.S. Dist. LEXIS 130806 (C.D. Cal. Aug. 16, 2017).** Plaintiffs claimed that executives of an Edison International Inc. 401(k) plan violated their fiduciary duties by selecting more-expensive retail-priced shares versus institutionally priced shares for identical investment options. After a trial, the Court found in favor of Plaintiffs. The decision finding in favor of Plaintiffs was published exactly 10 years after the case was first filed in 2007. Since that time, the case had two trials, multiple trips to the Ninth Circuit, and a significant 2015 U.S. Supreme Court ruling making it harder for 401(k) plan fiduciaries to have lawsuits challenging particular investment funds dismissed as untimely. In finding for Plaintiffs, the Court explained that it was imprudent for Defendant to include 17 mutual funds in its 401(k) plan that could have been obtained at a lower cost. Defendant's breach of duty occurred on the earliest possible date that it could have chosen institutional share classes over retail classes. Because Defendant should have made the switch immediately, the Court opined that damages could be calculated from the day the six year statute of limitations began to run – exactly 16 years before the decision (and exactly 10 years after plan participants filed their original complaint). The parties agreed that damages between 2001 and 2011 were about $7.52 million, and the Court ordered them to calculate damages from 2011 onward by comparing the returns of the disputed funds to the returns of the plan as a whole during that period.

(xiii) Preemption, Procedural, And Coverage Issues In ERISA Class Actions

***Advocate Health Care Network, et al. v. Stapleton*, 137 S. Ct. 1652 (2017).** This class action under the ERISA addressed the ability of certain organizations that are affiliated with churches, such as not-for-profit hospitals, to sponsor employee welfare benefit plans that are "church plans" per § 3(33) of the ERISA. Church plans are exempt from Title I of the ERISA, including the ERISA's reporting requirements, funding requirements, and fiduciary protections. Hence, maintaining church plan status can decrease the costs associated with administering and maintaining a plan. The lawsuit centered on a church-affiliated not-for-profit organization that operated hospitals and other healthcare facilities. These organizations maintained that their employee welfare benefit plans were church plans, which were established and maintained by the organizations and administered by internal committees appointed by the organizations. Participants in the plans brought multiple lawsuits, arguing that the plans were not church plans because they were not established by a church. The District Courts

agreed with the participants, as did the Third, Seventh, and Ninth Circuits. The U.S. Supreme Court reversed in consolidated appeal. The U.S. Supreme Court concluded that, in amending § 3(33) of the ERISA in 1980, Congress ensured that a broad range of plans maintained by church-affiliated organizations could qualify as church plans without needing to determine whether the organizations met the definition of a "church."

***Barton, et al. v. Constellium Rolled Products-Ranswood, LLC,* 2017 U.S. App. LEXIS 8357 (4th Cir. May 11, 2017).** Plaintiffs, a group of retirees, brought a class action against their former employer, alleging that it violated the ERISA when Defendant unilaterally reduced retiree health benefits provided under the collective bargaining agreement. The District Court entered summary judgment for Defendant, holding that the collective bargaining agreement did not provide for vested retiree health benefits. On appeal, the Fourth Circuit affirmed. Plaintiffs argued on appeal that their health benefits were vested for life based on their reading of the collective bargaining agreement and reference to extrinsic evidence outside the collective bargaining agreement. The Fourth Circuit rejected this argument, noting that under ordinary principles of contract law, the contract must unambiguously indicate that the parties intended such vesting. Relying on this maxim, the Fourth Circuit noted that the collective bargaining agreement did not expressly vest the retiree health benefits. In contrast, it limited these benefits to the duration of the agreement. The agreement provided that pension benefits were a lifetime benefit that could not be reduced. The Fourth Circuit held that the express vesting of pension benefits, coupled with the absence of such clear language with respect to health care benefits, underscored the conclusion that the health benefits were not vested. As the language of the collective bargaining agreement was clear, the Fourth Circuit did not consider the extrinsic evidence submitted by Plaintiffs. The Fourth Circuit thus affirmed summary judgment for Defendant.

***Pharmaceutical Care Management Association, et al. v. Gerhart*, 852 F.3d 722 (8th Cir. 2017).** In 2014, Iowa's legislature enacted Iowa Code § 510B.8, which regulates how pharmacy benefits managers ("PBMs") establish generic drug pricing and requires certain disclosures to network pharmacies and the Iowa Insurance Commissioner. PBMs are third-party administrators for prescription drug benefits for ERISA and non-ERISA health plans. A national trade association that represents PBMs brought an action for declaratory relief seeking a declaration that the law was preempted by the ERISA's express preemption provision, which preempts state laws which "relate to" ERISA plans through a connection with, or a reference to, an ERISA plan. The District Court granted the state's motion to dismiss the complaint, finding that although the law regulated an area of the ERISA's concern for the PBMs, the statute was not preempted. The District Court found that the statute did not have a prohibited connection to the ERISA because the PBMs continued to have sufficient choice and control as to administration of prescription drug benefits. The District Court also found that the statute did not impermissibly reference the ERISA because the existence of ERISA plans was not essential to the statute's operation and the statute did not "act immediately and exclusively" on ERISA plans. *Id.* at 727-28. Further, any specific references to the ERISA in the definitions section of the statute were too far removed from the statutory provisions at issue to conclude those previsions expressly referenced the ERISA. On appeal, the Eighth Circuit reversed the District Court. The Eighth Circuit observed that a state law has a prohibited "reference to" an ERISA plan when the law: (i) imposes requirements by reference to ERISA-covered programs; (ii) specifically exempts ERISA plans from an otherwise generally applicable statute; or (iii) premises a cause of action on the existence of an ERISA plan. *Id.* at 728. As an initial matter, the Eighth Circuit noted that when read alone, the statute did not appear on its face to impermissibly reference the ERISA. However, taking into account the statutory definition section of the law, it was apparent that the law specifically exempted certain ERISA plans from its otherwise general application, and thus the law had an improper reference to the ERISA. In addition to this express reference to the ERISA, the law also made an implicit reference to the ERISA through regulation of PBMs who were subject to ERISA regulation, and thus the law necessarily affected ERISA plans. The Eighth Circuit concluded that the law was expressly preempted due to its impermissible reference to the ERISA or ERISA plans. The Eighth Circuit noted that although it did not need to consider whether the law was preempted due to a connection with the ERISA, nevertheless the law had a prohibited connection with the ERISA because it intruded upon matters "central to plan administration and interferes with nationally uniform plan administration" by: (i) requiring PBMs to report their methodology for establishing reimbursement amounts to the state and network pharmacies; (ii) restricting the class of drugs for which the PBMs can establish maximum reimbursement amounts and limiting the sources by which they can get pricing information; and (iii) requiring PBMs to include a provision in their contracts with network pharmacies that allows pharmacies to appeal reimbursement rates and allows for

retroactive payment if the rates were applied incorrectly. *Id.* at 731. Because the duties imposed upon the PBMs were inconsistent with the ERISA's central design, the ERISA's express preemption clause required invalidation of the statute as it applied to the PBMs in their administration and management of prescription drug benefits for ERISA plans. The Eighth Circuit therefore reversed the District Court's decision, and ordered judgment in favor of the PBMs on the issue of express preemption.

***Spires, et al. v. Schools*, 2017 U.S. Dist. LEXIS 190294 (D.S.C. Nov. 17, 2017).** Plaintiffs, a group of participants in the Piggly Wiggly Carolina Co., Inc. and Greenbax Enterprises Inc. Employee Stock Ownership Plan and Trust (the "Plan"), filed a class action on behalf themselves and all other participants under the ERISA. Plaintiffs moved for leave to proceed without class certification, as a derivative action on behalf of the Plan under Rule 23.1. Plaintiffs also sought to be excused from compliance with the derivative-action pleading requirements of Rule 23.1(b). The Court denied Plaintiffs' motion. Plaintiffs asserted that they should be allowed under § 502(a) of the ERISA to proceed via a derivative action on behalf of plans under Rule 23.1. Plaintiffs noted that other case law authorities have excused such actions from compliance with the pleading requirements of Rule 23.1(b). In opposition, Defendants argued that an ERISA plan lacked standing to sue, that the complaint did not comply with Rule 23.1(b), the relief Plaintiffs sought would unfairly shift the burden of proof to Defendants, and that it would cause unreasonable delay. *Id.* at *3-4. The Court noted that it was questionable whether, under Fourth Circuit case law, an ERISA plan may bring ERISA claims against plan fiduciaries. The Court, however, stated that it need not reach that issue because Plaintiffs pleaded a class action. The complaint had nearly one hundred references to "class," "class members," and the "class period." *Id.* at *4. The Court found that the complaint did not meet the pleading requirements for a derivative action under Rule 23.1(b) and Plaintiffs did not attempt to explain why Rule 23.1(b) should not apply. *Id.* Further, the Court agreed with Defendants' argument that allowing a class action to proceed as a derivative action would unfairly shift to Defendants the burden of proving or disproving the adequacy of named Plaintiffs as representatives of all interested parties. The Court explained that in a class action, Plaintiffs must prove the adequacy of the class; however, in a derivative action, a Defendant has the burden to prove that a Plaintiff could not adequately represent the interests of the shareholders or of the corporation. *Id.* Therefore, the Court opined that allowing this class action to proceed as a derivative action without amendment of the complaint could make it impossible to ascertain from the complaint exactly what Defendants must prove or rebut to defend themselves. *Id.* at *5. Accordingly, the Court stated that recasting the lawsuit as a derivative action would require amendment of the complaint. The Court further noted that amendment of the complaint to base the entire action on a new legal theory would require adjudication of new motions to dismiss. The Court held that it would not return this matter to the pleading stage absent extraordinary circumstances, which Plaintiffs had not demonstrated. *Id.* The Court therefore denied Plaintiffs' motion to proceed as a derivative action.

(xiv) Tolling, Statute Of Limitations, And Exhaustion Requirements In ERISA Class Actions

***Barber, et al. v. Lincoln National Life Insurance Co.*, 2017 U.S. Dist. LEXIS 74005 (W.D. Ky. May 16, 2017).** Plaintiff, a participant in an employer-sponsored disability plan, initiated a class action to challenge the plan's ability to off-set his monthly benefit by other sources of income. He brought suit on behalf of two classes of similarly-situated persons. Defendant moved to dismiss, and the Court granted the motion. The Court found that the plan properly off-set Plaintiff's benefit by other sources of income, as the plain text of the plan authorized this off-set. The Court thus dismissed the claim with prejudice. The Court also found that Plaintiff had standing to challenge whether the plan could apply off-sets related to other sources of income before this income was reported for federal income tax purposes. Plaintiff theorized that premature off-setting could result in excessive reductions in benefits. The Court dismissed this argument, since Plaintiff had failed to exhaust his administrative remedies on this claim. The Court concluded that as the 180-day period to exhaust had run, Plaintiff had failed to timely exhaust. The Court thus dismissed the claim with prejudice.

***Hitchcock, et al. v. Cumberland University 403(b) DC Plan*, 851 F.3d 552 (6th Cir. 2017).** In this class action suit challenging a university's retroactive amendment of its 403(b) plan to make matching contributions discretionary, the Sixth Circuit held that that the ERISA plan participants did not need to exhaust their administrative remedies as to claims for violation of the ERISA's anti-cutback rule and breach of fiduciary duty and were entitled to discovery before responding to a motion to dismiss one additional claim. Plaintiffs were

participants in the university's retirement plan. The plan had previously provided for a 5% employer matching contribution. In late 2014, the employer amended the plan, retroactive to January 1, 2013, to provide for a discretionary employer match, and then set the match at 0% for 2013-14 and 2014-15. *Id.* at 555-56. Plaintiffs sued to recover matching contributions (Count I), alleged that the amendment violated the ERISA's anti-cutback rule (Count II), that proper notice of the amendment was not given (Count III), and that the amendment constituted a breach of fiduciary duty (Count IV). The District Court had ruled that Plaintiffs were required to exhaust their administrative remedies under the plan before filing Counts II and IV and granted Defendants' motion to dismiss on that basis. On appeal, however, the Sixth Circuit noted that these claims focused on the legality of the plan amendment, not on the interpretation of the plan terms themselves. According to the Sixth Circuit, matters of legality are within the expertise of judges, not plan administrators. Therefore, the Court sided with case law precedents of the Third, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits in finding that exhaustion of administrative remedies is not required as to claims challenging the legality of plan terms. *Id.* at 565. The District Court also had dismissed Plaintiffs' improper notice claim, finding that it was not pleaded with adequate specificity and that it failed to state a claim upon which relief had been granted. The Sixth Circuit reversed, holding that Plaintiffs should be allowed an opportunity to request discovery before being required to respond to a motion to dismiss that claim. The Sixth Circuit also directed the District Court to determine if Count III was a legal claim as to which exhaustion of administrative remedies was not required. *Id.* at 566.

***In Re Disney ERISA Litigation*, 2017 U.S. Dist. LEXIS 61202 (C.D. Cal. April 21, 2017).** In this putative class action, Plaintiffs – a group of participants in Walt Disney Company's individual account retirement plan – filed suit against the plan on behalf of all participants whose plan accounts included investments in the Sequoia Fund. Plaintiffs alleged that the plan breached its fiduciary duties to participants under the ERISA by failing to prudently manage and monitor investment options offered to participants. In particular, Plaintiffs alleged that the continued offering of the Sequoia Fund was imprudent because the fund had invested over 25% of its net assets in Valeant Pharmaceuticals International, Inc., the stock price of which declined substantially after concerns about its accounting practices and investment strategies emerged. The original complaint alleged that the plan's failure to monitor and correct Sequoia's concentration of investments in Valeant constituted a breach of fiduciary duty. The Court granted the plan's motion to dismiss the original complaint because, under established U.S. Supreme Court precedent, Valeant's stock price decline alone was insufficient to show a plausible breach of fiduciary duty absent special circumstances that would have required the plan to question the market's valuation of the company. Plaintiffs' amended complaint shifted theories of liability, alleging that Sequoia held itself out to be a "value" fund, but pursued a "growth" strategy by investing in Valeant. *Id.* at *6. Plaintiffs alleged that a prudent fiduciary should have monitored the fund to ensure that it adhered to its purported investment strategy. The Court granted the plan's motion to dismiss the amended complaint on the basis that Plaintiffs again failed to allege any special circumstances supporting the theory that the plan should have ceased offering the Sequoia Fund as an investment option or should have questioned the market's valuation of Valeant. Plaintiffs also failed to allege any facts showing that the representations made to participants about the Sequoia Fund were so inconsistent with its investment in Valeant that a reasonably prudent investor would have discontinued offering the fund. The Court further noted that the claim was time-barred under the ERISA's three-year statute of limitations. The Court found that under Plaintiffs' new theory of liability, Plaintiffs would have had actual knowledge of the alleged breach when the plan disclosed the Sequoia Fund's decision to invest in Valeant in 2010. At that time, Plaintiffs would have discovered that this investment allegedly contradicted the fund's value strategy. Plaintiffs' action, brought in 2016, was thus brought after the statute of limitations expired. Finally, the Court denied Plaintiffs' request for leave to amend their complaint because Plaintiffs had already been given an opportunity to plead additional facts making their claims plausible and had failed to do so. Accordingly, the Court dismissed the amended complaint with prejudice.

***Osberg, et al. v. Foot Locker, Inc.*, 2017 U.S. App. LEXIS 12041 (2d Cir. July 6, 2017).** Plaintiffs, a group of plan participants and beneficiaries, sued Defendants and sought equitable relief under the ERISA for violations arising out of Defendants' alleged failure to disclose that a conversion from a defined benefit to a cash balance pension plan would cause "wear-away," meaning that some employees would not accrue additional pension benefits for a period of time. Following a bench trial, the District Court ruled that Defendants' failure to disclose violated §§ 502 and 404(a) of the ERISA. The District Court ordered equitable relief under § 502(a)(3) of the ERISA in the form of plan reformation to conform to the plan participants' reasonably mistaken expectations,

which resulted from Defendants' "materially false, misleading, and incomplete disclosures." *Id.* at *4. On appeal, Defendants challenged four aspects of the District Court's decision. First, Defendants asserted that the District Court erred by awarding relief to plan participants whose claims were time-barred. As to the § 502 claim, Defendants argued that the claims were untimely for class members who received their pay-outs three years before the lawsuit was filed because they had constructive notice of the claimed reduction in benefits. The Second Circuit rejected Defendants' argument, finding that this constructive notice theory would have required a "heroic chain of deductions" for the average plan participant, particularly considering Defendants' "concealment." *Id.* at *19-20. Defendants also argued that the claims were time-barred because the concealment exception to the general three-year statute of limitations, which extended the statute of limitations to six years, did not apply due to lack of fraud. *Id.* at *23-24. The Second Circuit disagreed, noting that the exception applied in cases of fraud or concealment, the latter of which was established. *Id.* at *26-27. Second, Defendants argued that the District Court erred by ordering class-wide relief on the § 404(a) claims without requiring individualized proof of detrimental reliance. The Second Circuit held that under the Supreme Court's decision in *CIGNA Corporation v. Amara*, 563 U.S. 421, 443 (2011), detrimental reliance was not required for the remedy of reformation. *Id.* at *28-30. Third, Defendants challenged the District Court's conclusion that a mistake – a prerequisite to reformation – was shown by clear and convincing evidence as to all class members. The Second Circuit disagreed, finding that evidence of a mistake "need not be individualized," and the circumstantial evidence presented was sufficient, particularly in light of the finding of concealment. *Id.* at *30-32. Fourth, Defendants challenged the formula used by the District Court to calculate damages, arguing that it resulted in a windfall to certain participants who experienced little to no wear-away. *Id.* at *34. The Second Circuit determined that, while Defendants' arguments were "not completely without theoretical appeal," the District Court's award did not "fall outside the range of 'permissible decisions'" available under the applicable abuse of discretion standard of review. *Id.* at *35.

***Sulyma, et al. v. Intel Corporation Investment Policy Committee*, 2017 U.S. Dist. LEXIS 49788 (N.D. Cal. Mar. 31, 2017).** On behalf of a putative class action, Plaintiff – a former Intel employee – sued fiduciaries of the Intel Corp.'s 401(k) Savings Plan and Intel Retirement Contribution Plan for breaches of fiduciary duty relating to the Plans' investment in hedge funds, private equity, and alternative investments, and inadequate disclosures relating to those investments. Defendants moved for summary judgment on all of Plaintiff's claims, arguing that they were time-barred under the statute of limitations because Plaintiff had actual knowledge of the claims through plan disclosures more than three years before filing suit. For claims that it termed "substantive" imprudence claims, the Court noted that for Plaintiff's claims to be time-barred under the law, Plaintiff need only have "knowledge of the transaction that constituted the alleged violation, not by … knowledge of the law." *Id.* at *11. Despite Defendants' urging, the Court also refused to adopt a "willful blindness" standard for actual knowledge. *Id.* at *14. For claims that the Court termed "process" imprudence claims, in which a Plaintiff alleges some infirmity or self-dealing in Defendant's investment decision-making process, the Court reasoned that "actual knowledge of the breach will usually require some knowledge of how the fiduciary selected the investment." *Id.* at *15. The Court concluded that the Plan disclosures provided to Plaintiff gave him actual knowledge of the alleged breaches more than three years before filing suit, regardless of whether his claims were substantive or process claims. Distinguishing Plaintiff's case from *Tibble v. Edison International*, 729 F.3d 1110, 1120-21 (9th Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1823 (2015), the Court noted that even after discovery, Plaintiff had offered only conclusory assertions and no evidence of any infirmity in the decision-making process that led to the selection of the investments at issue. Because there was no genuine dispute of material fact that Plaintiff had actual knowledge of the facts comprising his imprudence claims, as well as knowledge of the disclosures he alleged were unlawfully inadequate, the Court granted summary judgment to Defendants as to those claims. The Court also granted summary judgment to Defendants on Plaintiff's derivative duty to monitor and co-fiduciary liability claims.

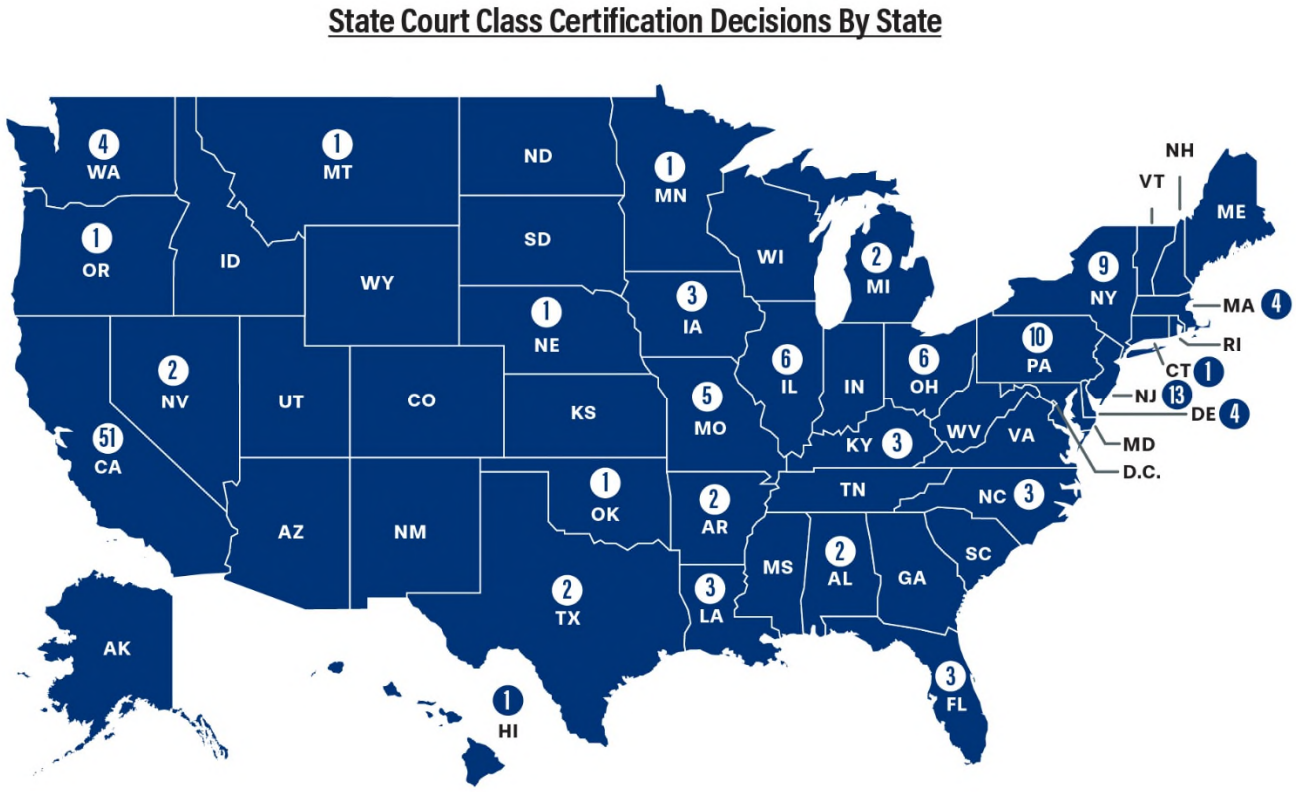
***White, et al. v. Chase*, 2017 U.S. Dist. LEXIS 53639 (D. Mass. Jan. 13, 2017).** In this class action suit alleging that Defendant had improperly and without proper notice terminated a pension plan in violation of the ERISA, the Court denied Defendant's motion to dismiss based upon the statute of limitations. Plaintiffs pleaded four claims based on the termination of the pension plan, including: (i) that proper notice was not given under 29 U.S.C. § 1054(h); (ii) the amendment effecting the termination was not in writing in violation of 29 U.S.C. § 1102; (iii) the amendment was a breach of fiduciary duty; and (iv) the amendment was made in violation of 29 U.S.C.

§ 1102. The Court had previously found that the first and second claims were timely, after determining that they were more like claims for benefits than claims for breach of fiduciary duty, and based on applying the Massachusetts statute of limitations for breach of contract. *Id.* at *4-5. Further, the Court had dismissed the third and fourth claims as untimely. Plaintiffs subsequently amended their complaint again, and asserted the first two claims in largely the same fashion as before. Defendant again moved to dismiss by raising the same defenses. The Magistrate Judge rejected Plaintiffs' claims on the grounds that they already had been rejected by the Court as untimely. *Id.* at *9-10.

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 2017 were clustered in California, Delaware, Florida, Illinois, Louisiana, Massachusetts, Missouri, New Jersey, New York, Ohio, Pennsylvania, and Washington. Rulings from California alone resulted in 51 class action decisions of the 144 decisions analyzed in this Chapter.

In terms of class action rulings at the state level, the following map shows those rulings:



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 2017. 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 plaintiffs' counsel to pursue class actions.

This Chapter analyzes reported class action rulings from all state jurisdictions, with an emphasis on the leading Arkansas, California, Delaware, Florida, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Texas, and Washington precedents.

A. Employment Discrimination Rulings

(i) California

***Alvarez, et al. v. Bank Of America,* 2017 Cal. App. Unpub. LEXIS 361 (Cal. App. 2d Dist. Jan. 19, 2017).** Plaintiffs, a group of collection associates who were terminated by Defendant, filed suit against Defendant alleging violations of the California Fair Employment and Housing Act ("FEHA") based upon claims of racial discrimination, disparate impact discrimination, and retaliation. The Plaintiffs also claimed intentional infliction of emotional distress as well as tortious terminations. The trial court granted Defendant's motion for summary judgment as to all of Plaintiffs' claims. In a separate hearing, the trial court ordered Plaintiffs to pay Defendant $620,000 in attorneys' fees. On Plaintiffs' consolidated appeal, the California Court of Appeal affirmed the trial court's rulings as to summary judgment. However, the Court of Appeal reversed the trial court's decision to award attorneys' fees to Defendant. The evidence presented at the summary judgment hearing was undisputed and established that Plaintiffs were terminated for fraudulent conduct as Plaintiffs admitted to engaging in the fraudulent conduct. Plaintiffs alleged that they were treated differently than Caucasian employees who engaged in the same conduct. Defendant presented undisputed evidence that it investigated all collection associates and conducted a race-neutral investigation into the fraudulent conduct and terminated employees based upon on race-neutral criteria. The Court of Appeal found that Defendant met its burden in showing that Plaintiffs' termination was based on legitimate and non-discriminatory factors and thereby negated a necessary element of Plaintiffs' discrimination claims. Because Plaintiffs failed to present any evidence of intentional discrimination, summary judgment was properly granted. The Court of Appeal also affirmed summary judgment as to the retaliation claim, noting that the protected activity that Plaintiffs alleged in the complaint is not activity protected by the FEHA. There was no evidence that Plaintiffs complained about or reported any alleged discrimination during their employment. Therefore, the Court of Appeal also affirmed summary judgment on the retaliation claim. However, the Court of Appeal found that the trial court abused its discretion in awarding attorneys' fees when it ruled that Plaintiffs' claims were frivolous, as Plaintiffs did not have access to the evidence of Defendant's race-neutral investigation and race-neutral criteria for termination until discovery was conducted. Accordingly, the Court of Appeal reversed the trial court's order awarding attorneys' fees to Defendant.

***Ellis, et al. v. Google*, Case No. CGC-17-561299 (Cal Sup. Ct. Dec. 4, 2017).** Plaintiffs, three former female employees, filed a putative class action alleging that Defendant "maintained throughout California a 'centrally determined and uniformly applied policy and/or practice of paying its female employees less than male employees for substantially similar work.'" *Id.* at 2. Plaintiffs also alleged that the U.S. Department of Labor had found, with respect to Google's Mountain View office in 2015, "'systematic compensation disparities against women pretty much across the entire workforce.'" *Id.* Plaintiffs asserted four causes of action against Defendant based on the alleged disparity, including a California Equal Pay Act claim, a California Labor Code claim, a Business and Professions Code claim, and a claim for a declaratory judgment. Plaintiffs purported to bring these claims on behalf of all female Google employees in California. The Court observed that a class action complaint should be dismissed where, "assuming the truth of the factual allegations in the complaint, there is no reasonable possibility that the requirements for class certification will be satisfied." *Id.* at 3. The Court discussed the requirements for class certification under California law against that standard, including: "(i) an ascertainable and sufficiently numerous class; (ii) a well-defined community of interest; and (iii) substantial benefits from certification that render proceeding as a class superior to the alternatives." *Id.* at 4. With respect to the second factor, the Court observed that it has three factors, including "(i) predominant common questions of law or fact; (ii) class representatives with claims or defenses typical of the class; and (iii) class representatives who can adequately represent the class." *Id.* The Court found that Plaintiffs did not allege sufficient facts to conclude that there was an ascertainable class. Even though Plaintiffs defined the class as "all women employed by Google in California," which on its face was ascertainable, the Court found the definition overbroad because Plaintiffs

offered "no means by which only those class members who have claims can be identified from those who should not be included in the class." *Id.* The Court found that Plaintiffs' allegation that the U.S. Department of Labor "found systemic compensation disparities against women pretty much across the entire workforce" at a Google office in 2015 was insufficient to support the conclusion that "Google implemented a uniform policy of paying all female employees less than male employees for substantially equal or similar work." *Id.* The Court observed that the complaint did not specify, for example, the specific job classifications to which it pertained, or whether the comparison was made against men who performed substantially similar work under similar working conditions *Id.* The Court also concluded that Plaintiffs failed to allege that there were common questions of law and fact that predominated over individual issues because Plaintiffs' class was "overbroad," so liability could not be decided for all putative class members in one proceeding. *Id.* at 5. The Court further opined that Plaintiffs' conclusory allegation that they "performed 'equal work' as their male counterparts" was insufficient to allege that they, in fact, performed equal work, and dismissed their individual claims. *Id.* at 6.

B. Wage & Hour Rulings

(i) California

***Bartoni, et al. v. American Medical Response West*, 2017 Cal. App. Unpub. LEXIS 2899 (Cal. App. 1st Dist. April 25, 2017).** Plaintiffs, a group of emergency response workers, alleged that Defendant violated California labor law for failure to provide meal and rest periods and they asserted a representative claim under the Private Attorneys General Act ("PAGA"). *Id.* at *1. Plaintiffs moved for certification of two classes. The trial court denied class certification and Plaintiffs appealed. *Id.* The California Court of Appeal declined to decide whether the order denying certification was appealable under the death knell doctrine and treated the appeal as writ of mandate. *Id.* at *10. At the trial court's request for clarification, Plaintiffs identified eleven alleged unlawful policies in its supplemental brief. *Id.* at *7. First, Plaintiffs alleged that Defendant's uniform policy of providing only on-duty meal periods to members of both classes was unlawful. *Id.* at *6. Second, Plaintiffs alleged that Defendant's uniform requirement that members of both classes remain on-duty at all times, deprived class members of "off-duty" rest periods, and was unlawful. *Id.* Lastly, Plaintiffs alleged nine unlawful polices that they characterized as uniform policies and related to the number, duration, and timing of meal and rest periods and were identified in a chart submitted to the trial court as part of Plaintiffs' supplemental briefing. *Id.* at *7. The Court of Appeal ruled that the trial court did not abuse its discretion in denying certification with respect to those nine policies because Plaintiffs failed to identify any policy that was uniformly applicable across either class and as individual issues predominated. *Id.* at *29. These proposed classes included field employees working in 18 different geographic operations with various approaches to meal and rest periods; accordingly, the Court of Appeal reasoned that the trial court properly concluded that individual issues predominated. However, the Court of Appeal vacated the portion of the trial court's order denying class certification for failure to provide off-duty rest periods. The trial court rested its ruling on the conclusion that a meal or rest period during which an employee remains "on-call" – but is not actually interrupted – is properly characterized as an "off-duty" period. *Id.* at *23. The Court of Appeal ruled that this conclusion was based upon an erroneous legal premise insofar as rest periods are concerned because the California Supreme Court's decision in *Augustus v. ABM Security Services, Inc.*, 385 P.3d 823 (2016), held that on-call time is not off-duty time and cannot be considered a rest period under California law. *Id.* at *27. As such, the Court of Appeal vacated the order, as it applied to the overarching rest-period policy and it remanded for the trial court to determine whether to certify the overarching rest break claims. *Id.* at *33.

***Betancourt, et al. v. Prudential Overall Supply,* 2017 Cal. App. LEXIS 191 (Cal. App. 4th Dist. Mar. 7, 2017).** Plaintiff, an employee, filed a class action alleging that Defendant violated § 2698 of the California Labor Code and the Private Attorneys General Act ("PAGA") by: (i) failing to pay overtime; (ii) failing to provide meal periods; (iii) failing to provide rest periods; (iv) failing to pay minimum wage; (v) failing to pay timely wages upon termination; (vi) failing to pay timely wages during employment; (vii) failing to complete accurate wage statements; (viii) failing to keep complete and accurate payroll records; and (ix) failing to reimburse necessary business-related expenses and costs. *Id.* at *2. Defendant moved to compel arbitration of Plaintiff's claims. The trial court denied the motion. On appeal, the California Court of Appeal affirmed. Defendant asserted that Plaintiff signed an arbitration agreement, which provided that he would submit to final and binding arbitration of any and all claims and disputes that were related in any way to employment or termination. *Id.* at *3. The

agreement further provided that Plaintiff agreed "to forego any right to bring claims on a representative or class member basis." *Id.* Defendant argued that all of Plaintiff's claims related to employment and therefore were subject to arbitration pursuant to the agreement. Defendant also asserted that Plaintiff's PAGA claim was not exempt from arbitration because it was not really encompassed by the PAGA. *Id.* Defendant argued that Plaintiff was attempting to evade arbitration by labeling his wage & hour claims as a PAGA claim. *Id.* at *4. Plaintiff asserted that there was insufficient evidence of a valid agreement to arbitrate. Plaintiff also contended his complaint only set forth a PAGA claim. Plaintiff also argued that the waiver of his right to bring a representative action under the PAGA was unenforceable because it would violate California-based substantive rights to have its laws enforced. *Id.* The Court of Appeal found that the trial court correctly denied Defendant's motion to compel arbitration because a Defendant cannot rely on a pre-dispute waiver by a private employee to compel arbitration in a PAGA case. *Id.* at *8. The Court of Appeal stated that since the action was currently a PAGA case, Plaintiff was not bound by the pre-dispute agreement to arbitrate. The Court of Appeal explained that if the California Attorney General filed a lawsuit against Defendant for alleged Labor Code violations, Defendant could not rely on its pre-dispute agreement with Plaintiff to compel arbitration in the State's case. *Id.* The Court of Appeal held that Plaintiff was suing on behalf of the State, and while a PAGA action might be subject to arbitration, relying on a pre-dispute agreement with a private party could not suffice to compel arbitration of a PAGA claim. *Id.* at *9. Thus, the Court of Appeal determined that the trial court did not err by denying Defendant's motion.

***Cortez, et al. v. Doty Brothers Equipment Co.,* 2017 Cal. App. Unpub. LEXIS 5667 (Cal. App. 2d Dist. Aug. 15, 2017).** Plaintiff filed a putative class action alleging wage & hour violations of California law and a representative claim under the Private Attorneys General Act ("PAGA"). *Id.* at *6. Defendant moved to compel arbitration of the individual statutory claims and to dismiss the class claims and representative PAGA claim, asserting that they were unauthorized pursuant to the parties' collective bargaining agreement ("CBA"). *Id.* at *7. The trial court granted Defendant's motion to compel arbitration of the individual claims and severed and stayed the PAGA claim. *Id.* at *2. On appeal, the California Court of Appeal denied Plaintiff's writ of mandate challenging the order to compel arbitration. The parties then agreed to allow the trial court, rather than the arbitrator, to determine arbitrability of the class claims. *Id.* The trial court ruled that the class claims were unauthorized under the CBA and dismissed them. *Id.* Plaintiff filed a notice of appeal regarding the order dismissing his class claims and the order compelling arbitration, asserting that that the Court of Appeal had jurisdiction to review. The Court of Appeal treated the consolidated appeal as a petition for writ of mandate and considered the merits of the trial court's orders compelling arbitration of Plaintiff's individual claims and dismissing the class claims. *Id.* at *5. The Court of Appeal granted Plaintiff's petition in part, ruling that the claims for failure to timely pay wages upon separation from employment and unfair competition were not encompassed in the arbitration provision of the CBA. *Id.* In all other respects, the Court of Appeal denied the petition on the basis that the remaining claims were subject to arbitration and the trial court's dismissal of the class claims was proper because the CBA did not authorize class-wide arbitration. *Id.* at *25. The Court of Appeal ruled that the question of whether an arbitration agreement authorizes arbitration of class action claims is also a matter of contract interpretation. Absent language in the arbitration provision itself or extrinsic evidence establishing the parties' agreement to arbitrate class-wide claims, only individual claims may be arbitrated. Silence on the issue may not be construed as agreement. Plaintiff did not dispute this interpretation of the CBA or otherwise challenge the trial court's determination that the language of the CBA did not contemplate class-wide arbitration. *Id.* at *24. Rather, Plaintiff argued that any employer-employee contract that prohibited class-wide arbitration violated the protections for collective action afforded employees under the National Labor Relations Act ("NLRA"), and therefore was invalid. Plaintiff requested that the Court of Appeal defer ruling on that issue, noting the split of circuits on this issue and because the U.S. Supreme Court had recently granted *certiorari* in *Ernst & Young, LLP v. Morris*, 137 S. Ct. 809 (2017), to resolve the issue. The Court of Appeal declined to defer its ruling, reasoning that the California Supreme Court had already decided that the NLRA did not bar parties from excluding class claims from the agreement to arbitrate. *Id.* at *25. Accordingly, the Court of Appeal dismissed the appeal and directed the trial court to vacate its order compelling arbitration only as to Plaintiff's two claims that were not encompassed in the arbitration provision of the CBA. *Id*.

***Crawley, et al. v. Airtouch Cellular*, 2017 Cal. App. Unpub. LEXIS 5216 (Cal. App. 2d Dist. July 28, 2017).** Plaintiffs, a group of retail store managers, filed a putative class action alleging overtime violations as result of

Defendant's misclassification of Plaintiffs as exempt from overtime compensation requirements. *Id.* at *1. The trial court denied Plaintiffs' motion for class certification and ruled that Plaintiffs failed to satisfy the requirements of typicality, predominance, and superiority. *Id.* at *13. On Plaintiffs' appeal, the California Court of Appeal affirmed the trial court's decision. *Id.* at *57. Plaintiffs argued that the trial court erred by concluding that individualized, rather than common issues predominated. *Id.* at *24. The Court of Appeal rejected Plaintiffs' argument and concluded that substantial evidence supported the trial court's ruling that individual issues predominated. *Id.* at *26. Plaintiffs argued that they did not qualify for exemptions because many of their tasks were non-managerial and Defendant's policies made it impossible for Plaintiffs to exercise any discretion or independent judgment when completing tasks. *Id.* Defendant asserted that Plaintiffs fell under the administrative and executive exemptions to California minimum wage law. *Id.* at *18. The regulations governing both exemptions required an examination of the work performed by the employee and the amount of time they spent on such work, in determining whether an employee is primarily engaged in performing exempt duties. *Id.* at *20. The Court of Appeal ruled that because there was sufficient evidence that Plaintiffs spent different amounts on time on a wide variety of tasks during the workday, individual issues predominated. Defendant presented evidence from employees and experts that the amounts of time on different tasks depended on a variety of factors, including the size and location of the store and the experience level of Plaintiffs' subordinates. Defendant also presented evidence, contrary to Plaintiffs' argument, that Defendant's policies did not deprive Plaintiffs of discretion by requiring them to engage only in non-exempt work. *Id.* at *29. Defendant presented evidence that Plaintiffs routinely interviewed candidates and made hiring and disciplinary recommendations. *Id.* at *30. Defendant's evidence tended to show that its policies did not eliminate managerial discretion in the fashion Plaintiffs claimed although Plaintiffs' evidence suggested otherwise. Given this conflict, the Court of Appeal found that the trial court could reasonably conclude that the question of whether Defendant's standardized policies placed Plaintiffs outside of the exemptions depended on an analysis of how each Plaintiff operated, and was not susceptible to common proof. *Id.* at *34. Plaintiffs also argued that the trial court erred by failing to consider their primary theory that Plaintiffs could not exercise discretion and independent judgment on matters of significance and they performed virtually no exempt tasks. *Id.* at *35. The Court of Appeal rejected this argument and found that the trial court acknowledged the detailed nature of Defendant's policies and it reasonably concluded that such operational minutia offered little insight into class-wide liability, especially considering that the declarations showed that Plaintiffs handled their time very differently depending upon the nature and level of tasks. The Court of Appeal reasoned that the fact that Defendant had common policies applicable to all Plaintiffs could not alone compel class certification as most duties that Plaintiffs performed were exempt as a matter of law, such as interviewing, hiring, disciplining, training, and directing work. The Court of Appeal ruled that the trial court appropriately weighed the common and individual issues, and reasonably concluded that certification was not proper because Plaintiffs' classification hinged on individualized proof. *Id.* at *37. Accordingly, the Court of Appeal affirmed the trial court's decision denying certification.

***De La Cruz, et al. v. Standard Drywall,* 2017 Cal. App. Unpub. LEXIS 446 (Cal. App. 2d Dist. Jan. 23, 2017).** Plaintiff, a plasterer, filed a class action alleging that Defendant failed to pay all wages due, failed to provide meal and rest periods, failed to pay wages of terminated or resigned employees, unfair competition, and failed to reimburse business expenses in violation of the California Labor Code. Plaintiff sought relief on behalf of himself and a putative class consisting of all non-exempt hourly-paid employees currently or formerly employed by Defendant in California during the four years prior to the filing of the complaint through the date of certification. Defendant filed a petition to compel arbitration, asserting that employees worked pursuant to collective bargaining agreements ("CBAs"). Defendant contended that Plaintiff's claims were subject to the arbitration procedures set forth in two CBAs that he submitted to the Court as evidence. *Id.* at *3. The trial court denied Defendant's motion to compel arbitration, finding that there was a dispute as to the threshold issue of whether an enforceable arbitration agreement existed. *Id.* at *5. The trial court stated that Defendant had the initial burden to show by a preponderance of evidence that there exists an enforceable arbitration agreement between the parties. *Id.* Defendant pointed to a declaration from another employee to support its contention that it was a party to the two CBAs. However, the trial court found that the cited portions of the declaration provided no evidentiary support for Defendant's argument that it is a party to either of the CBAs. *Id.* at *7-8. Defendant was not a signatory to either agreement and the declaration did not provide evidence that Defendant was a party to either of the two arbitration agreements on which it sought to rely. *Id.* at *8. On appeal, the California Court of Appeal affirmed the trial court's decision. Defendant contended that the trial court erred in holding that it had not

proven the existence of the agreements and their applicable arbitration provisions by a preponderance of the evidence; erred in shifting the burden of establishing waiver of arbitration to Defendant to prove that it had not waived arbitration; and erred in not granting Defendant a further evidentiary hearing. *Id.* at *10. The Court of Appeal stated that it was well established that on a petition to compel arbitration, Defendant bore the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence. The Court of Appeal found that the trial court did not apply a heightened or improper burden of proof and found Defendant's showing to be insufficient. *Id.* at *12. The Court of Appeal also held that Defendant's claim that the trial court improperly shifted the burden to it to prove that it had not waived arbitration failed, as the trial court properly assigned the burden to Defendant in the first instance to prove the existence of a valid arbitration agreement covering the dispute. *Id.* at *13. Further, the Court of Appeal opined that if Defendant sought the opportunity to present additional evidence, Defendant did not make an offer of proof as to what additional evidence it could offer at a continued hearing. *Id.* Since the trial court was not required to speculate that Defendant was capable of presenting additional evidence that would cure the inadequacy, the Court of Appeal reasoned that it did not err in failing to do so. Accordingly, the Court of Appeal determined that the trial court did not abuse its discretion in denying Defendant's motion to compel, and it thereby affirmed the trial court's judgment.

***Espejo, et al. v. The Copley Press, Inc*., 13 Cal. App. 5th 329 (4th Dist. 2017).** Plaintiffs, a group of newspaper delivery carriers, filed a class action alleging that Defendant violated California law and committed unfair business practices for its failure to reimburse Plaintiffs for business expenses. The trial court ruled that Plaintiffs were employees and not independent contractors, and thus entitled to recover under the Unfair Competition Law ("UCL") and entered a judgment in favor of Plaintiffs. On Plaintiffs' appeal, the California Court of Appeal ruled that there was substantial evidence that supported the trial court's finding that Plaintiffs were employees, even though their contracts indicated that they were independent contractors. *Id.* at 344. The trial court found that the contract was an adhesion contract because it was on a "take it or leave it basis." Plaintiffs never negotiated a rate of pay increase, and Defendant unilaterally revised the contract 11 times for its sole benefit. *Id.* at 335. The Court of Appeal also noted that the trial court identified facts and evidence that supported its finding that Defendant retained sufficient control such that the Plaintiffs were employees. The Court of Appeal ruled that there was no basis to decertify the class on the ground that the class was not adequately represented. *Id.* at 338. Defendant contended that the trial court erred in awarding the class expenses that Defendant had already reimbursed by paying the carriers enhanced compensation to cover their vehicle expenses and other business expenses. The carriers' invoices did not set forth a lump sum payment that included a means of identifying the amount being paid for labor performed and the amount being paid as reimbursement for business expenses, and the only payment the carriers received was after expenses were deducted. *Id.* at 350. The Court rejected Defendant's enhanced compensation defense because the language of the business code required an employer to identify the amount of compensation intended to reimburse expenses at or near the time of payment. As such, the trial court properly ordered the newspaper to reimburse the carriers by paying them enhanced compensation to cover expenses. However, there was testimony that with respect to expenses, Plaintiffs did not include any credits or reversals on the invoices when calculating expenses. Therefore, the Court of Appeal ordered that Plaintiffs' award be reduced by the amount of any documented and readily identifiable payments, credits, or reversals that the class members received as expenses. Defendants were not precluded from being credited with the credits and reversals specified on carrier invoices in the calculation of Plaintiffs' monetary award. The Court of Appeal directed the trial court to redetermine the amount of the class award and to reduce the award by the amount of any documented and readily identifiable payments, credits, or reversals in expenses that Defendant established that the class members received. Defendant also argued that the trial court erred in awarding attorneys' fees because Plaintiffs failed to meet the requirements for attorneys' fees under the statute. The Court of Appeal concluded the trial court did not abuse its discretion when it awarded attorneys' fees or in adopting Plaintiffs' lodestar amount. Further, the Court of Appeal rejected Plaintiffs' argument on its appeal that the trial court abused its discretion in its decision not to enhance the lodestar. However, the Court of Appeal remanded with directions for the trial court to reconsider the attorneys' fee award in light of the possible reduction of Plaintiffs' monetary recovery and to determine whether Plaintiffs' limited success required reduction of the fee. *Id.* at 359. In all other respect, the Court of Appeal affirmed the decision of the trial court. *Id.* at 361.

***Espinoza, et al. v. East West Bank,* 2017 Cal. App. Unpub. LEXIS 3478 (Cal. App. 2d Dist. May 17, 2017).** Plaintiff, an assistant branch manager, filed a class action alleging that Defendant misclassified assistant branch managers as exempt in violation of various provisions of the California Labor Code and the California Business and Professions Code. Plaintiff moved for class certification, and the trial court denied the motion. On appeal, the California Court of Appeal affirmed the trial court's ruling. Plaintiff's proposed class was comprised of approximately 172 former and current assistant branch managers who work at Defendant's 98 bank branches in California. Plaintiff asserted that class treatment was appropriate because all assistant branch managers performed the same tasks, were required to follow Defendant's standard policies and procedures, and that Defendant's expectations about the requirements of the assistant branch manager job could be determined on a class-wide basis. *Id.* at *3. The trial court found that Plaintiff satisfied the requirements of ascertainability, numerosity, typicality, and adequacy of representation, but failed to show common questions of law and fact predominated over individual issues. *Id.* at *17. The trial court found that Defendant produced evidence indicating while it might be possible to create an exhaustive list of tasks collectively performed by assistant branch managers, each assistant branch manager in fact performed some combination of these tasks in a highly individualized manner. The trial court therefore held that determination as to whether each task performed was properly classified as exempt or non-exempt, would not be dispositive as inquiries would be necessary as to the individual activities of each assistant branch manager. how much time was spent on each task, and how each task was performed. *Id.* at *17-18. The trial court also found that Plaintiff failed to show a class action was superior to separate lawsuits by individual class members. On appeal, the Court of Appeal found that the parties presented conflicting evidence as to the job duties and the amount of time spent on these tasks. Plaintiff submitted declarations from seven former assistant branch managers who stated they spent between 70% to 95% of their time performing non-managerial tasks, but Defendant presented evidence demonstrating the tasks were not uniform, and the time spent on each activity varied depending on the individual assistant branch manager. *Id.* at *35. Further, the Court of Appeal noted that there was substantial evidence of other differences in the job duties and time spent on each task. *Id.* at *36. The Court of Appeal therefore determined that the trial court could reasonably find individual issues predominated because assistant branch managers performed their jobs in a highly individualized manner. The Court of Appeal further concluded that even assuming common issues predominated, the trial court reasonably could have determined that individual issues could not be fairly and efficiently managed within a class setting, and therefore it did not err in finding that Plaintiff failed to meet the superiority requirement. Accordingly, the Court of Appeal affirmed the trial court's ruling denying class certification.

***In Re ABM Industries Overtime Cases,* 2017 Cal. App. Unpub. LEXIS 8415 (Cal. App. 1st. Dist. Dec. 11, 2017).** Plaintiffs, a group of janitors, filed a consolidated putative class action alleging various claims, including violations California labor laws. Plaintiffs moved for class certification of a general class of workers and various sub-classes of workers allegedly subjected to particular wage & hour violations. The trial court ruled that the report of Plaintiffs' expert was inadmissible and denied Plaintiffs' motion for certification. On Plaintiffs' appeal, the California Court of Appeal reversed. First, the Court of Appeal concluded that the trial court erred in its determination that: (i) Plaintiffs had not properly established their proposed expert as a qualified expert; and (ii) the information contained in their expert's declaration was not material. The trial court acknowledged that Plaintiffs' expert indicated an expertise in creating, managing, and analyzing large databases, but rejected him as an expert because there was no evidence that he had formal training or degrees that qualified him as an expert to review the time-keeping and payroll data at issue. The Court of Appeal ruled that the trial court abused its discretion when it refused to qualify the expert in database management and analysis based upon his experience. The Court of Appeal found that the trial court's emphasis on formal education and membership in professional organizations was misplaced given the expert's familiarity with numerous, highly complex transactions in that subject matter. Further, the Court of Appeal ruled that the trial court erred when it disregarded Plaintiffs' expert evidence of a common practice. Second, the Court of Appeal held that the trial court erred when it refused to certify the sub-classes because they were not ascertainable, and it determined that the sub-classes were all defined using objective characteristics and common transactional facts that allowed a potential class member to identify himself or herself as having a right to recover pursuant to that sub-class. The Court of Appeal concluded that the class was ascertainable and possible over-inclusiveness in the method proposed for identifying potential class members did not defeat ascertainability. Third, the Court of Appeal opined that Plaintiffs' allegations presented predominantly common questions and the trial court

improperly focused on the minutiae of each Plaintiff's individual situation. The Court of Appeal determined that when the merits of the expert's evidence of payroll practices was considered with Plaintiffs' evidence, it was clear that numerous common issues predominated in this matter. Accordingly, the Court of Appeal held that the trial court abused its discretion when it excluded Plaintiffs' expert evidence and refused to grant class certification. As such, the Court of Appeal reversed and remanded the trial court's order.

***Kizer, et al. v. Tristar Risk Management,* 2017 Cal. App. Unpub. LEXIS 4457 (Cal. App. 4th Dist. June 26, 2017).** Plaintiffs, a group of claims examiners, filed a putative class action alleging that Defendant misclassified Plaintiffs as exempt and failed to pay overtime, and committed other wage & hour violations of California law. *Id.* at *6. The trial court denied Plaintiffs' motion to certify the class. On Plaintiffs appeal, the California Court of Appeal affirmed. *Id.* at *35. The trial court denied class certification because Plaintiffs failed to show that they worked hours or days that required overtime compensation or that Defendant had a generally applicable policy or practice that required employees to work overtime. Plaintiffs were required to work 7.5 hours per day, but were also offered alternative work schedules that allowed claims examiners to work 8.33 or 8.5 hours a day in exchange for a day off every other week. *Id.* at *5. The trial court ruled that Plaintiffs failed to show that they could establish Defendant's liability based on proof common to all class members. *Id.* at *3. On appeal, Plaintiffs contended that the trial court erred because the amount of overtime worked was a damages issue, and the need for individual proof of damages was not a proper basis for denying class certification. *Id.* at *17. The Court of Appeal ruled that the trial court did not deny certification on this basis and it did not err when it denied the motion because Plaintiffs failed to satisfy the commonality requirement. *Id.* The Court of Appeal observed that Plaintiffs failed to show that their liability theory could be established on a class-wide basis through common proof as they failed to show that common fact issues existed and predominated. *Id.* at *20. The Court of Appeal reasoned that typically, in overtime claims, Plaintiffs present evidence of an employer's policy or practice that required the class members to work overtime and Plaintiffs failed to present any evidence of any such policy or practice. Plaintiffs also argued that the trial court erred in refusing class certification on their California Unfair Competition Law ("UCL") claim because the UCL did not require Plaintiff to establish that each class member individually suffered injury, and therefore Plaintiffs were not required to present evidence of the amount of overtime each putative class member worked. *Id.* at *31. However, the Court of Appeal ruled that the trial court did not deny Plaintiffs' class certification motion on this basis, but rather denied certification because Plaintiffs failed to satisfy the commonality requirement. *Id.* at *35. The Court of Appeal concluded that substantial evidence supported the trial court's decision that Plaintiffs failed to make that showing. *Id.* Accordingly, the Court of Appeal affirmed the trial court's decision to deny class certification.

***Matam, et al. v. Oracle Corp.*, 2017 Cal. App. Unpub. LEXIS 3087 (Cal. App. 1st Dist. April 28, 2017).** Plaintiff, a former technical analyst, filed an action alleging that Defendant's employment practices violated various state wage & hour laws and constituted unfair business practices. Plaintiff's case, both in the trial and appellate courts, turned largely on the reliability of his expert's report. The opinion of Plaintiff's expert was based on a comparison of Defendant's payroll records, internal time records, and time-cards. *Id.* at *3-4. In comparing those data sets, Plaintiff's expert purported to find a discrepancy between the number of overtime hours technical analysts worked and the number of overtime hours for which Defendant had paid them. In addition, by reviewing the time-cards, the expert purported to uncover that many analysts took shortened or late meal breaks, or missed them altogether. *Id.* at *6. Plaintiff moved to certify a class, arguing that his claims were subject to common proof through the expert's comparison and analysis of Defendant's records. Defendant opposed Plaintiff's motion to certify, relying on its own expert's report and 42 declarations, 22 of which were from putative class members. Defendant's rebuttal expert report identified significant flaws in the methodology and care used by Plaintiff's expert. *Id.* at *7. Among other flaws, Plaintiff's expert included on-call, non-worked, and sick time in his time-card numbers, which created significant discrepancies between the purported time worked and the time paid. *Id.* In addition, Plaintiff's expert misread Defendant's spreadsheets and ignored a $21 million overtime payment that it had made. *Id.* at *8. Finally, the expert made a number of assumptions about the data he analyzed, but failed to disclose those assumptions in his report. The trial court denied Plaintiff's motion for certification, concluding that Plaintiff's expert report was unreliable based largely on the reasons set forth in Defendant's opposition. Specifically, the trial court found that because Plaintiff relied on his expert's report to establish that three of his claims could be determined by common proof, and because that report was unreliable, he could not establish commonality for those claims. Plaintiff appealed the trial court's ruling on two main

grounds. Plaintiff first argued that whether or not his expert's calculations were accurate should not have been considered on his motion for class certification because accuracy of expert reports was a merits question. Second, Plaintiff argued that the trial court improperly weighed the competing declarations submitted by the parties. In evaluating the first question, the California Court of Appeal noted that whether or not common issues predominated over individual ones was often closely tied to the ultimate merits of a claim. *Id.* at *15. The Court of Appeal also rejected Plaintiff's argument that the opinion of Plaintiff's expert went only to the merits of alleged damages in the case, holding that when a party's expert report serves as its sole support for establishing that common questions predominated, the party has transformed that report into evidence of liability, not damages. The Court of Appeal reasoned that "Plaintiff's only evidence that uncompensated overtime and missed, late, or short meal breaks could be established class-wide with common proof was [his expert's] declaration and his comparison of [two of Oracle's] databases. The issue here is whether Plaintiff can establish that class members worked overtime for which they were not paid or had late, short, or missed meal breaks on a class-wide basis, and this is a question of entitlement to damages, not damages themselves." *Id.* at *19. The Court of Appeal also found it was within the trial court's discretion to weigh competing declarations from the parties in order to determine whether the requirements for class certification were satisfied, and that doing so was not an improper evaluation of the merits. Accordingly, the Court of Appeal affirmed the denial of Plaintiff's motion for class certification.

***Melendez, et al. v. San Francisco Baseball Associates LLC,* 2017 Cal. App. LEXIS 899 (Cal. App. 1st Dist. Oct. 17, 2017).** Plaintiff, a security guard, contended that he and other security guards were employed "intermittingly" for specific job assignments (baseball games or other events) and were discharged "at the end of a homestand, at the end of a baseball season, at the end of an inter-season event like a fan fest, college football game, a concert, a series of shows, or other events." Plaintiff asserted that under § 201 of the California Labor Code, he and the putative class members were entitled to but did not receive immediate payment of their final wages upon each such "discharge." *Id.* at *1. Defendant contended that payment immediately after each such event was not required because under the terms of the collective bargaining agreement ("CBA"), Plaintiff and all such security guards were not intermittent employees, but were "year-round employees who remain employed with the Giants until they resign or are terminated pursuant to the CBA." *Id.* at *2. Defendant moved to compel arbitration or to dismiss the action under the arbitration provision of the CBA and on the ground that the action was preempted by § 301 of the Labor-Management Relations Act. The trial court denied the motion. On appeal, the California Court of Appeal agreed that the present dispute was not within the scope of the arbitration provision in the CBA, but concluded that arbitration was required by § 301 of the Labor-Management Relations Act. *Id.* The trial court held that resolution of the controversy did not require interpretation of the CBA, but simply a determination of whether the security guards were discharged within the meaning of § 201 of the Labor Code at the conclusion of an event or series of baseball games. *Id.* at *9. The trial court observed that the dispute can be resolved without interpretation of "any specific language in the CBA." *Id.* at *10. The trial court reasoned that none of the provisions in the CBA, such as those "relating to vacations; how employees are assigned work; and so on…have any connection…to whether Plaintiffs here were or were not terminated, the core (if not only) factual issue pertinent to the statutory claims." *Id.* The Court of Appeal stated that while resolution of the controversy may not turn on the interpretation of any specific language in the CBA, it would not necessarily follow that the meaning of the CBA was irrelevant to the outcome of the dispute. *Id.* at *11. The parties agreed that the underlying issue was whether Plaintiffs were "discharged" within the meaning of § 201. In order to determine whether the conclusion of a baseball game or season or other event constituted a discharge, the Court of Appeal reasoned that it would be necessary to first determine the terms of employment. *Id.* The Court of Appeal opined that then it would be essential to determine whether the CBA provided for employment of security guards for only a single game or homestand or season or other event, or whether the agreement contemplated extended employment from season to season, event to event, or year to year, recognizing that not every day will be a day of work. *Id.* Accordingly, since application of § 201 necessarily "requires the interpretation of the CBA" and "substantially depends upon analysis of its terms," federal preemption principles applied and the Court of Appeal held that the dispute must be resolved pursuant to the grievance procedure and arbitration provisions under the CBA. *Id.* at *14-15. As a result, the Court of Appeal reversed the trial court's ruling.

***Miranda, et al. v. Pacer Cartage, Inc.*, 2017 Cal. App. Unpub. LEXIS 5966 (Cal. App. 4th Dist. Aug. 30, 2017).** Plaintiffs, a group of truck drivers, filed a claim with the California Labor Commission alleging that Defendant misclassified them as independent contractors, and as such, they were entitled to reimbursement for their business expenses under the California Labor Code ("CLC"). *Id.* at *1. The Labor Commissioner had found in favor of Plaintiffs and awarded them more than $2,000,000 in expenses and Defendant appealed to the trial court. The trial court rendered judgment in favor of Plaintiffs and ruled that they were independent contractors, and therefore entitled to reimbursement. *Id.* at *2. On Defendant's appeal to the California Court of Appeal, Defendant argued that: (i) the trial court erred by failing to accept its lump sum reimbursement method that covered both wages and expenses; (ii) the evidence did not support a finding that Plaintiffs were not reimbursed for their expenses; (iii) the trial court failed to make a reasonable approximation of the extent of non-reimbursement; and (iv) the trial court erred in awarding Plaintiffs reimbursement for their truck lease payments. The California Court of Appeal affirmed in part and reversed in part. The Court of Appeal concluded that the trial court erred in awarding Plaintiffs their truck lease payments because it was lawful for an employer to require its employees to provide their own vehicles as a condition of employment. *Id.* at *37. Accordingly, the Court of Appeal ruled that Plaintiffs were not entitled to reimbursement for their lease payments and reversed the trial court's decision on that basis. However, the Court of Appeal affirmed the rest of the trial court's ruling. *Id.* at *38.

***Moncada, et al. v. Wave Crest Hotels & Resorts LLC,* 2017 Cal. App. Unpub. LEXIS 7443 (Cal. App. 4th Dist. Oct. 31, 2017).** Plaintiffs, two hotel employees, filed a class action asserting that Defendant failed to provide employees with timely meal breaks, rest breaks for employees who worked between six and eight hours, and payment for five-minute periods before and after the end of scheduled shifts in violation of state wage & hour laws. Plaintiffs further alleged that Defendant failed to properly calculate its employees' base pay for purposes of paying overtime. Plaintiffs filed a motion for class certification of several sub-classes. The trial court found that with respect to the bulk of the Plaintiffs' claims, Defendant's liability could not be determined on a class-wide basis, and therefore class certification was not appropriate. *Id.* at *3. On appeal, the California Court of Appeal affirmed the trial court's ruling with respect to Plaintiffs' meal time, rest time, and grace period claims, finding that those claims were not amenable to class treatment because liability could not be determined on a class-wide basis. *Id.* at *11. With respect to meal time breaks, in which Defendant's express policy complied with the law, the Court of Appeal held that the trial court could reasonably conclude that liability could only be shown by way of individual proof, making class treatment impractical. *Id.* at *12. As to the rest time claims, the Court of Appeal reasoned that the fact many employees worked between six and eight hours plainly did show they were denied a second break, and conflicting evidence from employees failed to show any common policy. Thus, the Court of Appeal determined that the trial court properly concluded that class treatment was not appropriate because liability would require individual proof. *Id.* at *15. As for the grace period claims, Plaintiffs argued that by effectively rounding down employee shifts, Defendant was unfairly depriving employees of earned wages. *Id.* However, the Court of Appeal explained that in order to prove such an "off-the-clock" claim, Plaintiffs would have to rebut the presumption they only began working when their scheduled shifts commenced and ended which they could not do without individual proof of such work. *Id.* at *15-16. Plaintiffs also argued that because front desk employees received "upsell" bonuses, the bonuses should have been used in calculating their overtime pay. *Id.* at *16. The trial court had found that neither Plaintiff was a suitable representative for the claim because neither had worked at the front desk and earned the upsell bonuses. The Court of Appeal found that in failing to give Plaintiffs an opportunity to locate a new potential class representative, the trial court abused its discretion. The Court of Appeal stated that until a trial court had given class representatives an opportunity to locate a suitable representative, it could not find that such a representative was unavailable. *Id.* at *19. Accordingly, as to Plaintiffs' front desk employees claim, the Court of Appeal reversed and remanded with instructions that Plaintiffs be permitted to locate a suitable representative and amend their complaint accordingly.

***Ogle, et al. v. Restoration Hardware*, 2017 Cal. App. Unpub. LEXIS 2834 (Cal. App. 3d Dist. April 26, 2017).** Plaintiff, a customer service representative, filed a class action alleging that Defendant failed to provide meal periods, failed to pay overtime compensation, failed to provide pay stubs or itemized statements, and failed to timely pay wages in violation of the California Labor Code. Plaintiffs filed a motion for class certification, and the trial court denied the motion. On appeal, the California Court of Appeal affirmed the trial court's decision. Plaintiff's proposed class definition contained a broad overarching class and six sub-classes. The broader class

included "all former and current customer service representatives who worked for Defendant at its call center in Tracy, California, who were paid on an hourly basis during the period June 1, 2007 to the date of the filing of a motion for class certification in this case." *Id.* at *5. The trial court found that Plaintiff's class was not sufficiently numerous and was not ascertainable. Plaintiff contended that the trial court erred in finding that her overarching class or any of her proposed sub-classes were not ascertainable. In concluding Plaintiff failed to establish the existence of an ascertainable class, the trial court reasoned that Plaintiff's evidence was overly vague and not sufficient to demonstrate the existence of a sufficiently numerous class. The Court of Appeal found that the trial court properly recognized that the umbrella class definition encompassed class members not potentially harmed by Defendant's alleged conduct. As defined, the umbrella class included all current and former customer service representatives even though he or she never took a late first meal period, never worked more than 10 hours, never missed a second meal period, never worked overtime, and never earned a bonus. *Id.* at *19. While the various sub-class definitions were more narrowly drawn, the Court of Appeal concluded that the trial court did not abuse its discretion in finding Plaintiff failed to carry her burden of presenting substantial evidence to show the sub-classes were sufficiently numerous to justify class treatment. *Id.* at *30. The Court of Appeal thus determined that the trial court did not abuse its discretion in denying class certification on the basis of a lack of ascertainability and numerosity. *Id.* at *33. As to whether common questions of law existed, the Court of Appeal found that the trial court properly determined that individual questions would predominate over Plaintiff's meal break claims. The Court of Appeal stated that while one may be able to determine on a common basis that the employees' work schedules did not include a second meal break, such evidence, without a more individualized inquiry, was insufficient to establish that Defendant was liable for failing to provide second meal breaks. *Id.* at *45. Instead, the Court of Appeal determined that the evidence suggested in order to prove Defendant did not provide second meal breaks in violation of the Labor Code, Plaintiff would have to present an analysis day-by-day, and employee-by-employee. Accordingly, the Court of Appeal concluded that the trial court did not abuse its discretion in denying Plaintiff's motion for class certification, and it affirmed the trial court's decision.

***Segovia, et al. v. Chipotle Mexican Grill,* 2017 Cal. App. Unpub. LEXIS 1521 (Cal. App. 2d Dist. Mar. 2, 2017).** Plaintiff, a non-exempt hourly employee, filed a class action alleging that she and similarly-situated employees were not paid all vacation wages that were earned, were not reimbursed for all work-related mileage expenses, were not paid for off-the-clock work, were not permitted to take legally-mandated meal and rest breaks, were not paid all overtime hours at the correct rate, and were not given accurate and itemized wage statements in violation of the California Labor Code. *Id.* at *2. The parties settled the matter for a gross settlement amount of $2 million. The settlement provided that the settlement amount for each class member would be based on each individual's *pro rata* share of the total amount of wages earned by the settlement class members during the class period. *Id.* at *3. The trial court granted preliminary approval of the settlement, and stated that the settlement appeared on its face to be fair, reasonable, and adequate, and to have been the product of serious, informed, and extensive arm's length negotiations. *Id.* at *4. The claims administrator sent the settlement notice to the 38,344 class members on the class list. Four class members filed objections to the proposed settlement, and 35 individuals elected to opt-out. The objectors contended that the named Plaintiff had not shown the proposed settlement was fair, reasonable, and adequate; the notice to class members did not comply with due process; and Plaintiff did not meet her burden on class certification. Objector Lopez-Carrillo did not opt-out of the settlement, nor did he seek to intervene in the action. The trial court conducted a final approval and fairness hearing and entered an order overruling the objections of Lopez-Carrillo and the three other objectors, approved the settlement as "fair, reasonable, adequate, and in the public interest," and directed entry of a final judgment. *Id.* at *5. Lopez-Carrillo appealed and on appeal, the California Court of Appeal upheld the trial court's ruling. Lopez-Carrillo contended that the settlement's FLSA opt-in process did not comport with state or federal law; the trial court abused its discretion in concluding the proposed settlement was fair, reasonable, and adequate; and the trial court erred in granting certification of the settlement class. *Id.* at *6. Plaintiff and Defendant asserted that the appeal should be dismissed because Lopez-Carrillo lacked standing to appeal. The Court of Appeal noted at the outset that as a general rule, only parties of record may appeal and that the appellant must both have been a "party" and to have been "aggrieved" by the judgment. *Id.* at *8. The Court of Appeal further stated that it had previously ruled that only a party of record can appeal. *Id.* at *9. The Court of Appeal held that Lopez-Carrillo, as a non-party to the action, therefore lacked standing to appeal the trial court's decision. The Court of Appeal opined that unnamed class members who disagreed with a proposed settlement were not deprived of appellate recourse as they may move to formally intervene in the action and, if permitted to

intervene, then appeal the judgment entered relative to the settlement; alternatively, if denied the right to intervene, they may appeal the order denying intervention. *Id.* at*13-14. Furthermore, the Court of Appeal determined that if every unnamed class member who objected to a proposed settlement could appeal individually, class action litigation would become unwieldy and unmanageable and the benefits of the class action device would be undermined. *Id.* at *15. Accordingly, since Lopez-Carrillo was not a party of record, the Court of Appeal concluded that he lacked standing to appeal.

***Silva, et al. v. See's Candy Shops, Inc.,* 2017 Cal. App. LEXIS 1159 (Cal. App. 4th Dist. Jan. 5, 2017).** Plaintiff filed an action against Defendant alleging wage & hour violations. Plaintiff brought the action in her individual capacity, on behalf of a class of employees, and under the Private Attorney General Act ("PAGA"). The trial court certified the Plaintiff's wage & hour claims challenging Defendant's rounding and grace period policies. Defendant rounded time clock punches to the nearest tenth of an hour and also permitted employees to clock-in 10 minutes before and after a shift, but calculated work time minutes from the employees' scheduled start and end times. The trial court dismissed Defendant's affirmative defense that Defendant's rounding policy was lawful. Defendant argued that its employees were fairly and fully compensated and that these policies were consistent with state and federal law. Plaintiff asserted that the rounding policy was unlawful under California law. The trial court initially agreed with Plaintiff and dismissed the affirmative defense. On Defendant's appeal, the California Court of Appeal reversed and remanded because an employer is allowed to use a rounding policy if it is "fair and neutral on its face" and "is used in a manner that will not result, over a period of time, in failure to compensate the employees properly." *Id.* at *2. On remand, the trial court granted summary judgment on all of Plaintiff's claims. On Plaintiff's further appeal, the Court of Appeal ruled that the trial court erred in granting summary judgment as to some of Plaintiff's individual claims, but properly entered summary judgment as to all other claims. The Court of Appeal found that Defendant was entitled to summary judgment as a matter of law on the class claim based upon the rounding policy because this policy was proper under California law and did not result in under-compensation. The Court of Appeal also granted summary judgment on Plaintiff's challenge to the grace period policies because Defendant submitted evidence that employees were not working during the grace period. As Plaintiff offered nothing to negate this evidence, the Court of Appeal affirmed the grant of summary judgment on this claim. The Court of Appeal, however, held that the trial court erred in granting summary judgment as to Plaintiff's individual claims. The trial court adjudicated her individual claims even though Defendant did not move for summary judgment on any individual claims. Defendant asserted that Plaintiff never alleged individual claims in her first and second cause of action, and Plaintiff released the claims in a previous settlement agreement. The California Court of Appeal agreed with Plaintiff that she had sufficiently alleged individual claims in the first two causes of action, which alleged that she did not receive her required rest and meal periods and that the Defendant failed to reimburse her for expenses incurred through performance of job duties. The Court of Appeal held that summary judgment was not properly granted on the issue because they were separate theories from the challenges to the rounding and grace period policies. The Court of Appeals further ruled that summary judgment on the PAGA issues was proper because those claims were challenging the same rounding and grace period policies and Defendant was entitled to judgment on those issues.

***Stoetzl, et al. v. State Of California,* 14 Cal. App. 5th 1256 (1st Dist. 2017).** Plaintiffs, a group of correctional officers, brought coordinated class actions alleging wage & hour violations and that they were improperly denied pay for time they spent under their employer's control before and after their work shifts. Plaintiffs contended that Defendant breached their contracts and violated California's minimum wage law, when it failed to pay them for all hours worked. *Id.* at 1269. The trial court entered judgment in favor of Defendants on the basis that Plaintiffs' entitlement to overtime pay was controlled by federal law, rather than by California law. On Plaintiffs' appeal, the California Court of Appeal reversed with respect to the non-union represented employees, and affirmed with respect to the union-represented employees in part. *Id.* at 1260. The union-represented Plaintiffs entered a memorandum of understanding ("MOU") with Defendant that was approved by the legislature and was enacted into law. The Court of Appeal held that the MOU specified that federal law would apply to preclude compensation for time spent under the employer's control before and after work shifts, and this superseded California's minimum wage law. *Id.* at 1263. As such, the trial court properly concluded that the FLSA, not California's minimum wage law, governed the claims of union-represented Plaintiffs. The Court of Appeal also held that the trial court properly concluded that the union-represented employees could not establish a breach of common law contract claim for failure to pay overtime, as their compensable time was governed by federal law

rather than state law pursuant to the MOU. *Id.* at 1279. The Court of Appeal ruled that the trial court erred, however, with respect to non-union Plaintiffs because they were entitled to pay for all hours worked under the California law, as the minimum wage provisions were not superseded by the California pay scale manual as Defendant asserted. *Id.* at 1276. Further, the Court of Appeal concluded that the non-union Plaintiffs could also maintain breach of contract claims based on state common law for failure to pay overtime. Accordingly, the Court of Appeal reversed as to the non-union Plaintiffs' employees minimum wage and overtime claims. The Court of Appeal affirmed the trial court's decision that Plaintiffs could not maintain claims under §§ 222 and 223 of the California Labor Code for failure to pay contractual overtime owed under a collective bargaining agreement. *Id.* at 1277. Because the union-represented Plaintiffs, agreed to have their hours worked measured by federal law and the legislature had approved this arrangement, the Court of Appeal concluded that their causes of action for these violations failed. The Court of Appeal also ruled that the non-union Plaintiffs had no cause of action for these alleged violations, as the statute applied only to parties to a collective bargaining agreement. In sum, the Court of Appeal reversed and remanded in part, and affirmed in part. *Id.* at 1280.

***Turman, et al. v. Superior Court,* 2017 Ca. App. Unpub. LEXIS 7682 (Cal. App. 4th Dist. July 7, 2017).** Plaintiffs, a group of restaurant workers filed a class action alleging wage & hour violations under the California Labor Code and the FLSA, claims under the Unfair Competition law, as well as a claim under the Private Attorneys General Act ("PAGA"). Plaintiffs challenged four of the trial court's rulings, including: (i) the denial of their revised motion to compel responses to discovery; (ii) the issuance of discovery sanctions against Plaintiffs' counsel; (iii) an order only partially granting Plaintiffs' motion to certify a class action; and (iv) the trial court's determination that Parent and America's Printer were not Koji's alter egos and Parent was not liable to Plaintiffs as a joint employer with regards to Plaintiffs' state law claims. The California Court of Appeal treated Plaintiffs' appeal as a petition for writ of mandate. *Id.* at *3. The Court of Appeal granted the Plaintiffs' writ of mandate and directed the trial court to vacate the orders. *Id.* at *48. The Court of Appeal ruled that the trial court erred when it denied Plaintiffs' revised motion to compel further discovery responses and in finding that Plaintiffs failed to engage in further meet and confer efforts. The trial court stated at the hearing on the original motion to compel that no further meet and confer efforts would be required to support Plaintiffs' revised motion to compel. *Id.* at *29. A different trial court denied the revised motion and was not aware of the original trial court's previous statement and relied on the trial court's minute order that failed to reflect those statements. The Court of Appeal vacated the denial order and ruled that the trial court erred when it denied the motion and sanctioned Plaintiffs' counsel. Secondly, the Court of Appeal ruled that the trial court's denial of class certification on the claims alleged against Parent on a theory of joint employer liability was improper because the trial court's stated reasons did not include any reference to Plaintiffs' failure to prove a community of interests and stated that its reason for denying certification as to Parent was because the putative class members identified Koji as their employer. *Id.* at *22. Therefore, the Court of Appeal granted the petition for a writ of mandate as to certification of claims against Parent and directed the trial court to vacate its order. The Court of Appeal also ruled that the trial court's findings that Parent and American Printer were not alter egos of Koji must be vacated considering the ruling on the revised motion to compel, because the documents that Plaintiffs sought to compel focused on the alter ego issue. The Court of Appeal declined to decide the matter on the merits and concluded that additional information on that issue might be produced after the revised motion to compel was reconsidered on remand. Accordingly, the Court of Appeal directed the trial court to vacate its alter ego findings. Finally, the Court of Appeal ruled that the trial court erred in concluding that Parent was not liable as a joint employer and directed the trial court to vacate its findings as to Parent's joint employer liability as to the state law claims. The Court of Appeal reasoned that the trial court correctly identified the proper controlling authority, but misapplied the three alternative definitions of employer for purposes of state law claims. In addition, the trial court failed to address whether Parent might be a joint employer under the definitions applicable to Plaintiffs' claims under the unfair competition law, the tip misappropriation statute, and the PAGA. Accordingly, the Court of Appeal directed the trial court to vacate its finding that Parent was not liable as a joint employer with regards to Plaintiffs' state law claims. *Id.* at *48.

***Vaquero, et al. v. Stoneledge Furniture LLC,* 2017 Cal. App. LEXIS 165 (Cal. App. 2d Dist. Feb. 28, 2017).** Plaintiffs, a group of sales associates, filed a class action alleging causes of action for unfair business practices, failure to provide paid rest periods, and failure to pay all wages owed upon termination in violation of the California Labor Code ("CLC"). *Id.* at *4. Defendant moved for summary judgment, arguing that the rest-period

claim failed as a matter of law because Defendant paid its sales associates a guaranteed minimum for all hours worked, including rest periods. *Id.* at *5. Defendant also argued that a claim for rest period premium pay was not an action to recover wages under the CLC and that it did not willfully fail to pay wages. *Id.* Defendant argued that because the class claims failed as a matter of law, the derivative claim for unfair business practices also failed. *Id.* The trial court granted Defendant's motion, ruling that Defendant's payment system specifically accounted for all hours worked and guaranteed that Plaintiffs would be paid more than the minimum wage hour for those hours and there was no possibility that an employees' rest period time would not be captured in the total amount paid each pay period. *Id.* at *6. The trial court concluded that by tracking all the hours that its sales associates and employees were present at the facility, including rest periods, Defendant ensured that the compensation it paid its employees via commission would never fail to include payment for the time employees spent taking their mandatory rest periods. *Id.* at *6. The trial court ruled that all the other claims failed because they were derivative of the rest period claim. *Id.* On Plaintiffs' appeal, the California Court of Appeal reversed and remanded, holding that employees paid on commission were entitled to receive separate compensation for rest periods. *Id.* at *29-30. Keeping track of hours worked, including rest periods, and paying a guaranteed minimum wage as an advance on sales commissions earned in later pay periods, did not satisfy the employer's obligation because the formula it used for determining commissions did not include any component that directly compensated the employees for rest periods. The result was that employees who were paid by commission received the same amount of compensation regardless of whether they took rest periods. *Id.* at *25. The Court of Appeal held that employers are required to separately compensate employees for rest periods if an employer's compensation plan does not already include a minimum hourly wage for such time. *Id.* at *15. The Court of Appeal rejected Defendant's argument that because Plaintiffs were commissioned employees, it was not required to pay separately for rest periods, as there was no legislative intent to treat commissioned employees differently or nullify the plain language of the CLC. *Id.* at *22. Because Defendant's compensation system did not include any component that directly compensated for rest periods, it was unlawful as compensation plans must separately account for and pay for rest periods to comply with California law. *Id.* at *24. Defendant's commission agreement did not compensate for rest periods taken by sales associates who earned a commission. *Id.* at *25. Accordingly, the Court of Appeal reversed and remanded the trial court's judgment.

Vasserman, et al. v. Henry Mayo Newhall Memorial Hospital, **2017 Cal. App. LEXIS 90 (Cal. App. 2d Dist. Feb. 7, 2017).** Plaintiffs, a group of nurses, filed a putative class action against Defendant for violations of the California Labor Code ("CLC") and other statutes relating to meal and rest breaks, unpaid wages, and unpaid overtime compensation. Defendant moved to compel arbitration on the grounds that the arbitration clause in the collective bargaining agreement between the California Nurses Association and Defendant required Plaintiffs to arbitrate their claims. The trial court denied Defendant's motion to compel arbitration. On Defendant's appeal, the California Court of Appeal affirmed the trial court's ruling, noting that the collective bargaining agreement at issue required arbitration of claims arising under the agreement, but it did not include an "explicitly stated, clear, and unmistakable waiver" of the right to a judicial forum for claims based on statutes. *Id.* at *15. The arbitration clause of the collective bargaining made no mention of the CLC or any other statute, and it did not contain a waiver of a judicial forum. Further, the language in the arbitration clause's compensation and meals and rest period provisions was broad and did not include any explicit language regarding statutory requirements regarding compensation and meals and rest periods. Accordingly, the Court of Appeal affirmed the trial court's decision and awarded costs of appeal to Plaintiffs.

Williams, et al. v. Superior Court, **3 Cal. 5th 531 (Cal. 2017).** Plaintiff, a retail worker, brought an action under the Private Attorneys General Act of 2004 ("PAGA"), alleging that Defendant failed to provide her and other aggrieved employees meal or rest periods in violation of California labor law. Plaintiff issued two special interrogatories asking Defendant to supply the name, address, telephone number, and company employment history of each non-exempt California-based employee for the relevant period. *Id.* at 539. Defendant responded that there were 16,500 employees, but refused to provide their individual information on the basis that the request was overbroad, unduly burdensome, and an invasion of the privacy of third-parties under the California Constitution. *Id.* Plaintiff moved to compel. *Id.* The trial court ordered Defendant to provide employee contact information only for the store where Plaintiff worked. The trial court also certified its order for immediate review. Plaintiff sought writ relief and the California Court of Appeal denied the writ. The Court of Appeal held that the

Plaintiff failed to establish good cause to justified the discovery sought. In the alternative, the Court of Appeal concluded that because third-party privacy interests were implicated, Plaintiff was required to demonstrate a compelling need for discovery and that the discovery sought was directly relevant and essential to the fair resolution of the underlying lawsuit. On Plaintiff's further appeal, the California Supreme Court reversed and remanded. Defendant asserted that the discovery request was overbroad, unduly burdensome, and that information was private. *Id.* at 540. At the outset, the Supreme Court noted that in the absence of a contrary order, a civil litigant's right to discovery is broad. *Id.* at 541. The Supreme Court rejected Defendant's overbreadth argument, ruling that the information sought was sought was within the scope of discovery permitted by the California Code of Civil Procedure. *Id.* at 543. The Supreme Court opined that the information that Plaintiff sought was reasonably calculated to lead to discovery of admissible evidence because the operative complaint alleged that Defendant employed other non-exempt hourly employees throughout California and the complaint sought relief on behalf of Plaintiff and other aggrieved employees. Furthermore, Defendant failed to make any showing an undue burden that disclosure would impose, and the California discovery statute did not impose a good cause requirement for seeking such information. Furthermore, the privacy concerns did not support a complete bar against disclosure of the information that Plaintiff sought. Accordingly, the Supreme Court reversed and remanded the decision of the Court of Appeal. *Id.* at 559.

(ii) Kentucky

***Reesor, et al. v. City Of Audubon Park*, 2017 Ky. App. Unpub. LEXIS 437 (Ky. App. June 16, 2017).** Plaintiffs filed a lawsuit in state court asserting claims of wage & hour law violations, breach of contract, and promissory estoppel against the City of Audubon Park, Kentucky. *Id.* at *1. The trial court granted Defendant's motion for summary judgment on Plaintiffs' claims. On appeal, the Kentucky Court of Appeals affirmed the trial court's ruling. Plaintiffs were a police officer and a city clerk. *Id.* at *2. On November 17, 2003, the City's Council passed Municipal Order Number 1 Series 2003 (hereinafter "2003 Municipal Order"), which described a change in retirement benefits. Plaintiffs claimed that Defendant owed them wages under the retirement benefits after they voluntarily left their respective positions. Plaintiffs argued "retirement benefits" qualified as "wages" within the meaning of KRS 337.010(1)(c)(1) because "retirement benefits" qualify as "any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy." *Id.* at *10. The trial court held that the amounts Plaintiffs claimed Defendant owed them under their retirement agreements did not qualify as "wages" and were consequently not actionable under Kentucky's wage & hour statutes. *Id.* at *8. The trial court further held that Defendant could not be held liable under theories of breach of contract and promissory estoppel because the retirement agreements were illegal and unenforceable. The Court of Appeals stated that under KRS 337.010(1)(c)1, these general phrases of "wages" immediately follow the lists of items falling into classifications that do not include fringe benefits. *Id.* at *10. Therefore, the Court of Appeal presumed the General Assembly intended to exclude fringe benefits from the definition of "wages" set forth in KRS 337.010(1)(c)(1). The Court of Appeal found that Plaintiffs' reading of the statute was in error, and the phrase "wages" under the statute was not intended to include retirement benefits. *Id.* at *11. Plaintiffs also argued their retirement agreements were enforceable contracts or were enforceable through principles of equity. Defendant argued that its agreements were prohibited by statute and Defendant therefore had no authority to enter the agreements; the agreements were therefore void; and, similarly, principles of equity and estoppel could not save the agreements. The trial court agreed with the City, held that the agreements Plaintiffs entered into with the City were accordingly illegal, and, as such, ruled that the agreements were unenforceable in either law or equity. Plaintiffs argued that the trial court erred on this point. The Court of Appeal stated that the agreements that Defendant executed with Plaintiffs provided for systematically determinable benefits based upon a formula that factored prior compensation and years of service to be paid after retirement from a fund in which Plaintiffs had no ownership interest. *Id.* at *19. Thus, the Court of Appels agreed with the trial court's conclusion that the agreements were prohibited by KRS 65.156(6) and accordingly void. *Id.* at *20. Accordingly, the Court of Appeal held that Plaintiff failed to show that the trial court committed reversible error in granting summary judgment in favor of Defendant regarding their claims.

(iii) Massachusetts

***George, et al. v. National Water Main Cleaning Co.*, 477 Mass. 371 (Mass. 2017).** Plaintiffs filed a class action alleging non-payment of wages in violation of the Massachusetts Wage Act ("MWA"). *Id.* at 372.

Defendant removed to the U.S. District Court for the District of Massachusetts, the parties subsequently settled, and the District Court granted final approval of the class settlement agreement that resolved all issues except one question of law. *Id.* The District Court then certified a question for review by the Supreme Judicial Court of Massachusetts of whether statutory interest pursuant to Massachusetts General Laws ("MGL") 231, §§ 6B or 6C was available under Massachusetts law when liquidated damages were awarded pursuant to §§ 149 and 150. *Id.* The Supreme Judicial Court interpreted the gist of the question to be whether the Massachusetts legislature, when it amended § 150 in 2008 to require the award of treble damages on MWA judgments and characterized the award as liquidated damages, intended that pre-judgment interest not be added to any part of such an award because such interest was included within the scope of liquidated damages. *Id.* at 373. The Supreme Judicial Court answered that statutory pre-judgment interest shall be added by the clerk of court to the amount of lost wages and other benefits awarded as damages pursuant to § 150, but shall not be added to the additional amount of the award arising from the trebling of those damages as liquidated damages. The Supreme Judicial Court concluded that the legislature's characterization of treble damages as liquidated damages in the amendment to § 150, was not intended to produce any change in the award of pre-judgment interest in MWA judgments. Accordingly, pre-judgment interest was still to be added to the amount of lost wages and benefits, and was still not to be added to the trebled portion of the judgment that previously had been punitive damages and was now characterized as liquidated damages. The Supreme Judicial Court acknowledged that the legislative history was silent regarding the legislature's purpose in characterizing treble damages as liquidated damages in the amendment to § 150*. Id.* at 377. The Supreme Judicial Court in answering the certified question inferred that the legislature knew: (i) that the FLSA had characterized the additional equal amount of unpaid minimum wages and unpaid overtime compensation as liquidated damages; (ii) the U.S. Supreme Court had regarded liquidated damages as compensatory in nature rather than punitive; and (iii) the characterization of treble damages as liquidated damages could be used to defend an award of treble damages from the constitutional challenge that such an award was punitive in nature and required a finding that an employer's conduct was outrageous. *Id.* In sum, the Supreme Judicial Court concluded that the legislature's characterization of treble damages as liquidated damages in the amendment to § 150 was not intended to produce any change in the award of pre-judgment interest in MWA judgments. Accordingly, pre-judgment interest was still to be added to the amount of lost wages and benefits, and was still not to be added to the trebled portion of the judgment that previously had been punitive damages and was now characterized as liquidated damages. *Id.* at 380.

***Malden Police, et al. v. City Of Malden,* 2017 Mass. App. LEXIS 108 (Mass. App. Aug. 11, 2017).** Plaintiff, a labor union comprised of 79 police officers, filed suit against Defendant alleging that it owed the officers approximately $410,000 in compensation for the performance of past detail work. *Id.* at *2. Plaintiff and Defendant were parties to a collective bargaining agreement ("CBA") that governed the paid detail work performed by the officers. *Id.* at *1. Plaintiff alleged breach of contract, breach of an implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, and violation of the Massachusetts Wage Act ("MWA"). *Id.* at *2. Plaintiff filed a motion for summary judgment and Defendant moved to dismiss the Plaintiff's complaint or, in the alternative, for summary judgment and declaratory judgment. *Id.* The trial court denied Plaintiff's motion for summary judgment, and granted Defendant's motion for summary judgment with respect to the MWA claim and dismissed the remainder of Plaintiff's claims. *Id.* at *3. First, the trial court ruled that the Plaintiff's claims for breach of contract and breach of an implied covenant of good faith and fair dealing were governed by the CBA, and therefore those claims were best resolved by the dispute resolution provisions contained in the agreement. *Id.* The trial court further concluded that promissory estoppel was not a viable claim against Defendant. *Id.* The trial court also determined that the circumstances of the present dispute did not give rise to a claim of unjust enrichment. *Id.* Finally, the trial court ruled that, although detail pay constituted wages under the MWA, Plaintiff could not prevail under the Wage Act due to the provisions of the municipal finance law. *Id.* On Plaintiff's appeal, the Massachusetts Appeals Court reversed and remanded the trial court's granting of summary judgment in favor of the Defendant on the MWA claim and affirmed the trial court's dismissal as to Plaintiff's other claims. *Id.* at *3. The Appeals Court rejected the Plaintiff's argument that the trial court erred when it considered the merits of the city's motion, rather than deeming it fatally defective because Defendant failed to comply with the rules as to the form of its motion. *Id.* at *6. While the record was unclear whether the dispute fell within the department's primary jurisdiction or whether the CBA provided for a different manner of dispute resolution, the Appeals Court concluded that the trial court properly dismissed the union's contract-

based claims. *Id.* at *11. The Appeals Court ruled that the trial court properly dismissed Plaintiff's unjust enrichment claim as a Plaintiff is not entitled to recovery on a theory of unjust enrichment where a valid contract defines the obligations of the parties. *Id.* at *11. The Appeals Court also affirmed the trial court's dismissal of Plaintiff's promissory estoppel claim, as it is an equitable doctrine and where an enforceable contract exists, a claim for promissory estoppel will not lie. *Id.* at *12. The Appeals Court agreed with the trial court that where the detail work was performed for third-parties the plain language of the municipal finance law governed with respect to detail pay. *Id.* at *13. However, to the extent that the Defendant hired its own officers as employees to perform detail services, the payment was governed by the MWA. *Id.* at *14. The Appeals Court remanded to resolve the issues of: (i) what portion of the detail work at issue was performed for third-parties; and (ii) with respect to detail work performed for third-parties, whether the city complied with the requirements of the municipal finance law. Accordingly, the Appeals Court affirmed the trial court's decision in part, and reversed and remanded in part.

***Soto, et al. v. Action Emergency Services, Inc.*, 2017 Mass. App. Unpub. LEXIS 779 (Mass. App. Aug. 8, 2017).** Plaintiff sought damages from Defendants Action Emergency Services, Inc. and Michael Zaccaria for violations of the Massachusetts Wage Act ("Wage Act"). Zaccaria challenged the jury's verdict that he, as an individual, was jointly and severally liable as Plaintiffs' "employer," which is defined by the Wage Act as "the president or treasurer" of Action Emergency Services, or as an "officer or agent having the management of" Action Emergency Services. *Id.* at *1. Defendants also challenged the award of $95,150 in attorneys' fees to Plaintiffs. On appeal, the Massachusetts Appeals Court affirmed the verdict. Zaccaria worked for Action Emergency Services as president and treasurer, and he purchased the company in 2014. Zaccaria contended that there was insufficient evidence to support the decision that he was a joint employer of Plaintiffs. The Appeals Court explained that the applicable case law authorities have defined an employer under the Wage Act to include all those who have "directed and participated to a substantial degree in formulating the corporation's policy." *Id.* at *2. The Appeals Court concluded that there was ample evidence before the jury to support their decision that Zaccaria was an employer of Plaintiffs, including being listed as the company's president in its annual report filed with the Secretary of the Commonwealth in 2013, the testimony of several Plaintiffs indicating that Zaccaria was the company's owner and oversaw payroll and staff management, and evidence of Zaccaria signing four of Plaintiffs' employment contracts. *Id.* at *3. Defendants also contested the award of $95,150 in attorneys' fees. The Appeals Court found that neither Defendant opposed Plaintiffs' petition for attorneys' fees in the trial court, and as such, any challenge to the judge's award was waived. *Id.*

(iv) Nevada

***Western Cab Company, et al. v. The Eighth Judicial District Court Of The State Of Nevada,* 2017 Nev. LEXIS 16 (Nev. Mar. 16, 2017).** In this case, Plaintiff requested the Nevada Supreme Court to consider whether the Nevada Minimum Wage Amendment ("MWA") is federally preempted by either the National Labor Relations Act ("NLRA") or the Employee Retirement Income Security Act ("ERISA") and whether the MWA is unconstitutionally vague. *Id.* at *2. The MWA requires employers to pay employees one of two possible wage rates, depending on whether the employer offers qualifying health benefits. *Id.* at *3. The MWA allows for an exception to both of these requirements, however, if the employer and employees agree to a lower wage in clear and unambiguous terms through collective bargaining. *Id.* In 2012, Plaintiff began requiring its drivers to pay for fuel directly instead of deducting fuel costs from the drivers' paychecks. A group of drivers filed a complaint against Plaintiff alleging, among other things, that when the fuel costs were considered, drivers' wages fell below the constitutionally mandated minimum. *Id.* at *4. Plaintiff moved to dismiss the complaint, claiming that not only should fuel costs not be considered when calculating the minimum wage, but also the MWA itself is invalid because it: (i) is preempted by the NLRA; (ii) is preempted by the ERISA; and (iii) is unconstitutionally vague. *Id.* at *8. The trial court denied Plaintiff's motion on all grounds, and Plaintiff petitioned the Supreme Court for extraordinary writ relief. Plaintiff first claimed that the purpose of the MWA is to help unions and unionized employers compete with non-unionized employers, and therefore, it violated the equitable bargaining process protected by the NLRA, resulting in NLRA preemption. The Supreme Court stated that previous case law precedents dictated that minimum wage laws, such as the MWA, were within a state's police powers. *Id.* at *9. Moreover, the Supreme Court noted that the MWA allows employers and employees to collectively bargain around the minimum wage requirements. The Supreme Court opined that not only does the MWA not enter a field occupied by the NLRA, but also it explicitly allows the NLRA priority. *Id.* at *10. Therefore, the Supreme

Court held that because the MWA neither intrudes upon collective bargaining nor areas intentionally left unregulated, it is not preempted by the NLRA. *Id.* Plaintiff also argued that the ERISA was designed to cover the field of employee benefits and, therefore, any state regulation of benefits or anything related thereto was preempted. The Supreme Court stated that ERISA's preemption clause provides that, with limited exceptions, its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.* at *11. State laws do not refer to ERISA plans for the purposes of preemption, however, when they merely "mention[] a covered employee welfare benefit plan" or if the law's "text include [s] the word ERISA." *Id.* at *12. The Supreme Court held that the MWA does not regulate the type of benefits that an employer must provide to qualify for the lower minimum wage, nor does it require an employer to provide benefits at all. *Id.* at *14-15. Therefore, the Court held that the ERISA did not preempt the MWA. Finally, Plaintiff argued that the MWA was void for vagueness, since the term "health benefits" is so vague that a person of ordinary intelligence cannot understand what is prohibited. *Id.* at *16. The Supreme Court found that Plaintiff's argument was unpersuasive because "health benefits" is defined in the text of the MWA itself. *Id.* Further, the Supreme Court noted that Plaintiff put forth no evidence that determining which employers qualify for the lower-tier minimum wage was enforced arbitrarily or in a discriminatory manner. The Supreme Court therefore determined that the MWA was not preempted by either the NLRA or the ERISA, and was not void for vagueness. Accordingly, the Supreme Court denied Plaintiff's petition for extraordinary relief.

(v) New York

***Ahmed, et al. v. Morgans Hotel Group Management, LLC,* 2017 N.Y. Misc. LEXIS 638 (N.Y. Feb. 27, 2017).** Plaintiff, an employee, filed an action on behalf of himself and others similarly-situated, alleging that Defendants violated § 196-d of the New York Labor Law ("NYLL") and the New York Department of Labor's Hospitality Wage Order 12 NYCRR 146-2.18 and 2.19 (the "Wage Order") by representing their banquet service charges as gratuities, and then failing to pay their employees such gratuities. *Id.* at *1. Plaintiff also sought recovery of minimum wages allegedly owed to him, and other similarly-situated persons who are presently or were formerly employed by Defendants at hotel and catering venues located in New York. Defendants filed a motion to dismiss the action and Plaintiff filed a motion for class certification. The Court granted Defendants' motion and denied Plaintiff's motion. Defendants provided catered events for clients and employed a staff of numerous service workers to perform food and service related tasks. Plaintiff worked for Defendants as a server's assistant and alleged that Defendants engaged in a policy and practice of charging banquet customers a mandatory 23% "service charge," without disclosing that this service charge was not a gratuity for employees. *Id.* at *3. Plaintiff alleged that, without such a disclaimer, a reasonable customer would presume that such a charge was, in fact, a gratuity, and that because he and other employees were not paid these "gratuities," Defendants violated the NYLL and the Wage Order. In response to Plaintiff's discovery request, Defendants produced its banquet event order forms for the events that Plaintiff worked. Each of these forms contained clear language stating: "16% of food, beverage & room rental total for the event will be added to your account as gratuity and is fully distributed to service staff assigned to your event. 7% of food, beverage & room rental total for the event will be added to your account as an administrative charge. The administrative charge is not a gratuity and is the property of the Hotel to cover the discretionary costs of your event." *Id.* at *3-4. Section 196-d of the NYLL prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity. *Id.* at *4. The Wage Order states that there is "a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for 'service' or 'food service,' is a charge purported to be a gratuity." *Id.* at *7. However, an employer can conclusively rebut this presumption by "demonstrating, by clear and convincing evidence" that it provided notification that was "sufficient to ensure that a reasonable customer would understand that such charge[s] [were] not purported to be a gratuity." *Id.* The Wage Order provides that when an employer utilizes a combination charge, part of which is for the administration of a banquet, special function, or package deal, and part of which is to be distributed as gratuities to the employees who provided service to the guests, the "gratuity presumption" is rebutted when the employer breaks down in writing the specific percentages or portions of the charge that is for the administration/service, and the portion of the charge that is to be paid as gratuity to the staff. *Id.* at *8. The Court found that Defendants presented documentary evidence that they did not lead their customers to believe that the "service charge" was a gratuity and, therefore, did not unlawfully withhold the purported gratuities. *Id.* at *9. Defendants also moved for summary judgment on Plaintiff's minimum wage claim on the ground that Plaintiff's payroll records unequivocally demonstrated that Plaintiff earned an amount equal to

or above the minimum wage for his entire employment. *Id.* at *13. The Court stated that the record showed that Plaintiff earned an amount equal to or above the minimum wage throughout his entire employment. Accordingly, the Court found that the minimum wage cause of action should also be dismissed. *Id.* at *14. The Court determined that Plaintiff suffered no injury, and there was no basis for any claim against Defendants. The Court therefore found that Plaintiff could not be a class representative, and the action must be dismissed in its entirety.

***Andryeyeva, et al. v. New York Health Care, Inc*., 2017 N.Y. App. Div. LEXIS 6408 (N.Y. App. Div. Sept. 13, 2017).** Plaintiffs, a group of home health care attendants for elderly and disabled individuals, filed a class action asserting that Defendant failed to pay minimum wage in violation of the New York Labor Law ("NYLL") and 12 NYCRR 142-2.1(b) (the "Wage Order"). Plaintiffs were paid an hourly rate for 12 daytime hours of their 24-hour shifts and a flat rate for the 12 nighttime hours. Plaintiffs contended that they were entitled to minimum wage for each hour of their 24-hour shifts and that Defendant's payment practice resulted in a regular hourly wage that was below the minimum wage. *Id.* at *1. Plaintiffs sought certification of 1,063 home attendants who had worked 24-hour shifts for Defendant between December 28, 2007 and March 8, 2013. *Id.* at *2. The trial court granted the motion, and on appeal, the New York Appellate Division affirmed. Defendants contended that they were not required to pay home attendants for each hour of a 24-hour shift, but were permitted to exclude 8 hours of sleep time and 3 hours of meal time. *Id.* at *2-3. Defendant asserted that Plaintiffs would each be required to prove that they had not been afforded their sleep and meal times during shifts, and in light of the need for such a fact-intensive inquiry as to each member of the putative class, Plaintiffs could not meet the numerosity, commonality, and typicality requirements for class certification. *Id.* at *3. The Appellate Division noted that the U.S. Department of Labor had issued an opinion letter that advised that "live-in employees," whether or not they are "residential employees," "must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals." *Id.* at *4. Defendant also relied on an opinion letter issued by the New York State Department of Labor ("NYDOL"), which interpreted the Wage Order. Thus, the Appellate Division stated that it must determine whether the NYDOL's interpretation of the Wage Order was rational or reasonable insofar as it permitted Defendant's payment practices with respect to non-residential aides. The Appellate Division found that that the NYDOL's interpretation was neither rational nor reasonable, because it conflicted with the plain language of the Wage Order. The Appellate Division noted that Plaintiffs were required to be at the clients' residences and were also required to perform services there if necessary. *Id.* at *5. To interpret that regulation to mean that Plaintiffs were not, during those nighttime hours, "required to be available for work" simply because it turned out that they were not called upon to perform services was contrary to the plain meaning of "available." *Id.* Therefore, the Appellate Division determined that to the extent that the members of the proposed class were not "residential" employees who "lived on the premises of the employer," they were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals. *Id.* at *5-6. The Appellate Division opined that Defendant's arguments regarding class certification were premised on their contention that the NYDOL's opinion letter was in accord with the Wage Order. Accordingly, inasmuch as the Appellate Division rejected the NYDOL's interpretation of the Wage Order, it ruled that Plaintiffs established the existence of the five prerequisites to class certification. *Id.* at *6. Accordingly, the Appellate Division affirmed the trial court's ruling granting Plaintiffs' motion for class certification.

***Gold, et al. v. New York Life Insurance Co.*, 2017 N.Y. App. Div. LEXIS 5627 (N.Y. App. Div. July 18, 2017).** Plaintiffs, a group of former insurance agents, brought a class action under New York state law seeking unpaid overtime wages and recovery of improper wage deductions. Defendant filed a motion for summary judgment as to three of Plaintiffs' claims, which the trial court granted. Defendant also sought to compel arbitration of Plaintiff Kartal's claims pursuant to the arbitration agreement she signed at the commencement of her employment, which the trial court also granted. On appeal, the New York Appellate Division reversed and held that Plaintiffs were not required to arbitrate their disputes with Defendant because that obligation would run afoul of the National Labor Relations Act ("NLRA"). Under the arbitration agreement, Plaintiffs waived any right to a jury trial and agreed that no claim could be brought or maintained "on a class action, collective action or representative action basis either in court or arbitration." *Id.* at *5. The provision also provided that if the waiver of class, collective, or representative actions were found to be unenforceable, the class, collective, or representative claim would proceed in court. *Id.* The Appellate Division noted that New York case law authorities have not

squarely addressed the question of whether this type of arbitration provision is enforceable. *Id.* at *6. Further, the Appellate Division noted the recent split among the federal circuits regarding these types of clauses. Upon consideration of the matter, the Appellate Division concluded that the better view is that arbitration provisions such as the one in Plaintiff's contract, which prohibit class, collective, or representative claims, violated the NLRA, and thus the provisions are unenforceable. The Appellate Division found that the waivers were unenforceable as they interfered with employees' rights under the NLRA to engage in protected concerted activity by depriving them of the ability to bring class or collective actions. In reaching its decision, the Appellate Division weighed "an individual's right to resort to the courts, on the one hand, and this State's preference for enforcing arbitration agreements." *Id.* at *11. The Appellate Division found there to be "no reason that the [Federal Arbitration Act] policy favoring arbitration should trump the NLRA policy prohibiting employers from preventing collective action by employees." *Id.* at *12-13. Accordingly, the Appellate Division sided with the Sixth, Seventh, and Ninth Circuits and held "that waiver of collective claims violates the NLRA, and is void and invalid under the FAA's saving clause." *Id.* at *14.

***Shanklin, et al. v. Wilhelmina Models, Inc.,* Case No. 653702/2013 (N.Y. Super. Ct. May 25, 2017).** Plaintiffs, a group of models, filed a putative class action against various modeling agencies ("MADs"), alleging violations of the New York Labor Law ("NYLL") for failure to pay for subsequent use and reuse of their images, breach of contract, conversion, unjust enrichment, and breach of the duty of good faith. *Id.* at 1. Plaintiffs claimed that the agencies collected usage and reuse fees from advertising agencies and companies that used their likenesses on products, but failed to pay Plaintiffs for the work. Defendants moved to dismiss on several grounds. The Court granted Defendants' Elite Model Management Corp. ("Elite") and Major Model Management Inc. ("Major") motions to dismiss as to the NYLL claims on the grounds that the claims were time-barred. *Id.* at 16, 18. The Court denied the motions to dismiss as to the rest of Defendants. The Court ruled that for the claims to be timely under the six-year statute of limitation of the NYLL, they needed to accrue on or after October 24, 2007. The claims against Defendants Elite and Major related to models that ceased to have any relationship with the agency since 2005. The Court reasoned that only wages were recoverable under the NYLL and the post-termination payments that the models claimed that they were entitled to did not constitute wages if they were contingent upon any factors other than the labor or services that Plaintiffs rendered. *Id.* at 17. Plaintiffs' claims for fees for usage depended on factors other than each Plaintiff's productivity, such as the decisions of third-party clients to use the images and upon MAD's ability to license such use. The Court rejected Plaintiffs' contentions that the usage fees were essentially commissions that were protected as wages when they were guaranteed and were for a fixed amount that was earned prior to termination of employment. *Id.* The Court noted that the fees for usage were not specified or guaranteed in the models' contracts, nor was the accrual of such payments certain. The Court opined that these fees were not payments for services, but were like royalty or licensing payments and not covered under the NYLL. The Court also dismissed all claims of conversion, breach of duty of good faith, and unjust enrichment against all Defendants as the claims were either time-barred or were not sufficiently pled.

(vi) Ohio

***Dykes, et al. v. Temple Baptist College*, 2017 Ohio App. LEXIS 2699 (Ohio App. 1st Dist. June 30, 2017).** Plaintiffs, a group of former employees, brought an action alleging that Defendant failed to pay back pay and other damages in violation of Ohio wage laws. The trial court granted Defendant's motion for summary judgment, and on appeal, the Ohio Court of Appeals affirmed. Plaintiffs claimed that the college, its former president, and Defendant's directors were personally liable for unpaid wages after the college experienced serious financial difficulties and was unable to pay them. *Id.* at *1. In their capacities as members of the college's board of regents, the directors voted on matters presented to the board by the college's administration, including the college's budget, policies, and procedures and they approved the hiring of some employees, as recommended by the administration. *Id.* at *1-2. Plaintiffs each had a written employment contract with the college. The contract did not provide that the directors would personally guarantee the employees' wages. While the directors often acted as advocates for the college and expressed their belief that the financial difficulties were being addressed, there was no evidence that the directors ever personally promised to pay the employees' wages. *Id.* at *2. The trial court granted the directors' motion for summary judgment on Plaintiffs' claims against them for violations of R.C. 4113.15, Ohio's wage-payment statute. The trial court entered judgment against the college and in favor of Plaintiffs in the amount of $84,416. *Id.* Plaintiffs claimed that the trial court erred in

entering summary judgment in favor of the directors on their claim for back wages under R.C. 4113.15. The Court of Appeals noted that R.C. 4113.15(A) provides that, "Every individual, firm, partnership, association, or corporation doing business in this state shall pay all its employees the wages earned by them" at regular intervals. *Id.* However, the Court of Appeals explained, the statute does not state that directors of a corporation shall be liable, as "individuals," if the employer fails to pay its employees. *Id.* Rather, it provides that if an individual is doing business in Ohio, the individual, as the employer, must pay her employees. Plaintiffs maintained that the directors of an employer were liable, under R.C. 4113.15, if the employer failed to pay its employees. *Id.* Plaintiffs asserted that since the college's directors were acting in the interests of the college in relation to the employees that they too were liable for wages. *Id.* at *4. The Court of Appeals disagreed, and held that the principle that directors of a corporation are generally not liable for the debts of the corporation "is ingrained in Ohio law." *Id.* The Court of Appeals stated that even construing the evidence most strongly in Plaintiffs' favor, the directors were entitled to judgment as a matter of law under the clear language of R.C. 1702.55 and 4113.15. Moreover, the Court of Appeals found that Plaintiffs could not establish a genuine issue of material fact as to whether the corporate veil of the college should have been pierced, as they failed to show that the directors' control over the college was so complete that the college had no separate mind of its own. *Id.* at *5. Accordingly, the Court of Appeals upheld the trial court's order granting summary judgment to Defendant.

***Konarzewski, et al. v. Ganley*, 2017 Ohio App. LEXIS 2347 (Ohio App. 8th Dist. June 15, 2017).** Plaintiffs, a group of car purchasers, brought an action alleging that Defendant violated the Ohio Consumer Sales Practices Act ("OCSPA") and the Ohio Retail Installment Sales Act ("RISA") by using certain form documents containing conflicting, misleading, unconscionable, and substantially one-sided terms. After discovery, the parties filed cross-motions for summary judgment. The trial court granted partial summary judgment to Plaintiffs, finding that Defendant's use of the forms violated the OCSPA. Plaintiffs also filed a motion for class certification of their OCSPA claims, which the trial court denied. On appeal, the Ohio Court of Appeal found that the proposed class definition was inconsistent with the limitations on damages under the OCSPA. The Court of Appeal determined that the trial court had abused its discretion by failing to modify the class definition or giving Plaintiffs the opportunity to modify the class definition to conform with the additional requirement of actual damages for class actions brought for violations of the OCSPA. On remand, Plaintiffs provided a modified class definition and the trial court granted class certification for a class of consumers who, from within two years prior to the commencement of the action to the present, purchased a vehicle and did not receive the benefit of the bargain and as a result suffered actual damages. *Id.* at *4. On further appeal, the Court of Appeal reversed the trial court's decision granting class certification. The Court of Appeal stated that for a class to be certified under Ohio Rule 23(B)(3), the trial court must find: (i) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (ii) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Id.* at *6. The Court of Appeal noted that the modified class definition included purchasers who "did not receive the benefit of the bargain and as a result suffered actual damages." *Id.* at *8. The Court of Appeal opined that the trial court failed to explain how the class could be ascertainable, as individualized determinations would be necessary for determining whether members of the putative class in fact suffered damages. *Id.* at *8. The Court of Appeal determined that Plaintiffs failed to demonstrate that they could prove, through common evidence, that all class members were in fact injured by Defendant's use of the alleged misleading forms. The Court of Appeal found that the question of whether a particular purchaser suffered actual damage as a result of the use of the two form documents would turn on individualized facts and evidence. *Id.* at *10-11. Because resolution of the issue of actual damages would require a case-by-case analysis of each transaction, the Court of Appeal held that common questions of law or fact did not predominate over individualized inquiries. *Id.* at *12. The Court of Appeal therefore ruled that Plaintiffs failed to make a showing that all class members suffered an injury-in-fact. Accordingly, the Court of Appeal found that the trial court abused its discretion in granting class and reversed the decision.

(vii) Oregon

***Al Shaikhli, et al. v. Portland Specialty Baking,* 2017 Ore. Cir. LEXIS 1 (Multnomah County, Ore. Mar. 9, 2017).** Plaintiffs, a group of factory workers, brought a putative class action alleging wage & hour violations pursuant to Oregon labor law. Defendant moved to dismiss or in the alternative for summary judgment as to four of Plaintiffs claims. Plaintiffs claimed that Defendant failed to pay both daily and weekly overtime. *Id.* at *2. The Court granted Defendant's motion to dismiss as to Plaintiffs' overtime claim. *Id.* at *10. Plaintiffs worked more

than 10 hours in a day and more than 40 hours in a workweek and asserted that they were entitled to overtime under the state's overtime statutes. *Id.* at *2. The two overtime statutes did not specifically address the relationship between the two overtime laws and how overtime should be calculated when an employee works both more than 10 hours in one day and more than 40 hours in one week. *Id.* The Court agreed with Defendant's interpretation of the overtime laws that an overtime hour must be paid at the rate of time and one-half the regular wage only once in all circumstances and not twice in some circumstances. *Id.* at *9. Requiring employers to pay the greater of daily or weekly overtime was consistent with both statutes. *Id. at* *10. Accordingly, the Court granted Defendant's motion to dismiss as to the overtime claim. *Id.* Plaintiffs also claimed that Defendant failed to timely pay wages due upon termination. *Id.* The Court granted Defendant's motion to dismiss on the basis that the conduct of failing to pay daily overtime did not create separate liability for failure to pay upon termination and penalty wages because Plaintiffs could not recover double penalty wages for the same alleged wrong. *Id.* at *13. Plaintiffs also sought declaratory and injunctive relief to prevent Defendant from requiring or permitting workers from working more than 13 hours in a day. *Id.* The Court granted Plaintiffs' motion as to the declaratory relief claim because there was no present "uncertainty" or "insecurity" pertaining to the question of whether Defendant may require its employees to work more than 13 hours a day. *Id.* Accordingly, there was no legal basis to issue a declaratory relief. *Id.* at *14. However, because there was question of fact as to whether any Plaintiff worked more than 13 hours in a workday, the Court denied Defendant's motion as to Plaintiffs' request for an injunction. *Id.* Plaintiffs also sought declaratory relief that Defendant's attendance policy violated Oregon's sick leave law and an injunction ordering Defendants to remove accrued sick leave absences from its attendance points policy and remove from personnel records any consequences or adverse employment actions taken because of this policy. *Id.* The Court granted Defendant's motion for summary judgment as to these claims, as Plaintiffs presented no evidence that Defendant included protected sick leave absences in its attendance policy. *Id.* at *17.

(viii) Pennsylvania

***Chevalier, et al. v. GNC,* 2017 Pa. Super LEXIS 1092 (Pa. Super. Ct. Dec. 22, 2017).** Plaintiffs, a group of salaried retail store managers, filed a class action alleging that Defendant violated the Pennsylvania Minimum Wage Act ("PMWA") when it miscalculated Plaintiffs' rate of overtime pay. The parties agreed that the PMWA required that Plaintiffs be paid one and one-half of their regular rate, but disagreed over how to calculate the regular rate. The parties filed cross-motions for summary judgment, which were limited to the issue of whether Defendant's use of the FLSA's fluctuating workweek ("FWW") method to calculate overtime compensation complied with the PMWA. The trial court granted Plaintiffs' motion and denied Defendant's motion. It ruled that Defendant's practice of: (i) using a method of calculating an employee's regular rate by dividing the employee's salary in a given week by the number of hours actually worked in that week, as opposed to 40 hours, violated the PMWA; and (ii) the payment of an overtime premium of only one-half the regular rate violated the PMWA . On Defendant's consolidated appeal, the Pennsylvania Superior Court affirmed in part and reversed in part. *Id.* at *53. The Superior Court reversed the trial court's decision with respect to Defendant's method of calculating Plaintiffs' regular rate based upon the number of hours actually worked in a week, and held that this method did not violate the PMWA. The Superior Court reasoned that absent legislative or regulatory action, Defendant's calculation of the regular rate for salaried employees comported with Pennsylvania law. It noted that when the PMWA was enacted in 1968, the FLSA permitted employers to calculate the regular rate of salaried employees in such a manner. In addition, the Superior Court affirmed the trial court's decision that Defendant's payment of an overtime premium of only one-half the regular rate violated the PMWA. The Superior Court opined that Pennsylvania had adopted regulations addressing the appropriate multiplier for calculating overtime payments, which explicitly provided that employees shall be paid not less than one and one-half time**s** their regular rate of pay for all hours in excess of 40 hours in a workweek. Accordingly, the Superior Court affirmed the trial court's decision that Defendant's method of paying an overtime premium of one-half the regular rate violated the PMWA . As such, the Superior Court reversed in part and affirmed in part the trial court's decision granting summary judgment.

***Glover, et al. v. Udren Law Offices,* 2017 Pa. Super. Unpub LEXIS 4277 (Pa. Super. Ct. Nov. 20, 2017).** Plaintiff filed a putative class action against Defendant alleging that it illegally collected excessive fees in connection with mortgage foreclosure actions against homeowners. Plaintiff asserted that Defendant charged her court costs and legal fees in violation of the Pennsylvania Loan Interest and Protection Act ("Act 6") as well

as the Pennsylvania Unfair Trade Practices and Consumer Protection Act ("UTPCPL"). *Id.* at *6. The trial court dismissed the claims on the basis that Plaintiff's claims against Defendant were barred by prior rulings in a separate case that Plaintiff had filed in federal court against her mortgage lender Wells Fargo. *Id.* at *9. The Third Circuit had issued an opinion in that case in which it affirmed the entry of summary judgment in favor of Wells Fargo on Plaintiff's Act 6 claim and stated that Plaintiff failed to present evidence on which a reasonable jury could conclude that she was charged attorneys' fees not incurred or permitted under the loan documents or that she paid any fees. *Id.* Defendant objected to Plaintiff's complaint and argued that it should be dismissed based upon collateral estoppel, given the Third Circuits' determination that Plaintiff had not proven that she paid illegal fees to anyone. *Id.* at *11. The trial court agreed with Defendant's position. On Plaintiff's appeal, the Pennsylvania Superior Court affirmed the trial court's decision. It found that the elements of collateral estoppel were met as Plaintiff had a full and fair opportunity to litigate the prior action. *Id.* at *30. Accordingly, the Superior Court affirmed the trial court's decision. *Id.*

***King, et al. v. Albert And Carol Mueller LTD,* Case No. 2014-8688 (Pa. Cmmw. Oct. 24, 2017).** Plaintiffs, a group of McDonald's restaurant workers, filed a lawsuit alleging that Defendant failed to pay them all wages due in violation of state wage & hour laws. The parties ultimately reached a settlement and the Pennsylvania Court of Common Pleas granted their motion for preliminary settlement approval. The parties subsequently sought final settlement approval, which the Court granted. The Court stated that, for settlement purposes, the proposed class met all the requirements of class certification pursuant to Rule 1701, including numerosity, commonality, typicality, adequacy of representation, predominance, fair and efficient method of adjudication, and manageability. *Id.* at 4-5. The Court further found that the settlement agreement resulted from extensive arm's length negotiations by and through experienced counsel, with the assistance and oversight of the Court. *Id.* at 5. The Court held that the settlement was fair, reasonable, and adequate based on the following factors: (i) there was no fraud or collusion underlying the agreement; (ii) the complexity, expense, and uncertainty and likely duration of litigation favored settlement; and (iii) the settlement provided meaningful benefits to the settlement class. *Id.* at 6. Accordingly, the Court granted final settlement approval.

***Thiel, et al. v. Pennsylvania Leadership Charter School,* 2017 Pa. Super. Unpub. LEXIS 4594 (Pa. Super. Ct. Dec. 14, 2017).** Plaintiffs, a group of teachers, filed a class action alleging breach of contract and violations of wage payment and collections law due to Defendant's bonus program for teachers. Plaintiffs filed a motion for class certification, which the trial court denied. On appeal, the Pennsylvania Superior Court affirmed the trial court's ruling. Plaintiffs sought certification of a class consisting of "all individuals who were employed as salaried employees by the Pennsylvania Leadership Charter School for the academic school years from 2008-2009 through 2011-2012 and did not receive a bonus of 10% of their base salary for any of those years within the period of the next academic year." *Id.* at *2-3. The trial court found that Plaintiffs failed to establish commonality and typicality between their claims and those of the rest of the class. *Id.* at *3. On appeal, Plaintiffs argued they had sufficiently demonstrated commonality because their claims all arise from Defendant's non-payment of bonuses. Plaintiff indicated that Defendant's CEO, James Hanak, as a representative of the school, explicitly promised them bonuses in their interviews. *Id.* Plaintiffs conceded that other members of the proposed class could not recall if they were promised such bonuses, and still others were certain no such promises were made. Plaintiffs argued that the oral promises made to some members of the proposed class were unrelated to the central issue of recovery. The Superior Court disagreed. It determined that Plaintiffs' alleged evidence that Hanak guaranteed them bonuses in their interviews could not be used to prove that other putative class members, to whom Hanak did not make such promises, also were owed bonuses. *Id.* at *6. The Superior Court reasoned that where other class members could not prove reliance or causation in their individual action using the same evidence as Plaintiffs, common question of law and fact did not exist. *Id.* at *7. Thus, the Superior Court found that the trial court properly denied class certification based on lack of commonality between proposed class members. The Superior Court held that Plaintiffs also failed to meet the typicality requirement. Since bonuses were awarded each school year, even assuming the bonus program during the 2008-2009 school year was identical to that of later years and Defendant was found to owe bonus payments to employees, Plaintiffs acknowledged they did not work at the school during that school year. *Id.* Thus, Plaintiffs could not recover a bonus for that year even if they were successful at trial, and pursuit of their own claims would not advance those of proposed class members who may be owed bonuses for the 2008-2009 school year. *Id.* at *7-8. Accordingly, the Superior Court affirmed the trial court's ruling.

(ix) Washington

***Brady, et al. v. Autozone Stores, Inc.*, 188 Wash.2d 576 (Wash. 2017).** Plaintiff filed a class action in District Court seeking unpaid wages for meal breaks that Defendant allegedly withheld from employees. Plaintiff filed a motion for class certification. After reviewing § 296-126-092 of the Washington Administrative Code ("WAC") and various decisions from Washington state courts, the District Court concluded that employers have met their obligation under the law if they ensured that employees have the opportunity for a meaningful meal break, free from coercion or any other impediment. *Id.* at *579. The District Court expressly rejected the notion that Washington has adopted a strict liability approach to the taking of meal breaks, and found that class certification would be inappropriate, considering the unique fact scenarios associated with each potential violation of the meal break statute. Accordingly, the District Court denied Brady's motion for class certification. Plaintiff sought appeal of the denial with the Ninth Circuit, which declined Plaintiff's request to appeal the decision. Plaintiff then filed a motion in the District Court, seeking to certify two questions to the Washington Supreme Court, including: (i) is an employer strictly liable under WAC 296-126-092; and (ii) if an employer is not strictly liable under WAC 296-126-092, does the employee carry the burden to prove that his employer did not permit the employee an opportunity to take a meaningful break as required by WAC 296-126-092. *Id.* at *580. Considering together the noted sub-sections and guidelines, the Washington Supreme Court explained that an employee who works five consecutive hours is entitled to a 30 minute meal break, which may be taken from the second through the fifth hour of his or her shift, but which also may be waived. *Id.* at *581. Accordingly, the Supreme Court stated that the presence of the waiver option compels the answer to the first certified question to be no, since an employer is not automatically liable if a meal break was missed because the employee may waive the meal break. *Id.* at *581-582. An employee thereby asserting a meal break violation under WAC 296-126-092 would meet his or her *prima facie* case by providing evidence that he or she did not receive a timely meal break. *Id.* at *582. The employer may then rebut this by showing that in fact no violation occurred or a valid waiver existed. *Id.* Accordingly, the answer to the second certified question was no, for WAC 296-126-092 imposes a mandatory obligation on the employer to provide meal breaks and to ensure those breaks comply with the requirements of WAC 296-126-092. The Supreme Court thereby answered Plaintiff's certified questions.

***Hill, et al. v. Garda CL Northwest, Inc.,* 198 Wash. App. 326 (Wash. App. 2017).** Plaintiffs, a group of armored truck drivers, filed a class action alleging that Defendant denied meal periods and rest breaks to Plaintiffs under Washington's Industrial Welfare Act and the Washington Minimum Wage Act. The trial court awarded Plaintiffs double damages, pre-judgment interest, and attorneys' fees. Defendant appealed the trial court's certification of the class, denial of its motions for summary judgment, grant of Plaintiffs' partial summary judgment motion on liability, award of double damages, award of pre-judgment interest, and use of a lodestar to multiply Plaintiffs' attorney fee award. *Id.* at 328. On appeal, Defendant contended that the trial court abused its discretion and certified the class without making a clear record of its reasons or considering the appropriate criteria. The Washington Court of Appeals held that the trial court's order was sufficient because it identified the common questions that predominated, whether the drivers were allowed legally sufficient rest or meal breaks and whether they were entitled to compensation for missed breaks, and explained why a class action was superior to individual actions. *Id.* at 334. Defendant also argued that the trial court erred when it concluded that neither the Federal Aviation Administration Authorization Act ("FAAAA"), nor § 301 of the Labor-Management Relations Act, ("LMRA") preempted the Plaintiffs' claims. The Court of Appeals rejected this argument and held that the FAAAA did not preempt Plaintiffs' claims because complying with Washington law would not have had a significant impact on Defendant's operations if Defendant had sought a variance. *Id.* at 332. The Court of Appeals further held that § 301 of the LMRA did not preempt Plaintiffs' claims because Plaintiffs' rights were independent and non-negotiable, and it did not have to interpret Plaintiffs' collective bargaining agreements ("CBAs") in order to resolve the issue. *Id.* Defendant further maintained that the trial court erred when it granted summary judgment in favor of Plaintiffs for Defendant's failure to provide meal periods and rest breaks. Defendant maintained that Plaintiffs waived their right to meal periods when they acknowledged their CBAs that purported to contain waivers. *Id.* at 335. However, because Plaintiffs could not have waived their meal periods through the CBAs, as it was not an individual choice, the Court of Appeals held that the waivers in the CBAs were not evidence that Plaintiffs waived their rights. *Id.* at 336. The Court of Appeals rejected Defendant's argument that questions of material fact remained as to whether Plaintiffs could take rest breaks and held that Defendant's own testimony and materials established that there was a policy against taking breaks. *Id.* at 337. Defendant also argued that the trial court erred by awarding double damages for the missed meal periods

because those were not wage violations and Defendant's conduct was not willful. The Court of Appeals held that Washington treats a failure to provide meal periods as withholding wages, but agreed that Defendant's conduct was not willful, as there was a *bona fide* dispute, and reversed the award of double damages. *Id.* at 338. Defendant also argued that the trial court should not have awarded pre-judgment interest for any damages for which it awarded double damages. Because pre-judgment interest is not available when Plaintiffs receive punitive damages, such as double damages, the Court of Appeals reversed the award of pre-judgment interest on the rest break damages. *Id.* at 339. Finally, Defendant contended that the trial court abused its discretion when it applied a 1.5 lodestar multiplier to Plaintiffs' attorney fee award because the case was insufficiently risky. *Id.* at 340. The Court of Appeals disagreed and found that the multiplier was reasonable given the risks of the case and the fact that Plaintiffs' attorneys took the case on a contingency basis.

C. Rulings In Breach Of Employment Contract/Miscellaneous Workplace Claims

(i) Arkansas

***City Of Conway, et al. v. Shumate, Jr.,* 2017 Ark. 36 (2017).** Plaintiffs, a group of police officers and firefighters, brought a class action alleging that Defendant breached its contract when it failed to allocate sales-tax revenues to fund their salary increases. *Id.* at 38. Plaintiffs moved for certification and the trial court granted the motion. On Defendant's interlocutory appeal, the Supreme Court of Arkansas affirmed. *Id.* at 44. Plaintiffs alleged that Defendant provided police and fire employees with packets prior to employment that outlined a pay-grid structure that had been implemented pursuant to resolution that the voters in the City of Conway had passed. Plaintiffs alleged that the pay grid was part of their employment contract and when Defendant stopped funding salary increases, it breached its contract with Plaintiffs. *Id.* at 39. Defendant asserted that Plaintiff failed to satisfy the requirements of commonality, predominance, typicality, and superiority. On appeal, Defendant argued that: (i) there were no common questions because the mutuality element of a breach-of-contract claim required a meeting of the minds between the parties and a determination of individual issues before reaching any common questions; (ii) the common questions did not predominate because liability could not be established on a class-wide basis, as each Plaintiff had a distinct set of operative facts for their breach-of-contract claim; (iii) the class representatives' claims were atypical from those of the class; and (iv) a class action was not a superior method to adjudicate Plaintiffs' claims. *Id.* at 41. The Supreme Court ruled that commonality was established because the pay-grid in question became part of all Plaintiffs' employment contracts and whether that contract was breached when Defendant stopped making payment was common to all class members. Further, the inquiry of whether accepting a job was adequate consideration for a pay-grid was the same inquiry for every class member. The Supreme Court further opined that the common questions of whether a sales tax resolution was itself a promise to pay and whether accepting employment was adequate consideration predominated over any individual issues. The Supreme Court ruled that the common questions did predominate because each employee received the same pay-grid and was told that it represented his or her salary. *Id.* at 48. Thus, the common question of whether the sales-tax resolution was itself a promise to pay, and whether accepting employment was adequate consideration, predominated over any individual issues. *Id.* The Supreme Court rejected Defendant's argument that the claims of the two class representatives were not typical, as they arose from the same wrong asserted by the class. *Id.* at 49. Finally, the Supreme Court ruled that class action was superior because it was efficient for both parties to resolve all claims, possibly up to 200, in one forum. *Id.* at 50. Accordingly, the Supreme Court affirmed the trial court's decision to certify the class.

***Industrial Welding Supplies Of Hattiesburg, LLC v. Pinson, et al.*, 2017 Ark. LEXIS 277 (Ark. Nov. 16, 2017).** Plaintiffs filed a class action alleging breach of contract and unjust enrichment based on Defendant Industrial Welding's failure to compensate the employees for earned but unused vacation time after it was acquired by Defendant Airgas. The trial court granted Plaintiffs' motion for class certification. On appeal, Defendants argued that the trial court abused its discretion in granting the motion for class certification because: (i) the employees failed to meet the commonality requirement by presenting proof that common issues of law or fact existed; (ii) common issues of law and fact did not predominate over individual issues; and (iii) a class action was not the superior method of resolving the controversy. *Id.* at *1-2. On appeal, the Arkansas Supreme Court found that the trial court's ruling failed to comply with the mandatory requirements contained in Rule 23(b) of the Arkansas Rules of Civil Procedure, which states that "[a]n order certifying a class action must define the class and the class claims, issues, or defenses." *Id.* at *7. The Supreme Court noted that the trial court defined

the class as "all persons who were employed by Industrial Welding Supplies of Hattiesburg, LLC on December 31, 2011, were so employed for at least one year prior thereto, and continued to be so employed until Industrial Welding Supplies of Hattiesburg, LLC was acquired by Airgas, LLC on March 31, 2012." *Id.* The Supreme Court reasoned that this definition failed to define the "class claims, issues, or defenses." *Id.* The Supreme Court held that the trial court's only finding was the conclusory statement "that Plaintiffs have satisfied all elements of Rule 23 of the Arkansas Rules of Civil Procedure and class certification is appropriate in this case." *Id.* The Supreme Court explained that although neither party filed a Rule 52 motion for specific findings or challenged the sufficiency of the order on appeal, the trial court's failure to define the class claims, issues, or defenses, as required by Rule 23(b), prevented the Supreme Court from conducting a meaningful review of the order. *Id.* at *7-8. The Supreme Court reasoned that although its case precedents provide that a trial court is not required to conduct a rigorous analysis before it certifies a case as a class action, this did not mean that there was no standard at all. The Supreme Court opined that the trial court must undertake enough of an analysis to enable a meaningful review of the certification issue on appeal. *Id.* at *10. The Supreme Court therefore held that the trial court's bare conclusion that "Plaintiffs have satisfied all elements of Rule 23 of the Arkansas Rules of Civil Procedure and class certification is appropriate in this case" was clearly insufficient. *Id.* at *11. Accordingly, because the trial court's order granting class certification failed to comply with Rule 23(b), the Supreme Court remanded with instructions to enter an order that complied with Rule 23.

(ii) California

***Boling, et al. v. Public Employment Relations Board,* 10 Cal. App. 5th 853 (4th Dist. 2017).** In this consolidated proceeding of two writs of review, the City of San Diego and a group of citizens challenged a decision of the California Public Employment Relations Board ("PERB"). On appeal, the California Court of Appeal annulled the decision of PERB with a direction to dismiss the complaints. *Id.* at 895. Voters of the City of San Diego approved a citizen-sponsored initiative, the Citizens Pension Reform Initiative "CPRI", which mandated changes in the pension plan for certain employees of the City. *Id.* at 856. The PERB determined that the City was obliged to meet and confer with unions pursuant to the provisions of the Meyers-Milias-Brown Act ("MMBA") over the CPRI before placing it on the ballot. *Id.* The PERB further determined that because the City violated this obligation, the PERB could order "make whole" remedies that compelled the City to disregard the CPRI. *Id.* The Court of Appeal ruled that the City did not violate the MMBA when it declined to meet and confer with unions before it placed the CPRI on the ballot because the meet-and-confer obligations of the MMBA did not apply to proposed amendments that were placed on the ballot as a result of citizen proponents through the initiative process. *Id.* at 894. The Court of Appeal concluded that even though the City's mayor and others in the City's government provided support to the proponents to develop and campaign for the CPRI, the PERB erred when it applied agency principles to the support of the mayor and others government actors in regards to the initiative. *Id.* at 856. The Court of Appeal opined that such support did not transform the initiative into a governing-body-sponsored ballot proposal which required meet-and-confer obligations. *Id.* at 893. Accordingly, the Court of Appeal ruled that the PERB erred when it found that the Mayor and the City Council committed an unfair labor practice when they declined to meet and confer over the CPRI before it was placed on the ballot. *Id.*

***Doe, et al. v. Google, Inc.,* Case No. CGC-16-556034 (Cal. Super. Ct. Dec. 22, 2017).** Plaintiffs, a group of current and former employees, filed a class action alleging that Defendant used illegal agreements to restrict freedom of speech and to restrain trade. Defendant filed a motion for summary judgment, which the Court denied. Plaintiffs also filed a motion to compel discovery, which the Court granted. Plaintiffs challenged language in Defendant's "Employee and Temporary Workers Adult Content Liability Release," which required employees to agree that if, during the course of their employment they were exposed to sensitive adult content, they would release Defendant from any liability associated with having such material in the workplace, including claims of harassment, hostile work environment, and discrimination. *Id.* at 1. Defendant argued that the language in the release was limited by the qualifier that exposure to the adult content focused on "part of the employee's essential job function" and that the release operated as an assumption of risk. *Id.* at 3. The Court disagreed with Defendant and found that the document generally released "any and all liability," which included non-waivable statutory rights such as harassment and discrimination claims, and was therefore contrary to public policy. *Id.* at 4. The Court therefore determined that the release was unlawful, and accordingly, denied Defendant's motion for summary judgment. The Court also granted Plaintiffs' motion to compel discovery. The Court found that Defendant responded to Plaintiffs' request with several boilerplate objections that were evasive.

Id. at 4-5. The Court further stated that with respect to Defendant's arguments over the burden of complying with the discovery, Defendant only offered conclusory statements that the requests were burdensome because they would require parsing through privileged information. The Court thereby granted Plaintiffs' motion to compel.

***Mallano, et al. v. Chiang*, 2017 Cal. App. Unpub. LEXIS 2366 (Cal. App. 2d Dist. April 5, 2017).** Plaintiffs, a group of retired judges, filed an action alleging that Defendant failed to provide all payments and benefits based on the formula set forth in § 68203 of the California Government Code. Section 68203(a) provided for mandatory annual increases in judicial salaries by an amount equal to a judge's then current salary multiplied by the average percentage salary increase for state employees during that fiscal year. *Id.* at *3-4. Defendant's costing unit calculated the average percentage salary increase for California state employees. In performing these calculations, Defendant's costing unit did not consider decreases in state employee salaries, although most state employees experienced effective salary decreases during fiscal years 2008-2009, 2009-2010, and 2011-2012 as the result of mandatory furloughs or collectively bargained personal leave programs imposed pursuant to executive orders to address a fiscal emergency the state was experiencing during those years. *Id.* at *6-7. The mandatory furloughs did not alter an affected state employee's rate of pay, but did effectively reduce the wages or salary earned. Plaintiffs sought declaratory relief that: (i) the salary of each judicial officer in fiscal years 2008-2009 through 2013-2014 was the salary provided pursuant to § 68203; (ii) the salary increases provided for in § 68203 were mandatory and not subject to the discretion or authorization of any state official; and (iii) pension benefits were based on the final judicial salaries calculated according to § 68203. *Id.* at *8. The trial court certified a class and issued a proposed judgment in favor of Plaintiffs. The trial court stated that the plain meaning of the words "salary increase in § 68203(a), denoted amounts by which a salary is made larger. Thus, salary decreases are not considered part of the definition of 'salary increase." *Id.* Defendant appealed the judgment. Plaintiffs filed a motion for attorneys' fees, and the trial court granted that motion in part, awarding Plaintiff $659,756 in attorneys' fees. Defendant also appealed the fee order, and the California Court of Appeal consolidated the two appeals. *Id.* at *9. Defendants contended the phrase "average percentage salary increase for the current fiscal year for California State employees" as used in § 68203 must be construed to include not only salary increases, but also effective salary decreases caused by mandatory furloughs imposed during fiscal years 2008-2009 through 2011-2012. *Id.* at *13. The Court of Appeal found there was nothing in the legislative history that indicated that the average percentage salary increase for state employees in any given fiscal year was intended to include effective salary decreases as well as increases. Accordingly, the Court of Appeal upheld the trial court's ruling. As to the award for attorneys' fees, Defendants contended that the fee award should be reversed because Plaintiffs did not confer a significant benefit on the general public or a large class of persons and was motivated by personal pecuniary interest. *Id.* at *27. The Court of Appeal disagreed and held that judges have a vested right to their office for a certain term, and during the time periods relevant to this action, to an annual increase in salary in accordance with the formula prescribed in § 68203. *Id.* at *28. The Court of Appeal stated that a result of Plaintiffs' lawsuit, more than 3,000 judges, judicial retirees, and their beneficiaries will receive salaries and benefits that were wrongfully withheld. Accordingly, the Court of Appeal upheld the trial court's order granting attorneys' fees.

(iii) Connecticut

***Gold, et al. v. Rowland,* 2017 Conn. LEXIS 81 (Conn. April 11, 2017).** Plaintiffs, a group of retired state employees, brought a class action alleging breach of contract. Plaintiffs were enrolled in an Anthem Insurance group health care plan and asserted that they were entitled to proceeds from the demutualization of Defendant Anthem Insurance, Inc. *Id.* at *8. They claimed that because they were participants, they were entitled to a share of demutualization proceeds and that Defendants breached their contractual obligations when it distributed the proceeds to the State of Connecticut instead of the Plaintiffs. *Id.* at *9. The trial court entered a judgment in favor of Defendants. *Id.* On Plaintiffs' appeal to the Supreme Court of Connecticut, Plaintiffs argued that the trial court incorrectly concluded that the relevant contract provisions were ambiguous and consulted extrinsic evidence. The Supreme Court affirmed the trial court's decision. *Id.* at *70. Plaintiffs argued that the 1997 articles of incorporation represented the entirety of the relevant agreement and those articles unambiguously provided that Plaintiffs were members of Anthem Insurance who were entitled to a share of the demutualization proceeds. *Id.* at *24. Plaintiffs further contended that the contract was not ambiguous and that the trial court improperly considered extrinsic evidence of the parties' intent. *Id.* Defendants contended that the relevant agreement encompassed the articles of incorporation and the other merger documents. Defendants further maintained that

the articles, both standing alone and when read in conjunction with the other merger documents, were ambiguous with respect to Plaintiffs' membership status and entitlement to demutualization proceeds. Therefore, Defendants argued that the trial court properly looked to extrinsic evidence to resolve the ambiguity. *Id.* The Supreme Court agreed with Defendants that the articles and other merger documents were part and parcel of the same transaction and that they were ambiguous as to Plaintiffs' eligibility for membership in Anthem Insurance and their entitlement to a share of the demutualization proceeds. *Id.* at *25. Accordingly, the Supreme Court ruled that the trial court properly consulted extrinsic evidence and it concluded that the trial court's holding was consistent with Defendant's interpretation of the agreement. As a result, the Supreme Court affirmed the trial court's decision. *Id.* at *70.

(iv) Hawaii

***Kawashima, et al. v. The State Of Hawaii,* 140 Haw. 139 (Haw. 2017).** Plaintiffs, a group of substitute and part-time teachers ("PTT"), filed two class actions consisting of the *Kawashima* and *Garner* classes asserting breaches of contract claims related to wages they claimed that the State owed to them. The two actions were consolidated on appeal to the Supreme Court of Hawaii, which reversed and remanded for an entry of judgment in favor of Defendant. The substitute teachers' compensation was governed by § 302A-624(e) of the Hawaii Revised Statute, which established a pier diem rate. *Id.* at 143. The part-time teachers' pay was governed by the Department of Education's ("DOE") internal guidelines for School Code Regulation 5203 ("Regulation 5203"), which originally linked the hourly wage of PTTs to the per diem wage paid to substitute teachers under the HRS. *Id.* The DOE retroactively amended Regulation 5203, stating that the rate of pay for PTTs would be determined by the DOE. *Id.* at 144. The *Garner* class included approximately 8,000 substitute teachers, half of whom also worked as PTTs for which they were paid hourly wages. The argued that they were entitled to both per diem back wages and hourly back wages. The *Kawashima class* included approximately 20,000 PTTs who were paid on an hourly basis. *Id.* at 142. The state ultimately settled the claims of the *Garner* class' per diem wage claims of the substitute teachers, but disputed liability as to the payment of hourly wages to the PTTs. The PTTs in both classes alleged that they were owed back wages pursuant to the DOE's School Code Regulation 5203, which linked the hourly pay of PTTs to the per diem wage paid to substitute teachers. *Id.* at 143. Plaintiffs alleged that the state failed to incorporate Regulation 5203 into their employment contracts. The trial court granted in part and denied in part the *Garner* class' motion for partial summary judgment, and ruled that the state violated its contractual obligation to pay the substitute teachers per diem wages prescribed by the HRS. The trial court authorized an interlocutory appeal from its summary judgment order. The Hawaii Court of Appeals affirmed the trial court's determination that the state violated its contractual obligation to pay the substitute teachers by failing to pay them the per diem rate prescribed by the HRS. On remand the *Garner* class sought to include the teachers who they argued were also entitled to hourly back wages as PTT's. Similarly, the PTTs in *Kawashima* argued that their hourly pay rate, pursuant to Regulation 5203, was linked to the substitute teachers per diem pay rate under the HRS. The trial court granted the *Kawashima* Plaintiffs' motion for summary judgment, and ruled that Regulation 5203 had the same force and effect as law and the hourly pay rate for PTTs was linked to the most current per diem pay rate for substitute teachers. The state appealed in both cases and the cases were transferred to the Supreme Court and consolidated for purposes of appeal. On appeal, the state argued that the trial courts erred when they determined that Regulation 5203 was an HRS rule essentially linking the PTTs pay to the statutorily-mandated pay of the substitute teachers. The Supreme Court of Hawaii agreed and ruled that trial court in both *Kawashima* and *Garner* erred when they: (i) determined that Regulation 5203 was an HRS rule; and (ii) granted summary judgment in favor of Plaintiffs for their hourly back wages contract claims. The Supreme Court held that Regulation 5203 was not a rule under the HRS, chapter 91, rather it was an internal management policy that the DOE could amend at any time. The policy did not have the force and effect of law and was not incorporated into the teachers' contracts and the state was not liable for any hourly back wages. *Id.* at 149. Accordingly, the Supreme Court reversed and remanded for an entry of judgment in favor of the state. The Supreme Court affirmed the trial court only to the extent that the trial court determined that Plaintiffs were not entitled to interest under the HRS.

(v) Illinois

***Caritas Family Solutions, Inc., et al. v. Dimas,* Case No. 17-CH-112 (Ill. Cir. Ct. July 17, 2017).** Plaintiffs, a group of healthcare providers, sought an injunction ordering the State of Illinois Comptroller to pay the entire

sums allegedly due to them under their human services contracts, regardless of appropriations, based on claims of impairment of contract, due process, and equal protection violations. *Id.* at 1. The Illinois Comptroller did not authorize payments on the contracts due to the severe fiscal crisis of the State of Illinois. Plaintiffs argued that Illinois Public Act 99-0524 – which authorized some funding amid appropriations to pay for the State's critical needs – resulted in a permanent impairment of the amounts due to them under contracts and an impairment of their remedies in the Illinois Court of Claims. *Id.* Plaintiffs also asserted that that Illinois Governor exceeded his powers of office by entering into the contracts and continuing those contracts while simultaneously vetoing the Illinois General Assembly's budget bills. In opposition, Defendants argued that it was unconstitutional to pay Plaintiffs' contracts because there were no appropriations for that purpose. The trial court found that Plaintiffs' claims failed under the controlling precedent from the Illinois Appellate Court in *Illinois Collaboration on Youth v. Dimas*, 2017 Ill. App. LEXIS 385 (1st Dist. June 15, 2017). In *Dimas*, the Illinois Appellate Court examined similar issues, where the State conducted operations without a budget, entered into and continued contracts without appropriations, and vetoed appropriation bills that would have provided funding for the contracts. The Illinois Appellate Court affirmed the dismissal of all of the claims. The trial court determined that the result should be no different here. The trial court sympathized with Plaintiffs' plight – the slashing of their budgets, laying-off workers, and the closure of their agencies – because "the Governor and the General Assembly could not act together to take care of the needs of our citizens." *Id.* at 3. The trial court indicated that Plaintiffs were not entitled to relief, and their "remedy is to lobby the members of the General Assembly …" *Id.* The trial court acknowledged that Illinois would suffer if Plaintiffs were to lay-off hundreds of workers and withdraw services, and that the breach of hundreds of agreements did not amount to a simple breach of contract. *Id.* Nonetheless, the trial court found that *Dimas* controlled the issues in this case, and it therefore dismissed Plaintiffs' claims.

***Illinois Collaboration On Youth v. Dimas, et al.,* 2017 Ill. App. LEXIS 162471 (1st. Dist. June 15, 2017).** Plaintiffs, a group of social service organizations, filed suit alleging that Defendants violated the Illinois State Constitution when they failed to provide payments to Plaintiffs pursuant to contracts with the State for social services because of an on-going state budget impasse. Plaintiffs' contracts with the State were contingent upon and subject to the availability appropriated of funds. At the time the contracts were executed there were no appropriations for the services. Subsequently, the General Assembly twice passed an appropriation bill to cover Plaintiffs' contracts, but the Governor vetoed the bill each time. Plaintiffs did not receive payments on the contracts, despite providing services and sought an injunction ordering the Illinois Comptroller to pay Plaintiffs the entire sums owed. Plaintiffs asserted that Defendants: (i) acted beyond the scope of their legal authority; (ii) unconstitutionally impaired contractual obligations; (iii) denied Plaintiffs equal protection of the laws; and (iv) deprived Plaintiffs of property without due process. Defendants moved to dismiss the complaint on the grounds that it was barred by sovereign immunity and failed to state a valid claim for relief. The trial court granted the motion to dismiss. On Plaintiffs' appeal, the Illinois Appellate Court affirmed the trial court's decision. First, the Appellate Court held that Plaintiffs did not have claims to be paid for the services provided under contracts that made payment subject to legislative appropriations because under Article IV, § 9 of the Illinois Constitution the Governor had the authority to veto appropriations bills and was not obligated to approve any or all portions of appropriations bills. The failure of the contingency of sufficient appropriations to occur did not render the Governor's conduct unconstitutional or unlawful. The Appellate Court also held that there was no impairment of contract, as the impairment of contracts clause stated that "no law impairing the obligation of contracts shall be passed." *Id.* at *13. However, the mere failure to pass a law did not amount to an infringement on the obligation of contracts. The Appellate Court noted that the General Assembly twice passed appropriations bills that would have provided funding for the contracts at issue, and the General Assembly therefore did not breach the contracts clause. The constitutional provision denying the power to pass any law impairing the obligation of a contract applied only to a statute enacted after the making of a contract, and the contacts at issue were made at a time when there were no budget appropriations in place and contained a clause that expressly stated that the contracts were subject to legislative appropriations. The Appellate Court further held that Plaintiffs were not denied equal protection of the law because there were rational reasons for the State to assure appropriations did not outstrip available revenues. Finally, the Appellate Court ruled that there was no due process violation because the contracts were explicitly subject to appropriations, and therefore failure of that contingency to occur did not deprive the Plaintiffs of a property right. Accordingly, the Appellate Court affirmed the trial court's decision to dismiss Plaintiffs' complaint.

(vi) Michigan

***Aft Michigan, et al. v. State Of Michigan,* Case No. 154117-19 (Mich. Dec. 20, 2017).** Plaintiffs, a group of nearly 275,000 education employees and retirees, filed a class action against Defendant, the State of Michigan, alleging they had pay for retiree health care that had been illegally deducted from their paychecks. They sought the return of those funds. The dispute arose from a 2010 law that, according to Plaintiffs, violated the contract clauses of the U.S. Constitution and the Michigan state Constitution because it substantially impaired their employment contracts by involuntarily docking education workers' wages by 3% to fund retiree medical benefits. The alleged improper deductions were made from July 2010 until September 2012. Previously, the Michigan Court of Appeals awarded $554 million be returned to Plaintiffs from Defendant. On appeal, the Michigan Supreme Court affirmed the decision. The Supreme Court determined that the 2010 law "substantially impaired" Plaintiffs' employment contracts by involuntarily reducing their wages, and that Defendant "failed to demonstrate that this measure was reasonable and necessary to further a legitimate public purpose." *Id.* at 4. Accordingly, the Supreme Court ruled that the law authorizing the deductions was unconstitutional, and it affirmed the Court of Appeals' decision refunding $554 million to Plaintiffs.

Editor's Note: *Aft Michigan* affirmed the largest judgment of 2017 in a workplace class action.

***Bauserman, et al. v. Unemployment Insurance Agency*, 2017 Mich. App. LEXIS 1154 (Mich. App. July 18, 2017).** Plaintiffs filed a class action alleging that Defendant violated their rights to due process when investigating whether Plaintiffs committed fraud in receiving unemployment benefits. *Id.* at *1. The trial court denied Defendant's motion for summary judgment. On appeal, the Michigan Court of Appeals reversed and remanded. Plaintiffs alleged that Defendant used an automated decision-making system to detect and adjudicate suspected instances of employment benefit fraud, which deprived claimants of due process and fair and just treatment because it determined guilt without providing notice, without proving guilt, and without affording claimants an opportunity to be heard before penalties were imposed. *Id.* at *1-2. Defendant argued that the trial court erred in denying its motion for summary judgment because Plaintiffs' claims were not filed in compliance with the governing provision of the Court of Claims Act. The Court of Appeal agreed. The Court of Appeal explained that the relevant statute stated in part that "in all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." *Id.* at *9. Accordingly, the Court of Appeal found that it must determine whether the six months within which Plaintiffs were required to file a notice of intention to file a claim, or the claim itself, began to run: (i) when Defendant issued notices informing Plaintiffs that they were disqualified from receiving unemployment benefits; or (ii) when Defendant seized Plaintiffs' property. The Court of Appeal held that based on previous case law, it was most reasonable to interpret the language so that a party must file "a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action." *Id.* at *16. The Court of Appeal reasoned that it would follow that Plaintiffs' cause of action accrued when the wrong on which they base their claims was done. The Court of Appeals stated that in a constitutional claim alleging a deprivation of due process, "the alleged wrong upon which Plaintiffs' claims are based was done" when Defendant issued notices informing Plaintiffs of its determination that Plaintiffs had engaged in fraudulent conduct, and they were not given the requisite notice and opportunity to be heard. *Id.* at *20. The Court of Appeals opined that Plaintiff Bauserman's notices of redetermination regarding his unemployment benefits were dated December 3, 2014, Plaintiff Broe's notices of determination advising him of his disqualification for unemployment benefits were dated July 15, 2014, and Plaintiff Williams' notice of determination/redetermination was dated June 22, 2012. *Id.* at *23-24. Accordingly, since Plaintiffs did not institute their action until September 9, 2015, their claims were not filed in compliance with the Court of Claims Act, *i.e.*, "within 6 months following the happening of the event giving rise to the cause of action." *Id.* at *24. The Court of Appeals therefore reversed the trial court's ruling denying Defendant's motion for summary judgment.

(vii) New Jersey

***Atlantic Ambulance Corp. v. Cullum, et al.,* 451 N.J. Super. 247 (N.J. App. Div. 2017).** Plaintiffs filed counterclaims against Defendant after Defendant filed claims against Plaintiffs for their failure to pay ambulance bills. Plaintiffs asserted class counterclaims of negligence, common law fraud, breach of contract, unjust

enrichment, and violations of the New Jersey Consumer Fraud Act ("CFA"). Plaintiffs also moved for class certification on behalf of a proposed class who claimed that they were overcharged for ambulance services pursuant to the CFA and breach of contract claims. *Id.* at 252. The trial court denied the motion for class certification on the basis that Plaintiffs failed to satisfy the commonality and typicality requirements. *Id.* at 253. The trial court also ruled that Plaintiffs did not suffer an ascertainable loss under the CFA because they failed to pay Defendant's bill, and therefore it rejected Plaintiffs' argument that an excessive bill from Defendant was sufficient to prove an ascertainable loss. *Id.* On Plaintiffs' appeal, the New Jersey Appellate Division affirmed in part and reversed in part. The Appellate Division ruled that the trial court's reasoning was flawed when it determined that Plaintiffs were required to have paid the bill to demonstrate an ascertainable loss. *Id.* at 254. However, the Appellate Division affirmed the decision to deny class certification on the CFA claim, reasoning that the CFA was inapplicable to ambulance service providers under the learned professional exception to the CFA. *Id.* at 258. With respect to the two breach of contract claims that Defendant: (i) charged unreasonable rates for ambulance services, and (ii) improperly charged a $14 mileage fee, the Appellate Division agreed that denial of certification was proper to the extent that Plaintiffs challenged the reasonableness of fees charged. The Appellate Division reasoned that as a matter of public policy, trial courts are ill-equipped to determine the reasonable costs of health care. *Id.* at 260. However, some Plaintiffs were not brought to the hospital and Defendant improperly charged them $14 for one mile of travel. *Id.* at 261. Because this claim did not violate any policy concerns and merely related to improper billing, the Appellate Division remanded for the trial court to consider whether this class could pursue certification. *Id.* In sum, the Appellate Division affirmed in part and remanded in part. *Id.*

***In The Matter Of County Of Atlantic,* 230 N.J. 237 (2017).** Unions representing public employees entered into a collective negotiating agreement ("CNAs") with Atlantic County. The CNAs stated that while the contracts were in effect, the covered individuals would receive annual salary increases under an automatic increment system and when the CNAs expired, the provisions of the agreement would continue in effect until a successor agreement was negotiated. Prior to the expiration of the CNAs, the County informed the unions that the employees would no longer receive their automatic increase in salary once the CNAs expired. The County acknowledged that its customary practice was to continue the previously negotiated payment scheme, but it maintained that it was no longer reasonable to do so. *Id.* at 242. The unions filed charges against the County with the Public Employment Relations Commission ("PERC"), claiming that the County had engaged in an unfair labor practice in violation of the New Jersey Employer-Employee Relations Act ("EERA") by refusing to pay the salary increments after each CNA expired. *Id.* at 243. The hearing examiner found that applicable case law required the application of the "dynamic *status quo*" doctrine, which the PERC adopted in 1975, and which precluded the County from altering the *status quo* while engaged in collective negotiations. *Id.* Given the contract language and the County's history of continuing the payments after the previous CNAs had expired, the hearing officer found that the refusal to pay was a departure from the dynamic *status quo* and constituted a unilateral change in a mandatory subject of negotiations in violation of the EERA. The County petitioned for review and the PERC disagreed that the contract language required continuation of incremental salary increases after the contract expiration. *Id.* The PERC found that the dynamic *status quo* doctrine was impractical and burdensome considering economic conditions and legislative changes and that the County was within its authority to stop applying the salary increment systems in the expired CNAs. As a result, it dismissed the charges. After the PERC's decision in the Atlantic County matter, Bridgewater Township notified the union that it too would stop the salary step increments once the current CNA expired. *Id.* The union filed a grievance, which the Township denied. The union then submitted the matter to the PERC for arbitration. The PERC held that public employers were no longer required, as a matter of law, to fund automatic advancement on a salary guide after a contract had expired. On the unions consolidated appeal, the New Jersey Appellate Division reversed the PERC's decision. *Id.* The Appellate Division ruled that the PERC had adopted the dynamic *status quo* doctrine decades ago, and could not abandon it now. The Appellate Division found that the salary increment system was a term and condition of employment that could not be unilaterally terminated during negotiations for a successor CNA. Bridgewater Township, Atlantic County, and the PERC then appealed to the Supreme Court of New Jersey. It affirmed the Appellate Division's decision. The Supreme Court held that the language of the respective agreements required that the salary step increases remained in place until the parties reached agreement on new CNAs, and that the county and township had committed an unfair labor practice. Accordingly, the Supreme Court affirmed the judgment of the Appellate Division. *Id.* at 256.

***International Association Of Firefighters, et al. v. Atlantic City,* Case No. L-222-17 (N.J. Super. Ct. Aug. 25, 2017).** Plaintiffs, a group of firefighters' unions and their members, filed suit against Defendants over a planned reduction-in-force. The Court had previously granted Plaintiffs' request for an injunction against Defendants, which prohibited them from reducing the size of Atlantic City's Fire Department ("ACFD") to 125 firefighters. *Id.* at 1. The Court held that the dramatic reduction in personnel would compromise public safety, cause irreparable harm, and would not be reasonable under the New Jersey Recovery Act. *Id.* at 2. The Court ordered the parties to engage in discussions to determine the appropriate size of the reduction, but the parties could not agree. Defendants presented a modified proposal seeking to reduce the ACFD to 148 firefighters. Plaintiffs objected and sought to continue the injunction to prohibit Defendants from reducing the size of the ACFD to 148 firefighters. Plaintiffs also requested the Court to require Defendant to maintain a force of at least 188 firefighters. *Id.* at 2. The Court denied Defendant's request to set aside the injunction and held that Plaintiffs established by clear and convincing evidence that Defendants' proposal to reduce the size of the ACFD to 148 firefighters would cause irreparable harm in that it would compromise the public safety of residents and visitors. *Id.* at 25. The Court opined that any reduction below 180 firefighters would compromise public safety. *Id.* Accordingly, the Court enjoined Defendant from reducing the workforce of the ACFD to below 180 firefighters.

D. Other State Law Rulings Affecting The Defense Of Workplace Class Action Litigation

(i) Alabama

***Lawler, et al. v. City Of Birmingham,* 2017 Ala. LEXIS 109 (Ala. Oct. 20, 2017).** Plaintiffs brought a class action alleging claims of securities fraud against Defendant for making false statements regarding its financial condition and its anticipated future performance. *Id.* at *2. Class counsel negotiated a $310 million settlement and the trial court subsequently approved the settlement, awarding class counsel 40% of the settlement fund, or $124 million, as attorneys' fees. *Id.* at *3. The trial court gave a deadline for the filing of objections to class counsel's attorneys' fees that was seven days before the attorneys' fee application to the trial court was due. *Id.* at *4. Numerous class members filed objections to the settlement, arguing that the attorneys' fees requested were excessive and amounted to a windfall for Plaintiffs' counsel. *Id.* at *8. The trial court overruled the objections and entered an order awarding class counsel the $124 million in attorneys' fees they had requested. *Id.* at *37. On the objectors' appeal to the Supreme Court of Alabama, it vacated the trial court's order awarding the fees and remanded. The objectors argued that they were denied due process because objections were due before the attorney-fee application was filed, and that the attorneys' fees ultimately awarded were excessive. The objectors also asserted that they were given insufficient information regarding class counsel's time spent on the matter to properly object to the size of the attorneys' fees award. The Supreme Court denied class counsel's motion to dismiss the appeal, rejecting the argument that the objectors lacked standing. Instead, the Supreme Court ruled that a class member who objected in a timely manner to a settlement approval order may appeal without first intervening. *Id.* at *13. The Supreme Court also rejected class counsel's argument that the appeal should be dismissed based on an untimely objection, as the objectors appeared at the fairness hearing to object. *Id.* at *20. The Supreme Court agreed with the objectors' argument that a schedule requiring class members to object to the attorneys' fees request of class counsel before the request is formally made served to violate the class members' due process rights. Furthermore, the Supreme Court also agreed that the objectors were entitled to more information from class counsel about the time expended on the case, so as to allow the class members to pose any objections. The Supreme Court rejected class counsel's assertions that the amount of time that counsel expended on this case was irrelevant, ruling that it is a relevant factor that should be considered when determining reasonable attorneys' fees in a class action. *Id.* at *36. Accordingly, the Supreme Court vacated the trial court's order awarding the attorneys' fees and remanded to the trial court for class counsel to file a new attorneys' fees application with more detailed information regarding the time expended in this case. *Id.* at *37. The Supreme Court also ruled that the objectors shall be given a reasonable opportunity to review the new application and file any objections with the trial court. *Id.* at *38.

***Taff, et al. v. Caremark RX, LLC*, 2017 Ala. LEXIS 15 (Ala. Feb. 24, 2017).** In this case, the trial court in June of 2000 entered a final judgment approving a settlement agreement in *Taff v. Caremark, Inc.*, a class action lawsuit against the corporate predecessor of Defendant. Approximately 16 years later, class counsel moved the trial court to enter an order requiring Defendant to produce for them certain information regarding the members

of the class so that class counsel could notify those members of a proposed settlement in a separate class action lawsuit pending against Defendant – *Johnson v. Caremark Rx, LLC* – in which some of the members of the *Taff* class might be able to file claims. *Id.* at *1. The trial court ultimately granted class counsel's request and ordered Defendant to produce the requested information. Defendant petitioned the Alabama Supreme Court for a writ of mandamus directing the trial court to vacate that order, which the Supreme Court granted. Defendant argued that the Supreme Court should grant its mandamus petition because: (i) the trial court lacked jurisdiction to enter the order; and (ii) that the ordered relief was unreasonable and excessively burdensome, and that the trial court exceeded its discretion in ordering it. *Id.* at *14. The Supreme Court found that the June 2000 final judgment entered by the trial court approved the parties' settlement and resolved all the issues and claims that had been raised in the *Taff* case. The trial court specifically noted in the June 2000 judgment that it would continue to retain this residual jurisdiction when it stated that "the Court hereby reserves and maintains continuing jurisdiction over all matters relating to the settlement agreement or the consummation of the settlement." *Id.* at *15. The Supreme Court stated that the question was whether it was within the trial court's residual jurisdiction to issue the order requiring Defendant to produce the requested information. The Supreme Court concluded that it was not, finding that although it was true that the trial court's statement of retained jurisdiction might be read in a manner that would allow the trial court to require Defendant to now disclose the information sought by class counsel, the trial court's residual jurisdiction could not be extended that far. *Id.* at *16. The Supreme Court found that there was no real dispute directly related to the final judgment entered by the trial court. The Supreme Court determined that neither the terms of the June 2000 final judgment, nor the terms of the settlement agreement itself, nor the requirements of local Rule 23, which governs class action lawsuits in Alabama, nor any statute that has been identified by the parties required Defendant or its predecessors to file with the trial court the information now being requested. *Id.* at *21-22. The Supreme Court held that the trial court's August 1 order essentially sought to modify or amend that final judgment to impose new obligations upon Defendant. *Id.* at *22. Accordingly, the Supreme Court granted Defendant's request for a writ of mandamus vacating the trial court's order.

(ii) California

***Abboud, et al. v. Consolidated Disposal Services,* 2017 Cal. App. Unpub. LEXIS 4753 (Cal. App. 2d Dist. July 12, 2017).** Plaintiffs, a group of property owners, filed a putative class action alleging breach of contract, fraud, negligent misrepresentation, unfair business practices, declaratory relief, rescission and unjust enrichment. *Id.* at *5. Plaintiffs alleged that Defendant provided inadequate garbage collection and disposal services to the property owners and overcharged for its services in breach of Defendant's contract with the local government. *Id.* at *2. Plaintiff moved for class certification and the trial court denied the motion. On Plaintiffs' appeal, the California Court of Appeal affirmed. Plaintiffs argued that the trial court erred in finding a lack of common proof and in placing too much emphasis on case management issues. The Court of Appeal determined that the record amply supported the trial court's conclusions that Plaintiffs failed to present sufficient proof of the predominance of common issues over individual issues regarding Defendant's liability. *Id.* at *15. Plaintiff argued that the individualized issues related to damages and were not a sufficient basis to deny certification. *Id.* The Court of Appeal concluded, however, that the lack of commonality was not limited to damages, as Plaintiffs failed to show how they would use Defendant's records on a class-wide basis to prove that Defendant either overcharged certain customers or failed to service certain customers. *Id.* at *16. Furthermore, the Court of Appeal reasoned that Plaintiffs' expert did not offer opinions about how liability could be established on a class-wide basis as his declaration was largely conclusory and focused on damages. *Id.* The Court of Appeal also rejected Plaintiffs argument that the trial court over-emphasized case management issues. *Id.* at *17. The Court of Appeal concluded that Plaintiffs failed to articulate how the individualized issues could be managed at trial, even though the trial court gave Plaintiff numerous opportunities to present such evidence and even continued the hearing for several months to allow Plaintiffs to gather additional evidence. *Id.* at *18. The trial court also based its denial of class certification on the lack of evidence of numerosity, as the representative Plaintiffs had unique experiences that supported the trial court's conclusion that Plaintiffs failed to show that there were substantial numbers of property owners who were similarly overcharged or underserviced. *Id.* at *19. The Court of Appeal denied Plaintiffs' request to take judicial notice of voluminous records that Plaintiffs obtained pursuant to the Public Records Act in support of Plaintiffs' contention that Defendant withheld discovery. *Id.* at *20. The Court of Appeal determined that it was not proper to take judicial notice of the truth of hearsay statements. Furthermore, Plaintiffs were obligated to undertake discovery and if they believed that Defendant failed to fully

and faithfully comply with discovery obligations , Plaintiffs should have sought an appropriate remedy in the trial court. *Id.* at *20. As such, the Court of Appeal affirmed the trial court's decision.

***Burd, et al. v. Barkley Court Reporters, Inc.*, 2017 Cal. App. LEXIS 1050 (Cal. App. 2d Dist. Nov. 29, 2017).** Plaintiff, an attorney, filed a class action alleging that Defendant charged excessive court reporter fees in violation §§ 69950 and 69954 of the Government Code and the California Unfair Competition Law. Defendant filed a motion for judgment on the pleadings, arguing that the statutory transcription rates set forth in §§ 69950 and 69954 applied only to official reporters employed by the court system, and not to privately retained certified shorthand reporters who served as official reporters pro tempore. *Id.* at *2. The trial court granted Defendant's motion. On appeal, the California Court of Appeal reversed. The Government Code identifies two categories of persons who may perform the duties of a court reporter in the California court system, including official reporters and official reporters pro tempore. *Id.* at *4. An official reporter is an employee of the trial court, and an official reporter pro tempore may be either a court employee or a certified shorthand reporter privately retained by a party if an official reporter is not available. *Id.* at *4-5. The statutes authorizing the trial court to appoint official reporters and official reporters pro tempore are set forth in the Government Code under title 8, chapter 5, article 9 ("article 9"). The Court of Appeal stated that neither § 69950 nor § 69954 distinguished between court reporters employed by the trial court and privately retained court reporters. *Id.* at *8. The Court of Appeal opined that the plain language of the statutes indicated that the prescribed transcription fees were intended to apply to court reporters generally, and were not limited to court reporters employed by the trial court. *Id.* at *8-9. The trial court concluded that the statutory scheme of article 9 prescribed fee limits that apply only to court reporters employed by the courts or by local governments, and that the legislature intentionally used the term "official reporter pro tempore" in the statutes to distinguish between privately employed reporters appointed pro tempore and official reporters employed by the trial court. *Id.* at *9. The trial court noted that although §§ 69950 and 69954 made no reference to official reporters and official reporters pro tempore, the scope of those statutes is delimited by § 69947, which states "except in counties where a statute provides otherwise, the official reporter shall receive for his services the fees prescribed in this article." *Id.* at *10-11. The trial court ruled that the fact that § 69947 refers only to the "official reporter" is evidence that the Legislature did not intend the fee provisions of article 9 to apply to private reporters acting as official reporters pro tempore. *Id.* at *11. The Court of Appeal explained that the trial court's construction of §§ 69947, 69950, and 69954 was premised on the assumption that only official reporters were employees of the trial courts and that all official reporters pro tempore were privately retained by the parties. *Id.* The Court of Appeal found that the trial court's assumption was incorrect, and that the statutes in article 9 that referred to official reporters pro tempore did not distinguish between court reporters employed by the trial courts and those who are privately retained. Therefore, the trial court's reliance on § 69947's reference to "the official reporter" as the basis for concluding that §§ 69950 and 69954 applied only to court reporters employed by the trial court was incorrect. *Id.* at *12. The Court of Appeal further found that the trial court's interpretation conflicted with that of Court Reporters Board of California, which had interpreted §§ 69950 and 699554 to apply to both official reporters and official reporters pro tempore. *Id.* at *16. The Court of Appeal determined that the Board's longstanding interpretation was consistent with the plain language of §§ 69950 and 69954, which did not distinguish between privately retained and court-employed official court reporters pro tempore. The Court of Appeal concluded that the plain language of §§ 69950 and 69954 applied statutory transcription rates to official reporters and official reporters pro tempore, whether employed by the trial court or privately retained by a party. The Court of Appeal thus opined that the trial court erred by concluding that the statutory rates applied only to official reporters employed by the court. The Court of Appeal therefore reversed the trial court's decision granting Defendant's motion for summary judgment.

***Christman v. Apple American Group,* 2017 Cal. Unpub. LEXIS 6866 (Cal. App. 2d Dist. Oct. 4, 2017).** Plaintiff filed a claim on behalf of herself and other non-exempt employees under the Private Attorneys General Act ("PAGA") alleging violations of state labor law. *Id.* at *1. Defendant sought an order to enforce an arbitration agreement between the parties. *Id.* at *2. The trial court denied Defendant's motion, ruling that PAGA claims were not subject to arbitration and that Plaintiff's claim could not be split into a non-arbitrable representative claim and an arbitrable individual claim. *Id.* at *3. On Defendant's appeal, the California Court of Appeal affirmed. Defendant argued that Plaintiff's PAGA claim was subject to arbitration and that at a minimum, Plaintiff must arbitrate the threshold issues of whether she is an aggrieved employee for purposes of the PAGA. *Id.* at *4. The Court of Appeal ruled that a pre-dispute arbitration agreement that a Plaintiff has executed as an

individual does not subject the PAGA claim to arbitration because the right underlying the claim is subject to the state's control. *Id.* at *9. Plaintiff executed the agreement as a condition of her employment before she satisfied the statutory requirement of asserting a PAGA claim and until she satisfied those requirements, she was not authorized to assert the PAGA claim as an agent of the state. *Id.* at *11. The Court of Appeal rejected Defendant's claim that the Federal Arbitration Act governed the agreement because trial courts should employ state law principles regarding the formation of contracts. *Id.* at *11. The Court of Appeal also rejected Defendant's contention that the agreement required arbitration of Plaintiff's status as an aggrieved employee, since that status as an aggrieved employee could not be subject to arbitration because a representative PAGA claim cannot be split into an arbitrable individual claim and a non-arbitrable representative claim. *Id.* at *13.

***Cosio, et al. v. International Performing Arts Academy LLC,* Case No. CGC-16-551337 (Cal. Super. Ct. Sept. 18, 2017).** Plaintiff filed an application for a temporary restraining order ("TRO") and an order to show cause as to why a preliminary injunction should not be issued arising out of alleged improprieties in defense counsel's efforts to gather declarations from putative class members in anticipation of Plaintiff's motion for class certification. *Id.* at 1. The Court issued the TRO to maintain the *status quo* and then reviewed further briefing on the issues pertinent to the TRO and injunction. The Court found that Defendant's communications to individuals were calculated to induce the interviewees to believe that the lawsuit was an individual action and that they were merely providing a "statement" containing "feedback" to Defendant, rather than a sworn declaration that would be submitted to the Court. *Id.* at 5. The Court held that Defendant's deceptive conduct posed a serious and imminent threat to interfere with the fair administration of justice. *Id.* The Court also noted that in Defendant's communications with individuals, they were not told that the purpose of the interviews was to gather evidence to be used against the Plaintiffs in the current lawsuit. *Id.* at 7. Although the Court stated that it would not restrain Defendant from future communications with absent class members due to First Amendment concerns, the Court found an injunction was appropriate and ordered that Defendant provide written curative notice to all individuals to whom it had sent draft declarations. The curative notice must state: (i) the matter is a putative class action; (ii) the individual is a potential member of the class that Plaintiff sought to represent; (iii) a description of the claims; and (iv) that the declaration was sought in support of Defendant's opposition to Plaintiff's class certification motion. *Id.* at 10. Accordingly, the Court granted Plaintiff's motion for an injunction on Defendant's communications with class members.

***Driscoll, et al. v. Granite Rock Co.,* 2017 Cal. App. Unpub. LEXIS 7456 (Cal. App. 6th Dist. Oct. 31, 2017).** Plaintiffs, a group of concrete mixer drivers, filed a class action alleging that Defendant failed to provide off-duty meal periods and/or failed to pay Plaintiffs one additional hour of pay for duty-free meal periods in violation of the California Labor Code. The trial court granted class certification as to the claims of approximately 200 concrete drivers. The class action was tried without a jury, and the trial court returned a verdict in favor of Defendant, finding that Defendant did not violate applicable labor laws in its meal period policies. On appeal, the California Court of Appeal affirmed the trial court's ruling. One of the duties of the concrete mixer drivers was to monitor the constant rotation of the truck drum to ensure that the concrete did not harden. Defendant provided its concrete mixer drivers with the option of signing an on-duty meal period agreement which stated: "I understand that I may revoke this Waiver Agreement at any time by providing at least one (1) working day's advance notice to my Manager of my decision." *Id.* at *4. Defendant informed drivers that if they did not sign an On-Duty Meal Period Agreement and were asked to work through a meal, they would receive one hour of special pay. *Id.* All concrete drivers acknowledged receiving and reviewing this policy and drivers testified that they understood that they could revoke the On-Duty Meal Period Agreement at any time. The evidence at trial showed that only three drivers revoked their On-Duty Meal Period Agreement, and each of those drivers received an off-duty meal period and special pay. *Id.* Following trial, the trial court found that "Plaintiffs failed to prove that the drivers were forced, expected, or trained to involuntarily sign [On-Duty Meal Period Agreements] or to miss off-duty meal periods against their will." *Id.* at *5. On appeal, the Court of Appeal considered all of the evidence presented at trial and concluded that Defendant provided its concrete mixer drivers with an off-duty lunch period that was compliant with the law. The Court of Appeal found that the evidence at trial demonstrated that Defendant's employees received a legally compliant employee handbook that contained information about the availability and right to a 30-minute off-duty meal period, and the concrete mixer drivers acknowledged that they had reviewed the policy. In addition, the evidence showed that Defendant had posted the applicable wage order advising employees of their right to meal periods. *Id.* at *11-12. The Court of Appeal also stated that there

was no evidence at trial that any mixer driver was ever denied an off-duty meal period when he or she requested it. *Id.* at *12-13. The Court of Appeal further found that because concrete mixer drivers were aware of their rights and exercised those rights in requesting and always receiving off-duty meals when they wanted them, Defendant met its legal obligation with regard to meal periods. *Id.* at *13. Plaintiffs argued that Defendant's policies actually required employees to waive a minimum labor standard of an off-duty meal period. However, the Court of Appeal noted that the trial court specifically found that the employees were not required to waive an unwaivable right; rather, mixer drivers were given the opportunity to take an off-duty meal period each day, and could freely choose to take or not take such meal period. Plaintiffs also argued for the first time on appeal that Defendant violated applicable labor laws by providing illegal financial incentives to its employees to work through their lunch period. *Id.* at *17. The Court of Appeal noted that Plaintiffs did not make the argument at trial that Defendant provided illegal financial incentives to induce the mixer drivers to forgo their off-duty meal period, and Defendant therefore did not have notice of the issue, nor did it argue or present evidence specifically addressing the issue. *Id.* at *17-18. The Court of Appeal therefore determined that Plaintiffs were precluded from raising this argument for the first time on appeal. Accordingly, the Court of Appeal affirmed the trial court's ruling in favor of Defendant.

***E.H. Summit, Inc., et al. v. ADP LLC*, 2017 Cal. App. Unpub. LEXIS 7833 (Cal. App. 2d Dist. Nov. 14, 2017).** Plaintiff, a group of former employees, filed a putative wage & hour class action lawsuit against Defendant Summit, and Summit filed a cross-complaint against Defendants ADP LLC, ADP, Inc., and AD Processing LLC ("ADP"). Summit settled the wage & hour claims brought by its former employee, but Summit's cross-complaint against ADP alleged that ADP was responsible for the asserted employee time calculation errors that were the predicate for the settled claims. *Id.* at *1. Summit alleged causes of action for breach of written contract, breach of oral contract, and breach of implied-in-fact contract. Summit used ADP for time management solutions for many years, and subsequently agreed with ADP to move to a new time management system using updated software. ADP provided Summit with a "Time & Labor-Management Terms and Conditions" document ("TLM Agreement") that left blank the space on the form agreement that could be used to designate the parties to whom it applied. ADP argued that it had not breached any terms of the TLM Agreement, which was the only valid written contract between the parties; that there was no evidence of an oral or implied contract; and that oral or implied contracts would in any case be barred by the terms of the TLM Agreement. The trial court found the TLM Agreement was a valid contract between Summit and ADP. The trial court further determined there was no evidence of a written, oral, or implied contract between Summit and ADP other than the TLM Agreement, and that an integration clause in the TLM Agreement precluded recognizing an oral or implied contract even if there were evidence of one. *Id.* at *6. On appeal, the California Court of Appeal concluded that ADP had made a proper *prima facie* showing that: (i) Summit had no evidence of any contract that imposed on ADP the obligations that Summit alleged that ADP had breached; and (ii) the only valid contract, the TLM Agreement, relieved ADP of those alleged obligations or in fact imposed them on Summit. *Id.* at *15. The Court of Appeal also determine that Summit failed to provide "substantial responsive evidence" of an oral or implied contract. *Id.* at *16. Accordingly, the Court of Appeal affirmed the trial court's ruling dismissing Summit's claims.

***Esparaza, et al. v. KS Industries,* 2017 Cal. App. LEXIS 674 (Cal. App. 5th Dist. Aug. 2, 2017).** Plaintiff brought a representative action under California's Private Attorney General Act ("PAGA") alleging violations of the California Labor Code, including failure to: (i) pay minimum and overtime wages; (ii) provide meal periods and rest breaks; (iii) pay wages in a timely matter; (iv) provide accurate wage statements; and (v) reimburse business expenses. *Id.* at *5. Plaintiff's amended complaint alleged all violations as single count under the PAGA. *Id.* at *6. Plaintiff sought to recover unpaid wages, civil penalties, interest, and attorneys' fees and costs. *Id.* Defendant moved to compel arbitration pursuant to the parties' agreement and the trial court denied the motion. *Id.* at *8. Defendant argued that Plaintiff was attempting to circumvent the arbitration agreement by filing a single, non-arbitrable cause of action under the PAGA and fashioning the relief sought as civil penalties under the PAGA. *Id.* at *7. Plaintiff asserted that a claim for civil penalties under the PAGA is not subject to arbitration and this included the recovery of wages. *Id.* at *7. Defendant argued that Plaintiff's interpretation of the PAGA conflicted with the requirements of the Federal Arbitration Act ("FAA") that an arbitration agreement must be enforced for claims seeking victim-specific relief. *Id.* at *7. On Defendant's appeal, the California Court of Appeal affirmed the trial court's order insofar as it denied arbitration of the representative claims for civil penalties, but it remanded for further proceedings. Defendant argued that the trial court's failure to order arbitration of some of

the claims violated the FAA, as those claims sought individualized relief and were covered by the parties' arbitration agreement. *Id.* at *12. The Court of Appeal ruled that the FAA required the enforcement of arbitration agreements covering private disputes and the parties' arbitration agreement was worded to cover claims arising from the employment relationship, including Plaintiff's claims for unpaid wages and other types of victim-specific relief. *Id.* at *20. The State of California was not a party to the agreement, and thus claims brought by it or on its behalf under the PAGA are not subject to arbitration. Pursuant to the FAA, the claims that are private disputes between the Plaintiff and Defendant must be arbitrated and the claims brought on behalf of the State of California do not need to be arbitrated. The rule adopted in *Iskanian v. CLS Transportation Los Angeles*, LLC, 59 Cal. 4th 348 (2014), defined the boundary between the two types of claims, stating that PAGA representative claims for civil penalties are not subject to arbitration. *Id.* at *3. The Court of Appeal ruled that for purposes of the *Iskanian* rule, PAGA representative claims for civil penalties are limited to those where a portion of the recovery is allocated to the Labor and Workforce Development Agency and because claims for unpaid wages based on the Labor Code are not allocated in this manner, they are not exempt from arbitration. *Id.* at *20. The Court of Appeal concluded that some of the claims that Plaintiff was pursuing were PAGA representative claims seeking civil penalties that were not subject to arbitration. *Id.* at *25. The Court of Appeal affirmed the trial court's order denying arbitration of the representative claims for civil penalties and remanded for further proceedings to determine whether Plaintiff sought to recover wages under the Labor Code that were subject to arbitration. *Id.* at *28.

***Garcia, et al. v. Pexco, LLC*, 2017 Cal. App. Unpub. LEXIS 2853 (Cal. App. 4th Dist. April 24, 2017).** Plaintiff, an hourly employee, alleged that Defendant violated various provisions of the FLSA. Real Time Staffing Services, LLC ("Real Time"), a temporary staffing company, hired Plaintiff and assigned him to work for Defendant. As part of the hiring process with Real Time, Plaintiff filled out an employment application that included an arbitration agreement between Plaintiff and Real Time. Defendant was not a signatory to the arbitration agreement. *Id.* at *1-2. In 2014, Plaintiff filed suit against Real Time and Defendant for violations of the California Labor Code and unfair business practices pertaining to payment of wages during his assignment with Defendant. Real Time and Defendant moved to compel individual arbitration of Plaintiff's claims. The trial court granted the motion to compel arbitration. Plaintiff appealed the order, and contended that Defendant should not be allowed to compel arbitration as a non-signatory. On appeal, the California Court of Appeal disagreed, and upheld the trial court's ruling. The Court of Appeal noted that California law recognizes exceptions to the general rule that allows non-signatories to compel arbitration of a dispute arising out of the scope of the agreement, one of which is equitable estoppel. The Court of Appeal explained that under this exception, "a non-signatory Defendant may invoke an arbitration clause to compel a signatory Plaintiff to arbitrate its claim when the causes of action against the non-signatory are 'intimately founded in and intertwined with' the underlying contract obligations." *Id.* at *4. Plaintiff argued that equitable estoppel did not apply because his claims against Defendant were not sufficiently "intertwined" with the underlying arbitration agreement. *Id.* Plaintiff contended that he was not seeking to enforce the terms and conditions of his employment contract containing the arbitration clause, and that he only asserted causes of action based on the Labor Code. Plaintiff alleged that his claims were based on statutory violations, and could not be deemed part of the arbitration agreement. *Id.* at *4-5. The Court of Appeal found that Plaintiff's argument ignored the fact that a claim "arising out of" a contract does not itself need to be contractual. The Court of Appeal reasoned that Labor Code violations were clearly included as one of the types of disputes covered by the arbitration agreement. *Id.* at *5. The Court of Appeal determined that Plaintiff's claims against Defendant were rooted in his employment relationship with Real Time, and the governing arbitration agreement expressly included statutory wage & hour claims. *Id.* at *7. The Court of Appeal held that Plaintiff could not attempt to link Defendant to Real Time to hold it liable for alleged wage & hour claims, while at the same time arguing that the arbitration provision only applied to Real Time and not Defendant. *Id.* at *8. Therefore, because the arbitration agreement controlled Plaintiff's employment, the Court of Appeal opined that he was equitably estopped from refusing to arbitrate his claims with Defendant. As alleged joint employers, Defendant and Real Time were agents of each other in their dealings with Plaintiff. Accordingly, the Court of Appeal concluded that Defendant was entitled to compel arbitration of Plaintiff's claims against it under the arbitration clause in his contract with Real Time.

***Gonzalez, et al. v. City Of Norwalk*, 2017 Cal. App. LEXIS 1071 (Cal. App. 2d Dist. Dec. 4, 2017).** Plaintiffs, a group of residents of the City of Norwalk who paid telephone user taxes through their cellular telephone

providers, filed a class action asserting that Defendant's 2007 ordinance violated Propositions 62 and 218, which prohibit local governments from imposing, extending, or increasing taxes without voter approval. *Id.* at *2. Plaintiffs asserted that when voters approved a utility user tax in 2003, they "specifically voted not to tax services that were exempt from taxation under" § 4251 of the Internal Revenue Code. Thus, Plaintiffs argued eliminating the ordinance's reference to the Internal Revenue Code had the effect of imposing, extending, or increasing taxes within the meaning of Propositions 62 and 218. *Id.* Defendant demurred, asserting that the 2007 ordinance did not violate Propositions 62 or 218 as a matter of law. The trial court sustained the demurrer without leave to amend and subsequently entered a judgment of dismissal. On appeal, the California Court of Appeal affirmed. The Court of Appeal found that while the 2007 ordinance made a technical change to the Norwalk Municipal Code, it did not impose, extend or increase the telephone tax. Accordingly, as a matter of law, the 2007 ordinance did not violate Propositions 62 or 218. Proposition 62 requires local governments to seek voter approval of all new general taxes. Proposition 218 added to the California Constitution the requirement that local governments seek voter approval of new general and special taxes. Plaintiffs contended that when the City Council adopted the 2007 ordinance, which deleted sub-section D from § 3.36.060 of the Norwalk Municipal Code, it unlawfully "imposed, extended, or increased a local tax without voter approval" in violation of Propositions 62 and 218. *Id.* at *4. Prior to 2003, Defendant taxed telephone, electric, and gas utility services at the rate of 5.5%. In 2003, the City Council agreed to allow the voters to ratify the City's continued collection of the utility user tax. The City Council then adopted a resolution that called for the setting of a special election to obtain voter approval of the "continued collection of a utility user tax as a general tax at a rate not to exceed 5.5%." *Id.* at *26. The Court of Appeal stated that this language suggested that the intent of the initiative was to continue the utility user tax as it then existed, by ratifying a 5.5% tax on all telephone service. *Id.* at *27. Accordingly, the Court of Appeal concluded that the change in the interpretation of federal law did not mean, as Plaintiffs suggested, that Norwalk "had unlawfully been collecting a telephone users tax on services exempt from taxation under … the 2003 tax ordinance passed by the City's voters." The Court of Appeal found that as before 2007, § 3.36.060 (as approved by the voters in 2003) applied a 5.5% utility user tax to all telephone service. After the City Council adopted the 2007 ordinance, § 3.36.060 continued to apply a 5.5% utility user tax to all telephone service. *Id.* at *28. Accordingly, the Court of Appeal held that the 2007 ordinance did not "impose," "extend," or "increase" a general tax within the meaning of Propositions 62 or 218. *Id.* The Court of Appeal thereby affirmed the trial court's ruling.

***Hefczyc, et al. v. Rady Children's Hospital,* 2017 Cal. App. LEXIS 1016 (Cal. App. 4th Dist. Nov. 17, 2017).** Plaintiff, a health care consumer, filed a putative class action and sought declaratory relief to establish that Defendant's form contract that it gave to patients or their guarantors authorized Defendant to only charge the reasonable value of its services. Plaintiff asserted that Defendant was not authorized to bill self-pay patients based on its master list of itemized charge rates or its "Chargemaster" schedule, as it was grossly inflated. *Id.* at *4. The trial court denied Plaintiff's motion for class certification, and concluded that Plaintiff failed to satisfy the requirements of ascertainability, predominance, and superiority. *Id.* at *9**.** On Plaintiff's appeal, the California Court of Appeal affirmed. *Id.* at *45. Plaintiff asserted that the trial court erred in denying class certification because his complaint sought only declaratory relief and the motion for class certification was brought under the equivalent of Federal Rule 23(b)(1)(A) or 23(b)(2). Therefore, Plaintiff contended that he was not required to establish ascertainability, predominance, and superiority. The Court of Appeal affirmed the trial court's decision and concluded that Plaintiff's arguments lacked merit. *Id.* at *11. The Court of Appeal rejected Plaintiff's argument that the trial court should have applied the class certification requirements set forth in Federal Rule 23(b)(1)(A) or 23(b)(2), rather than the requirements set forth in California case law. The Court of Appeal concluded that the authority for class action litigation in California was set forth in § 382 of the Code of Civil Procedure and California case law consistently has held that ascertainability, predominance, and superiority are required to certify a class action in California. *Id.* at *12. Further, there was no California authority that supported Plaintiffs' contention that ascertainability, predominance, and superiority were not required under Federal Rule 23(b)(1)(A) or 23(b)(2). The Court of Appeal held that the trial court properly required Plaintiff to establish ascertainability, predominance, and superiority. Furthermore, the Court of Appeal opined held that the trial court properly denied class certification on the basis that ascertainability, predominance, and superiority requirements were not satisfied. Defendant submitted an extensive declaration that explained that each patient account's history had to be individually and manually evaluated to determine whether the rates billed were the full Chargemaster amounts or some other amount, as self-pay patients often obtained a variety of different

discounts based on their unique circumstances. *Id.* at *27. Further, patients may have been billed at full Chargemaster rates, and later established that they were covered by insurance or other benefits. Because it would take an individual inquiry into hundreds of thousands of records to even determine whether a patient fell under the class definition, the Court of Appeal concluded that trial court did not abuse its discretion in ruling that the class was not ascertainable. *Id.* at *32. Further, the Court of Appeal held that individual issues predominated because the trial court would be required to determine whether Plaintiff's Chargemaster rates were reasonable, thereby creating an unmanageable individualized factual inquiry that differed as to each class member. As such, the trial court also properly concluded that a class action was not the superior method for adjudication. Accordingly, the Court of Appeal affirmed the trial court's decision denying class certification. *Id.* at *45.

***Hernandez, et al. v. Ross Stores, Inc.,* Case No. E064026 (Cal. App. 4th Dist. Jan. 3, 2017).** Plaintiff, an hourly-paid warehouse employee, filed a representative suit against Defendant under the Private Attorney General Act ("PAGA"). Plaintiff claimed that Defendant violated the California Labor Code ("CLC") by failing to pay all appropriate wages, failing to properly itemize hours worked and paid, and failing to pay for overtime. Defendant filed a motion to compel arbitration pursuant to the parties' arbitration agreement on the issue of whether Plaintiff was an "aggrieved party" under the PAGA. The arbitration agreement stated that it "applies to any disputes, arising out of or relating to the employment relationship between an associate and Ross…" *Id.* at 2. Defendant asserted that the issue of whether Plaintiff was an aggrieved party was a "dispute" covered under the agreement and any "claim" under the PAGA should be resolved in the trial court after the aggrieved party dispute was resolved. The trial court denied the motion because it found that the PAGA claim was a representative action brought on behalf of the state and did not include individual claims. On Defendant's appeal, the California Court of Appeal of California affirmed. Defendant asserted that under the Federal Arbitration Act ("FAA") and the California Arbitration Act ("CAA"), an employer and employee have the preemptive right to arbitrate individual "disputes" underlying a PAGA claim, while leaving the PAGA claim to be litigated in the trial court. The Court of Appeal was not persuaded by Defendant's argument that the language of the agreement referring to "disputes" as opposed to "claims" was a crucial distinction, or dispositive as to whether the aggrieved party dispute was subject to the arbitration agreement. Further, the Court of Appeal held that the dispute was not a dispute between an employee and an employer, but instead a representative action that did not involve any individual claims. The Court of Appeal noted that it found no authority supporting Defendant's argument that an employer may compel an employee to arbitrate individual aspects of their PAGA claim, as such requirement would thwart California's public policy of empowering employees to enforce labor laws under the PAGA.

***Khaligh, et al. v. Consumertrack,* 2017 Cal. App. Unpub. LEXIS 5378 (Cal. App. 2d Dist. Aug. 4, 2017).** Plaintiffs brought a representative action under the California Private Attorney General Act ("PAGA") alleging violations of the California Labor Code, including failure to pay required overtime, furnish proper wage statements, and to provide meal and rest periods. *Id.* at *1. Defendant moved to compel Plaintiffs to arbitrate their claims pursuant to an arbitration agreement. *Id.* The trial court granted Defendant's motion. On Plaintiffs' appeal, the California Court of Appeal reversed on the grounds that the arbitration provisions were both procedurally and substantively unconscionable and the trial court erred in enforcing the arbitration agreement. *Id.* at *4. Plaintiffs' employment was conditional upon accepting the arbitration provisions as part of a pre-printed employment agreement and they had one day within which to accept the offer. The Court of Appeal found that the arbitration agreement was procedurally unconscionable because Defendant offered employment to the Plaintiffs on a "take it or leave it basis" and gave them only a short time to decide whether to sign the agreement. *Id.* at *7. The Court of Appeal held that the agreement was substantively unconscionable because: (i) it required employees to share arbitration fees and costs on unwaivable statutory claims; (ii) it allowed the employer to seek damages in a trial court while barring employees from doing so; and (iii) it allowed the employer to seek a permanent injunction in a trial court, but not the employee. *Id.* Because the arbitration provision contained more than one unconscionable term, the Court of Appeal ruled that it was not enforceable. *Id.* at *11. Accordingly, the Court of Appeal reversed and ordered the trial court to vacate its order compelling arbitration. *Id.*

***Lawson, et al. v. ZB, N.A.,* 2017 Cal. App. LEXIS 1132 (Cal. App. 4th Dist. Dec. 19, 2017).** Plaintiff brought wage & hour claims under the Private Attorneys General Act ("PAGA") and the California Labor Code ("CLC").

Plaintiff asserted that as a representative claimant under the PAGA, she was entitled to recover the penalties imposed under §§ 558(a)(1) and (a)(2) of the CLA for under-payment of wages owed to her and other employees. Defendant moved to compel arbitration of Plaintiff's individual wage claims pursuant to the parties' arbitration agreement. Defendant asserted that Plaintiff waived the right to bring a class action or representative action against it, and therefore she was precluded from asserting lost wage claims on behalf of other employees. Defendant did not ask the trial court to order arbitration of Plaintiff's claims for civil penalties pursuant to § 558. The trial court granted Defendant's motion to compel arbitration and bifurcated Plaintiff's unpaid wages claim from her claim for the civil penalties. *Id.* at *4. However, because Plaintiff was acting as a PAGA representative, the trial court ordered that the unpaid wages portion of her claim be arbitrated as a representative claim and not an individual claim. *Id.* Thereafter, Defendant appealed. The California Court of Appeal consolidated Defendant's appeal and petition for writ of mandate challenging the trial court's order. At the outset, the Court of Appeal determined that it lacked appellate jurisdiction over the trial court's order compelling arbitration and dismissed Defendant's appeal. The Court of Appeal rejected Defendant's argument that preemption under the Federal Arbitration Act applied because prior to enactment of the PAGA, there was no private remedy under § 558 and there was no basis upon which to conclude that recovery under the statute would go to individual employees. *Id.* at *26. The Court of Appeal held that Plaintiff's claims under § 558 were indivisible claims for civil penalties, and the trial court erred when it: (i) bifurcated the civil penalties and under-paid wages portions of Plaintiff's PAGA claim; and (ii) ordered Plaintiff's unpaid wages claim to be arbitrated as a representative action. *Id.* at *27. The Court of Appeal opined that in bringing a PAGA action, Plaintiff was not acting on her own behalf, but on behalf of the State, which was not bound by Plaintiff's agreement. The Court of Appeal reasoned that the PAGA claims were outside the scope arbitration agreements pursuant to the statute and allowing arbitration of a PAGA claim would deprive Defendant of the ability to challenge rulings on the merits and thus posed considerable risks for Defendant. The Court of Appeal declined to direct the trial court to modify its order to compel arbitration of Plaintiff's individual unpaid wage claim and instead issued a writ directing the trial court to vacate its order and enter a new order denying Defendant's motion to compel arbitration. *Id.* at *28.

***McGill, et al. v. Citibank,* 2 Cal. 5th 945 (Cal. 2017).** Plaintiff brought a putative class action alleging claims under California's Consumers Legal Remedies Act ("CLRA"), Unfair Competition Law ("UCL"), Insurance Code, and false advertising law. *Id.* at *953. Plaintiff opened a credit card account with Defendant and purchased a credit protector plan in which Defendant agreed to defer or to credit certain amounts on her credit card account if certain qualifying events occurred, such as unemployment. After Plaintiff lost her job she alleged that Defendant did not a handle a claim that she made as required under the plan. Plaintiff sought injunctive relief to prohibit Defendant from continuing to engage in its allegedly illegal and deceptive practices. *Id.* Plaintiff's credit card agreement contained an arbitration provision. *Id.* at *952. Defendant moved to compel arbitration and the trial court denied the motion and ruled that agreements to arbitrate claims for public injunctive relief under the CLRA, the UCL, or the false advertising law are not enforceable in California. *Id.* at *12. On Defendant's appeal, the California Court of Appeal reversed the trial court's decision and held that the Federal Arbitration Act ("FAA") preempted California law. On further appeal, the California Supreme Court reversed the Court of Appeal's decision. The parties agreed that the arbitration provision purported to preclude Plaintiff from seeking public injunctive relief in any forum. *Id.* at *956. Accordingly, the Supreme Court considered whether the arbitration provision was valid and enforceable insofar as it purported to waive Plaintiff's right to seek public injunctive relief in any forum. *Id.* at *957. Defendant argued that the FAA preempted the California rule precluding enforcement of the waiver, because the FAA required enforcement of the arbitration provision as written, regardless of what it said or implied about claims that sought public injunctive relief. The Supreme Court rejected Defendant's argument and held that such a provision was contrary to California public policy and was unenforceable under California law. The Supreme Court further held that California law was not preempted by the FAA and did not require enforcement of the waiver provision. Accordingly, the Supreme Court reversed the judgment of the Court of Appeal. *Id.* at *967.

***Network Capital Funding Corp., et al. v. Papke*, 2017 Cal. App. Unpub. LEXIS 5034 (Cal. App. 4th Dist. July 21, 2017).** Plaintiff filed a declaratory relief action alleging its arbitration agreement with Defendant required him to arbitrate his wage & hour claims on an individual basis rather than the class-wide basis he sought in his pending arbitration proceeding. Defendant petitioned the trial court to compel Plaintiff to submit its declaratory

relief claims to arbitration. According to Defendant, the broad language in the parties' arbitration agreement required the arbitrator, not the trial court, to decide whether the agreement authorized class arbitration. The trial court denied Defendant's petition, concluding it must decide whether the arbitration agreement authorized class arbitration, and in doing so found this particular agreement did not allow for class arbitration. *Id.* at *1-2. On appeal, the California Court of Appeal affirmed the trial court's judgment. The Court of Appeal noted that it had previously affirmed the trial court's order based on: (i) the then existing uniform federal precedent holding that a trial court should decide whether the parties agreed to class arbitration; and (ii) U.S. Supreme Court precedents holding that an agreement to authorize class arbitration may not be inferred from the mere existence of an arbitration agreement, but rather the parties must expressly agree to class arbitration. *Id.* at *2. The California Supreme Court thereafter granted Defendant's petition for review and eventually remanded the case for reconsideration based on its subsequent decision in *Sandquist v. Lebo Automotive, Inc.* 1 Cal. 5th 233 (2016). In *Sandquis*t, the Supreme Court addressed whether the trial court or an arbitrator must decide if the parties' arbitration agreement authorized class arbitration. It concluded there is no universal rule allocating the decision to either the trial court or an arbitrator because the allocation of that decision is a matter of agreement between the parties. Accordingly, in each case, who decides whether the parties agreed to class arbitration turns on who the parties assigned that decision to under the terms of their contract. *Id.* at *2-3. *Sandquist* interpreted the arbitration agreements in that case as assigning to the arbitrator the decision of whether class arbitration was authorized. In doing so, *Sandquist* rejected the contention that California law presumes that trial courts rather than arbitrators must decide the availability of class arbitration. Similarly, *Sandquist* rejected the contention the Federal Arbitration Act ("FAA") imposes a similar interpretative presumption in favor of trial courts deciding this question. *Id.* at *3. As a result, the Court of Appeal, in the instant matter, concluded that the arbitration agreement between Defendant and Plaintiff was strikingly similar to the arbitration agreements at issue in *Sandquist*, and therefore the Supreme Court's reasoning compelled the conclusion the arbitration agreement allocated to the arbitrator the decision of whether Defendant and Plaintiff agreed to class arbitration. Based on that analysis, the Court of Appeal reversed the trial court's order and remanded with directions for the trial court to grant Defendant's petition to compel arbitration.

***Noel, et al. v. Thrifty Payless, Inc.*, 17 Cal. App. 5th 1315 (1st Dist. Dec. 4, 2017).** Plaintiff, an inflatable swimming pool purchaser, filed a class action alleging Defendant violated the California Consumers Legal Remedies Act ("CLRA") Unfair Competition Law, ("UCL"), and False Advertising Law ("FAL") by selling a pool that he alleged was smaller than the image shown on the box. *Id.* at *1321. Plaintiff filed a motion for class certification, which the trial court denied. The trial court determined that as to the UCL and FAL causes of action, Plaintiff's proposed class – which consisted of more than 20,000 potential members – was not ascertainable. The trial court also refused to certify a class on Plaintiff's CLRA cause of action because it determined that common questions of law or fact did not predominate over individual questions of reliance and causation. *Id.* On appeal, the California Court of Appeal affirmed the trial court's ruling. As to the UCL and FAL claims, the trial court had found that Plaintiff had presented "no evidence" to establish "what method or methods will be utilized to identify the class members, what records are available, (either from Defendant, the manufacturer, or other entities such as banks or credit institutions), how those records would be obtained, what those records will show, and how burdensome their production would be." *Id.* at 1323. The trial court also had found "a class action is not superior to numerous individual actions" and "will be no more efficient than individual actions in light of the individual issues that must be presented on the issue of reliance and damages." *Id.* Due to the stricter proof requirements under the CLRA, the trial court had determined that Plaintiff had not shown a commonality of issues required for the CLRA. The trial court had reasoned that the CLRA requires that all class members must show actual injury in order to recover damages, restitution, and/or injunctive relief, unless the advertisement was materially misleading. *Id.* The trial court had concluded that unless it found that "the packaging materially misleading as a matter of law, in order to recover under a CLRA claim every class member must prove he/she purchased the pool in reliance on the deceptive advertising." *Id.* The trial court did not find the packaging materially misleading and therefore found reliance and causation were not predominantly common issues. The Court of Appeal agreed with the trial court that Plaintiff submitted no evidence the class members could readily be identified from Defendant's records. The Court of Appeal reasoned that unless Plaintiff could propose some realistic way of associating names and contact information with the 20,000-plus transactions identified, there remained a serious due process question in certifying a class action. *Id.* at 1327. The Court of Appeal stated that while Plaintiff was not required to actually identify the 20,000-plus individuals who bought pools, his failure to

come up with any means of identifying them was a legitimate basis for denying class certification. *Id.* at 1328. On this record, the trial court had made no finding that the proposed class was unascertainable on any conceivable set of facts; rather, the class could not be ascertained on the evidentiary showing Plaintiff made. *Id.* at 1333. Accordingly, the Court of Appeal found that it could not say the trial court's ruling in denying certification in these circumstances was an abuse of discretion. *Id.* The Court of Appeal also determined that Plaintiff's CLRA cause of action did not predominantly involve common issues, as a number of pool purchasers may have been motivated by the dimensions of the pool rather than by the photo, and accordingly individual determinations would predominate. *Id.* at 1334. The Court of Appeal therefore affirmed the trial court's ruling.

***Quiroz, et al. v. E.A. Renfroe & Co.*, 2017 Cal. App. Unpub. LEXIS 5119 (Cal. App. 3d Dist. July 26, 2017).** Plaintiffs filed a class action in state court on behalf of themselves and other similarly-situated current and former employees alleging that Defendant failed to provide meal and rest breaks, pay overtime, pay final wages in a timely manner, provide accurate wage statements, and for non-payment of wages and an unfair competition law claim in violation of the Private Attorneys General Act of 2004 ("PAGA"). Defendant filed a motion to compel arbitration based on agreements Plaintiffs signed during employment orientation, which the trial court denied. The trial court held that the employment agreement was strikingly one-sided with the majority of terms favoring Defendant. The trial court determined the Plaintiffs made a showing of an absence of meaningful choice and unequal bargaining power. *Id.* at *6. The trial court determined that since the agreement was agreed to from an on-line portal, Plaintiff had no opportunity to discuss the terms of her employment agreement, let alone the arbitration provision, prior to accepting her employment. *Id.* The trial court held that Defendant negotiated the employment contracts from a significant advantage over those transitory employees, like Plaintiff, who had little to no ability to sufficiently review or negotiate the terms of employment. *Id.* at *7. On appeal, the California Court of Appeal reversed the trial court's ruling and remanded for further proceedings. First, the Court of Appeal found that Plaintiff did not dispute the choice-of-law provision and therefore the issue was thus whether the arbitration provision was unconscionable under Alabama law. *Id.* at *8. Under Alabama law, "an unconscionable contract or contractual provision is defined as a contract or provision such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Id.* at *9-10. Plaintiffs argued that the arbitration provision was procedurally unconscionable because Defendant possessed overwhelming bargaining power with regard to the terms of the contract, Plaintiffs lacked an opportunity to negotiate the terms of the contract, and they also lacked a reasonable opportunity to read and understand the terms of the contract. *Id.* at *11-12. The Court of Appeal disagreed that Plaintiffs established any of the allegations as a matter of Alabama law. *Id.* at *12. With respect to the absence of a meaningful choice factor, the Court of Appeal found that the trial court's conclusion that the named Plaintiff "was unable to discuss the terms of her employment agreement, let alone the arbitration provision, prior to accepting her employment" was not supported by the evidence. *Id.* at *13. The named Plaintiff declared that at some point after she applied for the job, she "was presented" with the agreement through its on-line portal, she later received a hard copy that she signed, and Defendant "did not advise" her she was entitled to negotiate the terms. *Id.* at *14. The Court of Appeal stated that there was no evidence regarding whether the named Plaintiff could have negotiated the terms of the agreement because she did not try. The Court of Appeal further found that Plaintiffs failed to demonstrate sufficiently unequal bargaining power under Alabama law to demonstrate procedural unconscionability. *Id.* at *20. Additionally, the Court of Appeal found no evidence or authority from which it could conclude that Plaintiffs lacked the opportunity to read and understand the terms of the contract. *Id.* at *22. Since the parties had not fully briefed the impact this ruling would have on Plaintiffs' claims under the PAGA, the Court of Appeal remanded for further proceedings in light of the conclusion that the arbitration agreement was not unconscionable under Alabama law.

***Racza, et al. v. J.K. Residential Services, Inc.,* 2017 Cal. App. Unpub. LEXIS 222 (Cal. App. 2d Dist. Jan. 12, 2017).** Plaintiffs, filed three separate lawsuits alleging wage & hour claims against Defendant. Defendant filed 15 motions to compel arbitration and the trial court denied all of the motions on the basis that Defendant had waived its contractual right to arbitrate. On Defendant's consolidated appeal, the California Court of Appeal affirmed the trial court's decisions. The Court of Appeal noted that while there is a strong policy in favor of arbitration, a contractual right to arbitrate may be waived in limited circumstances. Two factors weighed heavily in the Court of Appeal's decision. First, the Court of Appeal found that Defendant had "substantially invoked" litigation as the parties had been preparing for trial well before Defendant notified Plaintiffs of an intent

to arbitrate. *Id.* at *9. Defendant had "actively participated in the discovery process propounding more than a thousand interrogatories in addition to demands for production and causing plaintiffs to waste valuable resources on litigation." *Id.* at *10. Second, the Court of Appeal determined that Plaintiffs were prejudiced and misled when Defendant demanded a jury trial and then waited a year to move to compel arbitration. The Court of Appeal noted that many Plaintiffs had spent over a year preparing their cases for trial. The Court of Appeal further noted there was no justification for the delay, as most of the motions were filed three months before trial. The Court of Appeal held that Plaintiffs were prejudiced because they were denied the benefit of the efficiency and cost-effectiveness of arbitration and Plaintiffs spent time and money preparing for trial. Accordingly, the Court of Appeal affirmed, holding that the trial court did not err when it denied Defendant's motions to compel arbitration.

***Rosendez, et al. v. Green,* 2017 Cal. App. Unpub. LEXIS 6845 (Cal. App. 4th Dist. Oct. 4, 2017).** Plaintiffs alleged that Defendant made numerous false claims about SnoreStop, its homeopathic snoring aid, regarding the product's efficacy in violation of California's Consumer Legal Remedies Act ("CLRA") and Unfair Competition Law ("UCL"). The trial court had previously certified Plaintiffs' classes. Defendant subsequently filed a motion for summary judgment, which the trial court granted. The trial court also decertified Plaintiff's class claims. On appeal, the California Court of Appeal reversed and remanded. Although the trial court found the testimony of Defendant's homeopathy expert was not credible and gave the expert report no weight, the trial court concluded that Plaintiffs failed to meet their burden of proof on both of their causes of action, noting they "proceeded on the theory that there is no scientific basis for the advertised efficacy of SnoreStop," but "provided no evidence of tests to determine the efficacy of SnoreStop." *Id.* at *2. Plaintiffs contended the trial court should have entered judgment in their favor and awarded them relief because they met their burden of proof on both of their causes of action through expert testimony and other evidence that the trial court improperly ignored. Plaintiffs further asserted the trial court abused its discretion by decertifying the class. The Court of Appeal found that, while the trial court did not expressly reject the testimony of Dr. Lynn Willis, Plaintiffs' expert witness, on the inefficacy of SnoreStop, it did disregard his testimony and mischaracterize parts of it in its decision. For example, the trial court said that the pharmacologist testified about the remedy's individual ingredients, but could not testify about the product as a whole. *Id.* at *14. The Court of Appeal stated that Dr. Willis testified that each individual active ingredient in SnoreStop would not have an effect on snoring, nor would it shrink swollen tissues that block air passages in the back of the throat. *Id.* at *26. Dr. Willis further testified that he was not aware of any credible scientific evidence that the combination of ingredients would shrink those tissues and he believed that they would not. *Id.* at *27. The Court of Appeal further determined that although the trial court had also ruled that Plaintiffs failed to show proof that a clinical study referenced on SnoreStop's label was flawed, in fact Dr. Willis had testified about a number of the study's flaws. *Id.* The Court of Appeal concluded that Dr. Willis' testimony about the inefficacy and scientific implausibility of homeopathy in general alone was sufficient to satisfy Plaintiffs' burden of proving the inefficacy of SnoreStop as a snoring remedy. *Id.* Accordingly, the Court of Appeal reversed and remanded the trial court's ruling. The Court of Appeal also reversed the class' decertification order and ordered the trial court to determine damages and restitution and award those to the class.

***Rubenstein, et al. v. The Gap,* 14 Cal. App. 5th 870 (Cal. App. 2d Dist. 2017).** Plaintiff, a retail clothing purchaser, filed a class action alleging violations of California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA"). *Id.* at *2. Plaintiff sought injunctive relief, restitution, damages, exemplary damages, attorneys' fees, and costs. Plaintiff moved for certification of a putative class of purchasers at Defendant's clothing store in California. Defendant demurred to the complaint and the trial court sustained the demurrer without leave to amend. On Plaintiffs' appeal, the California Court of Appeal affirmed. The factual basis of Plaintiff's causes of action were that: (i) Defendant used its brand names in its factory stores located in outlet malls; (ii) Defendant labeled the clothing items it sold with its brand names at the factory stores, even though the clothing was allegedly of lesser quality than clothing it sold in its traditional stores; and (iii) Defendant did not disclose to consumers that factory store items were not sold at traditional stores and were of lesser quality. *Id.* Defendant asserted that Plaintiff could not establish liability under any of her proposed causes of action because she did not allege a misrepresentation by Defendant or any duty to disclose that clothing sold in factory stores had not been offered for sale in its traditional stores. Defendant contended that Plaintiff's claims rested on the position that it was unlawful for Defendant to use its brand names when selling its own merchandise in factory stores because the brand names implied a certain level of quality

that was allegedly lacking. *Id.* at *5. Defendant also asserted that Plaintiff lacked statutory standing because she failed to allege how the items that she purchased were not of the quality she expected or how the amount she paid exceeded the value that she received. The trial court sustained the demurrer without leave to amend, and concluded that Defendant's labeling of its stores as brand name factory stores did not constitute any actionable misrepresentation about the quality of the products sold at those stores. The trial court found that Plaintiff had not lost money or property because of an alleged violation of the UCL or the FAL, and therefore she lacked statutory standing. The Court of Appeal held that the allegation that Defendant sold lesser-quality clothing items at its factory stores that were never sold at its traditional stores did not state a claim under FAL because, as a matter of law, Defendant's use of its own brand name labels on clothing that it manufactured and sold at its stores was not deceptive, regardless of the quality. *Id.* at *8. Further, the Court of Appeal ruled that Plaintiff failed to state a claim under the UCL because Defendant's use of its own brand names in factory store names and on factory store clothing labels was not likely to deceive a reasonable consumer as a purchaser was still getting that retailer's item. *Id.* at *15. The Court of Appeal also held that there was no viable claim under the CLRA because Plaintiff failed to allege any advertising or representation that the retailer made about the characteristics or quality of its factory store merchandise. *Id.* at *17. Accordingly, the Court of Appeal affirmed the trial court's decision. Further because Plaintiff failed to demonstrate how her complaint might be amended, the Court of Appeal concluded that the trial court properly sustained Defendant's demurrer without leave to amend. *Id.* at *18.

***Sanchez, et al. v. McDonald's Restaurants Of California,* Case No. BC499888 (Cal. Super. Ct. April 20, 2017).** Plaintiffs, a group of employees, filed a class action alleging that Defendant failed to pay them overtime in violation of the California Labor Code. Plaintiffs filed a motion for summary judgment as to Defendant's liability for failure to pay overtime wages, which the Court granted. Plaintiffs asserted that Defendant configured its electronic time-keeping system to attribute all hours worked on a specific shift to the date on which the shift began, rather than on the date the work was actually performed, which resulted in a failure to pay overtime to employees who worked an overnight shift followed by another shift the next day (and equaling more than eight hours in a 24-hour period). *Id.* at 2. Defendant contended that its method of calculating daily overtime complied or substantially complied with the California Labor Code. The Court explained that § 510 of the Labor Code requires employers to pay overtime of 1 1/2 times the employee's regular rate of pay for "any work in excess of eight hours in one workday (defined as any consecutive 24-hour period)." *Id.* The Court found that Plaintiffs presented evidence that they worked over eight hours in 24-hour periods without being paid overtime. *Id.* The Court further noted that Defendant agreed that Plaintiffs worked at least one week during the class period in which they recorded a shift that began on one calendar day and ended the next calendar day followed by a shift that began the same calendar day that the overnight shift ended without being paid overtime. *Id.* at 3. The Court agreed that Defendant's workday need not be a calendar day, but the problem was that Defendant did not calculate overtime based on that a calendar day time-frame by applying a shift beginning on one day to only that day. *Id.* at 4. The Court opined that overtime calculations should be based on the amount of work completed by an employee during any single 24-hour period, regardless of whether the employees worked continuously through the day divide. *Id.* The Court therefore determined that Defendant was liable for overtime pay, and granted Plaintiffs' motion for summary judgment.

***Sprunk, et al. v. Prisma LLC,* 14 Cal. App. 5th 785 (2d Dist. 2017).** Plaintiffs, a group of exotic dancers, filed a class action alleging that they were misclassified as independent contractors and consequently, suffered wage & hour violations. All class members signed contracts which contained an arbitration clause. *Id.* at 789. Defendant moved to compel arbitration in the named Plaintiff's case. Plaintiff objected and Defendant withdrew its motion for arbitration. The parties proceeded with discovery and Plaintiff moved to certify the class. Defendant objected and argued that class action was not superior to other forms of litigation, because the class members had signed arbitration agreements. The trial court certified the class. Defendant subsequently moved to compel arbitration and asserted that it had not waived its right to compel arbitration. *Id.* at 791. Defendant asserted that it could not have previously moved for individual arbitration of the claims of the unnamed class members because the putative class members were not parties to the action prior to the time the trial court certified the class. Plaintiffs argued that Defendant had waived the right to arbitrate by actively litigating the case. The trial court denied Defendant's motion and ruled that it had waived its right to compel arbitration. The trial court found that Plaintiffs would be prejudiced by the four-year delay in adjudicating their claims if it were to order arbitration

now. *Id.* at 792. On Defendant's appeal, the Court of Appeal of California affirmed the trial court's decision on the basis that the four-year delay resulted in the named Plaintiff conducting class-related discovery and preparing and arguing an extensive class certification motion, that never would have been necessary if individual arbitration had been ordered earlier in the case. *Id.* at 809. The Court of Appeal affirmed the trial court's decision denying Defendant's motion to compel arbitration and concluded that the trial court's finding of prejudice was supported by sufficient evidence. *Id.*

***Wan, et al. v. SolarCity Corp.*, 2017 Cal. App. Unpub. LEXIS 14 (Cal. App. 6th Dist. Jan. 3, 2017).** Plaintiff, a field energy advisor, brought a representative claim against Defendant under the Private Attorney General Act ("PAGA") alleging that Defendant failed to pay overtime, provide meal expenses, reimburse business expenses, and pay wages in a timely matter. Plaintiff sought recovery of civil penalties on behalf of himself and other employees. Prior to the Plaintiff commencing employment, the parties entered into a written agreement that included an arbitration agreement, stating in part that "…an employee may seek only in arbitration individual remedies for himself or herself under any applicable private attorney general representative statute, and an arbitrator shall decide whether an employee is an aggrieved person under any private attorney general statute." *Id.* at *2. The agreement also included a class action waiver stating that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the public." *Id.* at *2. In January 2015, Defendant filed a motion to compel arbitration on the issue of whether Plaintiff was an "aggrieved employee" under the PAGA pursuant to the arbitration agreement. Initially, Defendant sought to dismiss the PAGA claims brought on behalf of others on the basis that Plaintiff waived such a claim pursuant to the agreement. Subsequently, Defendant requested that arbitration of the "aggrieved employee" issue proceed first and that judicial proceedings be stayed. In response, Plaintiff argued that he had alleged only a representative claim under the PAGA and not an individual claim; therefore, there were no individual claims to arbitrate. Further, Plaintiff asserted that the waiver of representative claims under the PAGA is void under *Iskanian v. CLS Transportation Los Angeles*, *LLC*, 59 Cal. 4th 348 (2015). Plaintiff contended that because the PAGA waiver was void and not severable from the entire arbitration agreement, the agreement was unenforceable. In the alternative, Plaintiff argued that whether he was an "aggrieved employee" under the PAGA was encompassed in the representative claim that was properly brought before the trial court. The trial court denied Defendant's motion to compel arbitration, holding that the waiver of Plaintiff's right to bring a PAGA claim was unenforceable. Therefore, Plaintiff could not be compelled to arbitrate the "aggrieved party" issue before pursuing his PAGA claim in the trial court. Defendant appealed, asserting that a portion of Plaintiff's PAGA claim fell within the scope of the parties' arbitration agreement. *Id.* at *27. Specifically, Defendant asserted that whether Plaintiff qualified as an "aggrieved employee" under the PAGA and has standing to bring a representative PAGA action on behalf of other employees were issues that were subject to arbitration, and if Plaintiff was not an "aggrieved employee," then the PAGA claim on behalf of others would be rendered moot. Defendant also asserted that Plaintiff could only seek individual remedies under the PAGA and not on behalf of others because he had waived remedies on behalf of other employees. The California Court of Appeal rejected Defendant's arguments in whole and affirmed the trial court's decision denying Defendant's motion to compel arbitration. The Court of Appeal held that an employee may not be forced to submit any portion of his representative PAGA claim to arbitration and the "aggrieved person" issue was not dispositive. Further, the Court of Appeal concluded that the PAGA waiver was invalid under *Iskanian*, and because the waiver was not severable, the entire arbitration agreement was therefore unenforceable.

***Woosley, et al. v. State Of California*, 2017 Cal. App. Unpub. LEXIS 7599 (Cal. App. 2d Dist. Nov. 3, 2017).** Plaintiffs filed a class action in 1978 alleging Defendants, the State of California, through the Department of Motor Vehicles and the State Board of Equalization, unconstitutionally collected vehicle license fees and use taxes. The trial court certified two classes and entered judgment for Plaintiffs in the 1980s. After the action was resolved on the merits, the trial court awarded Plaintiffs' counsel more than $23 million in attorneys' fees and costs. In 2010, the California Court of Appeal reversed that fee award because the trial court had not given "any consideration to the lack of success" in the case. *Id.* at *3. The 2010 decision remanded the matter to the trial court to redetermine attorneys' fees after undertaking such consideration. The trial court subsequently deducted the lodestar figures of Plaintiffs' counsel for lack of success, and reduced the multiplier that had been applied in the prior fee proceeding from 3 to 1.25 for all of Plaintiffs' counsel except attorney Woosley, whose multiplier

was eliminated. *Id.* at *4-5. The trial court separately awarded Plaintiffs' counsel additional attorneys' fees for work on their fee applications. Woosley contested the fee award and appealed. On appeal, the California Court of Appeal reversed the trial court's fee order in two limited respects, including the Busetti firm's award for work done from 1978 to 1985 and the Gansinger firm's award for work on its 1985 fee application; in all other respects, it otherwise affirmed the trial court's decision. The Court of Appeal stated that it must uphold a trial court's order awarding attorneys' fees pursuant to § 1021.5 unless it was convinced the trial court abused its discretion. *Id.* at *10. The Court of Appeal found that the trial court evaluated the individual billing records and rates of Plaintiffs' counsel, and considered the written and oral arguments of all parties. The Court of Appeal held that the trial court expressly considered whether the fee awards should be reduced for lack of success; deducted hours it found to be unrecoverable, vague, unnecessary, or otherwise inappropriate; and ultimately awarded fees without any enhancement. *Id.* at *11. Accordingly, the Court of Appeal ruled that the trial court appropriately exercised its discretion. The Court of Appeal noted that the trial court expressly recognized that lack of success was a factor to be considered in determining attorneys' fees. Woosley contended the trial court abused its discretion in calculating his lodestar because the trial court: (i) reduced his hours without an adequate basis or explanation; (ii) did not use his actual hourly rate; and (iii) did not enhance his award for risk and delay. The Court of Appeal stated that Defendant specifically identify time entries by Woosley that it objected to and the basis for its objections. *Id.* at *17. The Court of Appeal noted that the trial court sustained some, but not all, of the State's objections and reduced Woosley's lodestar after independently reviewing his records, and it made certain deductions for time entries it found to be block-billed and vague, inflated, or otherwise unreasonable. *Id.* at *18. The Court of Appeal determined that the trial court settled on an hourly rate of $400 after considering "the going market rates in the community for the type of case involved" and Woosley's experience and background, which was "primarily in the area of taxation and tax litigation." *Id.* The Court of Appeal found that the trial court's determination was well within its discretion. Finally, the Court of Appeal concluded the trial court's decision not to enhance Woosley's fee award for risk and delay was not erroneous. Accordingly, the Court of Appeal affirmed the trial court's ruling granting attorneys' fees in part.

***Zimmerman, et al. v. Wells Fargo Bank, N.A.*, 2017 Cal. App. Unpub. LEXIS 6337 (Cal. App. 4th Dist. Sept. 14, 2017).** Plaintiff, an underwriter, filed a class action alleging that Defendant violated various provisions of California's Private Attorney General Act ("PAGA"). Defendant terminated Plaintiff's employment in connection to a mass lay-off and provided her with a separation agreement containing a "release of claims." *Id.* at *2. Defendant filed a motion for summary judgment on the issue of whether Plaintiff's claims on behalf of herself and other aggrieved individuals were barred as a matter of law by the agreement and release of claims that Plaintiff signed. *Id.* at *5. Plaintiff opposed the motion, arguing the release she signed governed only her individual claims, and not representative ones. *Id.* at *6. The trial court granted Defendant's motion for summary judgment, finding that as Plaintiff released Defendant from liability for "all claims" as a result of her employment, and her PAGA claims arose out of that same employment, the release she provided barred her from seeking PAGA penalties. *Id.* at *6. The trial court further ruled that Plaintiff was therefore barred from pursuing PAGA claims in a representative capacity. The trial court noted that under § 2699 of the PAGA, a claim must be brought by an aggrieved employee on behalf of himself or herself and other current or former employees. Since Plaintiff could not assert any PAGA claim on her own behalf, the trial court reasoned that she also could not pursue such a claim in a representative capacity. *Id.* On Plaintiff's appeal, the California Court of Appeal reversed the trial court's ruling. Relative to the language of the waiver contained in Plaintiff's termination agreement, she contended that it applied only to her individual claims for damages, and was not intended to include a release of PAGA claims. The Court of Appeal explained that it was contrary to public policy for an employment agreement to require employees to waive the right to bring a PAGA action before any dispute arises. Accordingly, the Court of Appeal stated that the issue of waivable and non-waivable PAGA claims turned on whether the employee was aware of the alleged Labor Code violations and intended to resolve that disputed issue as part of the waiver. Therefore, the Court of Appeal found that the enforceability of PAGA waivers would not turn on the parties' intentions or the language of their agreements. Instead, it is an issue governed by public policy, which will override the terms of the parties' agreement. The Court of Appeal opined that in this case, public policy precluded Defendant from extracting PAGA waivers from employees who were unaware that a Labor Code violation has occurred, and in the absence of any existing dispute about it. *Id.* at *12. The Court of Appeal stated that there was no evidence Plaintiff was aware of the Labor Code violations she alleged as the basis of her PAGA claim – let alone that any dispute had arisen about them – at the time she signed the

employment separation agreement containing the general release. *Id.* at *14. Absent such proof, the Court of Appeal concluded that there was not an enforceable waiver of Plaintiff's right to bring a PAGA claim based on those alleged violations. Accordingly, the Court of Appeal reversed the trial court's ruling and remanded for further proceedings.

(iii) Delaware

***Ford, et al. v. VMware, Inc.,* 2017 Del. Ch. LEXIS 70 (Del. Ch. May 2, 2017).** Plaintiff was a minority stockholder of VMware who brought a putative class action, as well as a purported derivative action, for breach of fiduciary duty that arose out of a corporate merger. *Id.* at *2. Defendants moved to dismiss the complaint for failure to state a claim and the Delaware Chancery Court granted Defendants' motion. *Id.* at *5. EMC was the controlling stockholder of VMware. EMC merged with Denali and Denali then acquired all of EMC's interest in VMware. Plaintiff's complaint recounted the negative effects that the EMC-Denali merger had on Defendant VMware and the trading price of its common stock. *Id.* at *2. At the outset, the Chancery Court noted that Plaintiff failed to connect these diverse allegations to any legal theories and simply incorporated factual allegations into four cursory counts. The Chancery Court concluded that Plaintiff's complaint sought to turn these negative effects into claims for breach of fiduciary duty against: (i) EMC, as VMware's pre-merger controlling stockholder; (ii) individuals affiliated with EMC who served as members of VMware's board of directors; and (iii) Denali and its affiliates, for allegedly aiding and abetting breaches of duty by other Defendants and as the entity that became VMware's controlling stockholder. *Id.* at *3. The Chancery Court dismissed the complaint because EMC, as the controller, was under no obligation to alienate its shares by spinning off the company and EMC could act in its own interest when determining to retain its property. Further, the Chancery Court reasoned that the "known-looter" theory did not support a claim against members of VMware's board who were also directors of EMC and its subsidiaries, as they could not be held liable for failing to act against EMC. *Id.* at *27. The Chancery Court concluded that EMC violated no duty when it committed itself contractually to exercise its rights in a manner that furthered its own business objective of merging with Denali. As such, the Chancery Court dismissed Plaintiff's complaint in its entirety.

In Re Wal-Mart Stores Delaware Derivative Litigation,* 2017 Del. Ch. LEXIS 131 (Del. Ch. July 25, 2017).** In *Wal-Mart I,** Plaintiffs brought a consolidated action, asserting a single breach of fiduciary duty claim against certain Wal-Mart current and former directors and officers and the Delaware Chancery Court dismissed the complaint. Prior to this action, The New York Times published an article that detailed an alleged bribery scheme at Wal-Mart de Mexico, a subsidiary of Wal-Mart Stores, Inc. and the related cover-up. *Id.* at *6. Shortly thereafter, Wal-Mart stockholders filed multiple derivative suits in Delaware and Arkansas. The District Court dismissed the Arkansas consolidated action under Rule 23.1, for failure to adequately allege demand futility. *Id.* at *6. In Delaware, Defendants moved to dismiss this action, on the basis that the Arkansas decision collaterally estopped Plaintiffs from alleging demand futility, and that even if they were not collaterally estopped, Plaintiffs failed to adequately plead demand futility under Chancery Court Rule 23.1. *Id.* at *8. The Chancery Court agreed and granted the motion to dismiss on the basis that the Arkansas decision precluded the Delaware Plaintiffs from relitigating the issue of demand futility. *Id.* On appeal, the Delaware Supreme Court remanded for the Chancery Court to determine whether a situation – where a dismissal by the District Court in Arkansas of a stockholder's derivative action for failure to plead demand futility is held by the Delaware Chancery Court to preclude subsequent stockholders from pursuing derivative litigation – violated the subsequent stockholders' due process rights. *Id.* at *2. The Chancery Court answered that preclusion of subsequent stockholders from pursuing derivative litigation did not violate their due process rights, unless the representative Plaintiffs' management of the first derivative action was so grossly deficient as to be apparent to the opposing party or failed to satisfy one of the Restatement's other criteria for determining adequacy of representations. However, the Chancery Court recommended that the Supreme Court adopt the rule that a judgment could not bind the corporation or other stockholders in a derivative action until the action had survived a Rule 23.1 motion to dismiss, or the board of directors had given the Plaintiff authority to proceed by declining to oppose the suit. Accordingly, the Chancery Court recommended that the Supreme Court adopt the rule proposed in *In Re EZCORP Inc. Consulting Agreement Derivative Litigation,* 130 A.3d 934, 948 (Del. Ch. 2016*)*.. However, if the Supreme Court declined to adopt the new rule, the Chancery Court submitted that it correctly dismissed Plaintiffs' complaint in *Wal-Mart I* consistent with prevailing authority. *Id.* at *34.

***Sciabacucchi, et al. v. Liberty Broadband Communications*, 2017 Del. Ch. LEXIS 93 (Del. Ch. May 31, 2017).** Plaintiff, a stockholder of Charter Communications, Inc. ("Charter"), brought an action against officers and directors of Charter and Liberty Broadband Corp. ("Liberty"), a stockholder of Charter, alleging breach of fiduciary duty. Plaintiff's complaint alleged that Defendants breached their fiduciary duties of loyalty owed to stockholders by unfairly transferring voting and economic power to Liberty. *Id.* at *3. Defendants moved to dismiss and the Court reserved its ruling pending supplemental briefing. *Id.* at *86. However, the Court held that Plaintiff adequately pled facts that because the vote was coercive, it did not ratify Defendant's actions. *Id.* at *11. The vote approved two proposals that Charter submitted to its stockholders not controlled by or affiliated with Defendant Liberty, after Charter's board of directors approved a purchase of Bright House Networks, LLC ("Bright House"), and a merger of Charter with Time Warner Cable ("TWC"). *Id.* at *40-42. The first proposal was to approve the Bright House and TWC acquisition transactions. The second proposal was to approve Defendant Liberty's $700 million purchase of Charter shares and an agreement granting a proxy to Liberty that increased Liberty's voting power by up to 6% of Charter's outstanding shares. *Id.* at *43. The Court characterized a structurally-coerced vote as one where facts extraneous to the challenged transaction have driven the vote, and not a determination by the stockholders that the transaction was in the corporate interest. *Id.* at *6. In reaching the conclusion that the vote on the second proposal was structurally coercive, the Court considered that Charter informed its stockholders that the Bright House and TWC acquisitions covered in the first proposal were expressly conditioned on approval of the Defendant Liberty's transactions covered in the second proposal. Charter's board did not determine that Defendant's shares issuance and proxy agreement were necessary to achieve the Bright House and TWC acquisitions. The proxy materials Charter provided to its stockholders did not state that Liberty's transactions were in the corporate interest and the financial advisor fairness opinion delivered to Charter's board did not address fairness of Liberty's transactions independent of the Bright House and TWC acquisitions. There was no evidence that Liberty's transactions were integral to the acquisition transactions. *Id.* at *12. Although Liberty provided $5 billion in financing for the TWC acquisition, this contribution was relatively insignificant to the total TWC transaction deal value of $78.7 billion. The Court held that these alleged facts supported an inference that Defendants used the value of the Bright House and TWC transactions to obtain favorable votes on the Liberty transactions to the detriment of Charter. *Id.* at *52. The Court determined that since the vote on the second proposal was coercive, it did not "cleanse" the alleged breaches of fiduciary duties, so as to subject the actions to review only under the business judgment rule standard, instead of under the entire fairness standard. *Id.* The Court rejected Defendants' argument that the vote should be treated as ratifying fiduciary actions subject to Liberty's control as a controlling stockholder because Liberty was not a controlling stockholder. *Id.* at *69. Finally, the Court reserved decision on the motion to dismiss under Chancery Court Rules 12(b)(6) and 23.1, pending supplemental briefing regarding whether Plaintiff's claims were direct or derivative, as each required a different burden of proof. *Id.* at *86.

***Texas Roadhouse Management, et al. v. Delaware Department Of Labor,* 2017 Del. Super. LEXIS 152 (Del. Super. Mar. 30, 2017).** The Delaware Department of Labor ("DDOL") sent a letter to several Texas Roadhouse restaurants contending that the restaurant improperly treated hosts and bus persons as tipped employees. *Id.* at *1. The DDOL alleged that hosts were being paid at an hourly rate of $4.00 and improperly included in a tip pool. The DDOL contended that hosts should receive the minimum wage rate of $7.75 per hour because the hosts were improperly included in a tip pool. The trial court found in favor of the DDOL. On appeal, the Delaware Superior Court reversed the trial court's ruling. The Superior Court noted that the minimum wage provision 19 Del. C. § 902 provides that "every employer shall pay to every employee in any occupation of a rate" that is "not less than $7.75 per hour." *Id.* at *4. However, the Superior Court explained that there was a statutory exception to this general rule in situations where "gratuities received by employees engaged in occupations in which gratuities customarily constitute part of the remuneration," these gratuities "may be considered wages in an amount equal to the tip credit percentage . . . of the minimum rate." *Id.* at *5. The trial court found that Texas Roadhouse "did not present any evidence the hostess category of employee would be considered by a customer to receive tips on a regular and customary basis." *Id.* at *9. The Superior Court found two issues with this holding, including: (i) the parties stipulated that hosts at the Texas Roadhouse restaurants customarily and regularly received more than $30 per month in tips, and the tips combined with their $4.00 hourly rate exceeded the state minimum wage of $7.75; and (ii) the statute does not indicate that the customer determines the tip standard under § 902. *Id.* at *9-10. The Superior Court held that all that was required under 19 Del. C. § 902(b) for an employer to apply a tip credit to the employee's hourly rate, and consequently pay the employee less than

a minimum wage of $7.75 per hour, is that the individual is "engaged in an occupation in which workers customarily and regularly receive more than $30 per month in tips or gratuities." *Id.* at *10. The Superior Court found that the trial court also improperly focused on Defendant's lack of evidence that "the Delaware Code would include the hostess position as a primary direct service employee and be included in a tip pool." *Id.* at *11. Section 902(d)(2) provides that "[w]here more than 1 direct service employee provides personal service to the same customer from whom gratuities are received, the employer may require that such employees establish a tip pooling or sharing system not to exceed 15% of the primary direct service employee's gratuities." *Id.* Thus, the Superior Court determined that a host does not need to be a primary direct service employee to be included in an employer initiated tip pool under § 902(d)(2). *Id.* at *12. Under the plain reading of the statute, a host need only be considered a direct service employee who provides personal service to the same customer for the employer to require the employee to share tips. The Superior Court stated that Texas Roadhouse hosts performed direct personal services to the guests at the restaurants, and although the hosts may not be the primary direct service employee who received the gratuity from the customer, the hosts' tasks provided personal direct service to the customers. The Superior Court thus found that under 19 Del. C. § 902, the hosts at the Texas Roadhouse restaurants were direct service employees and were properly included in the mandatory tip pool. Accordingly, the Superior Court reversed the trial court's ruling in favor of the DDOL.

(iv) Florida

***Florida Department Of Transportation v. Tropical Trailer Leasing, LLC, et al.*, 2017 Fla. App. LEXIS 16153 (Fla. Dist. Ct. App. Nov. 6, 2017).** Plaintiff sued the Florida Department of Transportation (the "Department") for erroneously interpreting §§ 316.003(21) and 316.1001 of the Florida Statute to authorize the Department to assess tolls against a trailer owner, instead of the owner of the vehicle towing the trailer. Plaintiff asserted that its trailers were not "motor vehicles" within the meaning of § 316.003(21), and that the Department should have charged the vehicle owner the toll pursuant to § 316.1001, because the vehicle owner was the "person" who "used" the toll road. *Id.* at *1. Plaintiff also asserted that there were approximately 40 other trailer-leasing companies subject to the same unauthorized billing procedures. Plaintiffs filed a motion for class certification of four sub-classes, which the trial court granted. On appeal, the Florida District Court of Appeal reversed the trial court's ruling. The Department argued that the trial court abused its discretion by certifying broader sub-classes than Plaintiff had requested. The District Court of Appeal agreed that the trial court abused its discretion by expanding the class beyond that pled in Plaintiff's amended complaint. *Id.* at *1-2. Before filing its motion for class certification, and in response to the Department's motion to strike its initial class as "absurd and grossly overbroad," Plaintiff specifically limited its class definition to exclude trailer owners that also owned the vehicle pulling the trailer. *Id.* at *7. In its amended motion for class certification, however, Plaintiff proposed sub-classes A, B, and C, which again included all trailer owners, changing the class size from approximately 400 to over 180,000. The trial court certified two sub-classes consisting of the new larger class size. The District Court of Appeal stated that the proper procedural method to expand a class was by moving to amend the complaint, and then moving to certify the newly defined class. *Id.* at *8. Expanding a class beyond what was pled in the complaint unfairly surprised the Department, because it was not on notice to defend against such a broad class definition. *Id.* at *11. The District Court of Appeal thus found that the trial court abused its discretion by expanding the scope of the class beyond the class definition proposed in the amended complaint. Accordingly, the District Court of Appeal reversed the trial court's ruling and remanded.

***Fraternal Order Of Police, et al. v. City Of Miami,* 2017 Fla. App. LEXIS 18714 (Fla. Dist. Ct. App. Dec. 13, 2017).** Plaintiff, a public employee union, sought declaratory relief, injunctive relief, and damages against Defendant, alleging that the oral portion of an exam used for promotion to police sergeant was unlawful. *Id.* at *1-2. The trial court determined that Plaintiff lacked standing to seek damages against Defendant on behalf of the union members. *Id.* at *1-2. The trial court ordered that, although Plaintiff possessed associational standing to seek declaratory, injunctive, or other prospective relief for its members, it lacked associational standing to recover damages on behalf of the members affected by the allegedly flawed promotion examination. The trial court found that because the determination of the damages sought by Plaintiff would require extensive and individualized discovery to determine whether and to what extent each individual member was damaged, Plaintiff did not have standing to recover damages on their behalf. *Id.* at *2. On appeal, the Florida District Court of Appeal affirmed the trial court's ruling. The District Court of Appeal found that based on abundant federal case law authorities, under federal law a union may not file suit solely in its representational capacity to seek

damages on behalf of its members if individualized proof from the union's members would be required in the litigation. *Id.* at *9. The District Court of Appeal stated the Florida state law "modified" the associational standing doctrine, though it closely resembled its federal counterpart. *Id.* at *10. The District Court of Appeal determined that the few cases dealing with a union's standing to sue in its representational capacity have only permitted unions to seek declaratory or injunctive relief, and those claims did not require individualized participation from the unions' members. Therefore, while an association may have standing to seek injunctive or declaratory relief on behalf of its members due to the automatic application of the relief to its injured members, an association does not have standing to seek damages on behalf of its members where individual participation from the association's injured members is "indispensable to proper resolution of the cause." *Id.* at *13-14. The District Court of Appeal explained that disputes about claims for individualized damages are typically not "properly resolved in a group context." *Id.* at *14. Accordingly, the District Court of Appeal found that, consistent with both federal law and Florida law, a union may not seek damages solely in its representational capacity on behalf of its members when the calculation of those damages would depend on individualized participation from the union members. *Id.* at *15. The District Court of Appeal thereby affirmed the trial court's ruling.

***The Florida Bar v. Hunter, et al.*, Case Nos. SC16-1006 & SC16-1009 (Fla. Jan. 9, 2017).** The Florida Bar alleged that Respondents, two Florida attorneys, violated Florida Rules of Professional Conduct 4-1.7 and 4-1.9, governing conflicts of interest. *Id.* at 1. A referee found that the attorneys were guilty of violating Rule 4-1.7 and recommended that they be admonished. *Id.* at 56. The attorneys represented a group of flight attendants who had been part of a $300 million class action settlement with tobacco companies. Under the terms of the settlement, the flight attendants received no compensation, but kept their rights to bring individual suits and the tobacco companies agreed to pay $300 million to be used to establish a foundation called the Flight Attendant Medical Research Institute ("FAMRI"), which would sponsor research into cures for diseases cause by cigarette smoking. *Id.* at 9. Subsequently, the attorneys filed a petition to enforce and administer the mandate after the FAMRI did not respond to a request for an accounting of how the funds were being used. The attorneys asked for an injunction against any more expenditures, and an order disbursing the settlement funds to the flight attendants. Two class members, Blissard and Young, sat on the board of the FAMRI and were listed as Defendants in the petition that the attorneys filed. Blissard and Young filed a motion to disqualify the attorneys on the basis that the relief being sought was materially adverse and prejudicial to the interests of class members. The trial court granted the motion to disqualify and found that the attorneys possessed a conflict of interest and their representation was precluded by Rules 4-1.7 and 4-1.9. The attorneys filed an appeal, and the Florida District Court of Appeal quashed the disqualification order and held that before disqualifying a class member's attorney, the trial court should balance the actual prejudice to the objector with the opponent's interest in continued representation. *Id.* at 3. The FAMRI, Young, and Blissard subsequently appealed to the Supreme Court of Florida. It rejected the District Court of Appeal's use of the balancing test and held that: (i) the Florida Rules of Professional Conduct provided the standards for determining whether counsel should be disqualified; (ii) the District Court of Appeal lacked the constitutional authority to adopt a new test; and (iii) the trial court had not abused its discretion when it determined that the attorneys violated the Florida Rules of Professional Conduct. *Id.* at 4. The Supreme Court requested the Florida Bar to investigate whether any Florida Rules of Professional Conduct were violated during the underlying proceedings or during the presentation of this case to the Supreme Court. *Id.* at 6. The Florida Bar asserted that the attorneys violated Rules 4-1.7 and 4-1.9 because: (i) certain class members who they represented had either objected to the filing or had not given informed consent; and (ii) the petition sought relief materially and directly adverse to the class members' interests. *Id.* at 2. A consolidated trial took place and the referee determined that the attorneys violated Rule 4-1.7 and recommended that they be admonished. *Id.* at 56. The referee acknowledged that the attorneys exercised poor judgment, but given the circumstances, an admonishment was the appropriate sanction. *Id.*

(v) Illinois

***Illinois Retail Merchants Association, et al. v. Cook County Department Of Revenue*, Case No. 17-L-50596 (Ill. Cir. Ct. June 30, 2017).** Plaintiffs, a group of retail stores selling sweetened beverages, filed an emergency motion for a temporary restraining order ("TRO") and preliminary injunction following the county's implementation of a tax on sweetened beverages. The Court noted that a party seeking a temporary restraining order must establish that: (i) a clearly ascertained right in need to protection exists; (ii) there is no adequate remedy at law for the injury; (iii) irreparable harm will occur without the injunction; and (iv) success on the merits

is likely. *Id.* at 1. The Court found that Plaintiffs established a protectable interested in the matter sufficient to establish standing because the retail stores would be required to collect the sweetened beverage tax, which would require them to undertake administrate tasks of implementing new systems to comply with the collection and display requirements of the tax. *Id.* at 2. The Court noted that Plaintiffs had no adequate remedy at law. The Court also determined that Plaintiffs would be irreparably harmed if the tax goes into effect and is subsequently found unlawful because of the increased administrative and overhead costs they would endure. *Id.* Finally, the Court concluded that Plaintiffs presented evidence that a fair question exists as to the constitutionality of the sweetened beverage tax. *Id.* at 3. Accordingly, the Court granted Plaintiffs' motion for a TRO.

***Mims, et al. v. Adecco USA, Inc.*, 2017 Ill. App. Unpub. LEXIS 2311 (Ill. App. 1st Dist. Nov. 9, 2017).**
Plaintiff filed a class action lawsuit on behalf of herself and a purported class of similarly-situated laborers alleging that Defendant violated certain state and municipal minimum wage laws. Defendant filed a motion to compel arbitration of Plaintiff's claims based on an arbitration agreement contained in the parties' dispute resolution agreement. Plaintiffs then filed an unfair labor practice charge against Defendant with the National Labor Relations Board ("NLRB"), alleging that the mandatory arbitration provision in the parties' dispute resolution agreement was invalid and unenforceable because it contained an arbitration provision waiving employees' rights to bring a class action lawsuit in violation of §§ 7 and 8(a)(1) of the National Labor Relations Act ("NLRA"). The trial court denied Defendant's motion. On appeal, the Illinois Appellate Court affirmed the trial court's ruling. Defendant initially contended the trial court did not possess the authority to determine the "gateway" issue of arbitrability and that it erred in finding it possessed such authority. *Id.* at *4. Defendant maintained that the parties' dispute resolution agreement delegated this authority to the arbitrator rather than the trial court. The Appellate Court disagreed and found that the trial court did not err in this regard. The Appellate Court noted that the primary issue was whether an arbitration provision was invalid and unenforceable in violation of the NLRA if it contained a class action waiver of employees' rights to engage in concerted activities. *Id.* at *7. The Appellate Court explained that the NLRB has consistently found that §§ 7 and 8(a)(1) of the NLRA preclude enforcement of arbitration provisions that waive employees' rights to pursue employment-related claims on a collective or concerted basis. *Id.* The Appellate Court determined that the trial court properly determined that the arbitration provision was invalid under § 8(a)(1) of the NLRA because it interfered with employees' rights to engage in concerted activities granted in § 7 of the NLRA. *Id.* at *8. Defendant alternatively argued that even though the arbitration provision waived employees' rights to engage in concerted activities, the provision should still be held valid and enforceable because the agreement contained an "opt-out" clause giving an employee the right to opt-out of the arbitration provision within 30 days of executing the agreement. *Id.* at *9. The Appellate Court held that the agreement's 30-day opt-out clause could not save the arbitration provision from invalidation under the NLRA. *Id.* at *10. The Appellate Court stated that the NLRB has held that opt-out procedures impermissibly interfere with employees' § 7 rights by requiring them to affirmatively take steps prescribed by the employer to retain those rights. The NLRB has determined that a procedure requiring employees to take affirmative steps to opt-out of an arbitration agreement that otherwise waived their § 7 rights impermissibly interfered with the employees' exercise of those rights in violation of § 8(a)(1) of the NLRA. Since the unenforceable arbitration provision was an essential part of the agreement, the Appellate Court stated that the remaining provisions of the agreement were not severable from the unenforceable arbitration provision, and the entire agreement was therefore void and unenforceable. *Id.* at *13. The Appellate Court therefore determined that the trial court did not err in denying Defendant's motion to compel arbitration.

***Murphy, et al. v. Group O Inc*., 2017 Ill. App. Unpub. LEXIS 1927 (Ill. App. 3d Dist. Sept. 20, 2017).**
Plaintiffs, a group of former employees, filed a class action alleging that Defendant failed to pay all wages owed in violation of the Illinois Minimum Wage Law ("IMWL"). Plaintiff filed a motion for class certification, and the trial court granted the motion. On appeal, the Illinois Appellate Court reversed the trial court's decision. Defendant argued the trial court abused its discretion and applied improper legal criteria when it: (i) did not conduct a rigorous analysis of the elements required to certify a class action; (ii) failed to recognize that Illinois law does not require that employers pay employees for clocked-in time and does not prohibit automatic meal deduction policies; (iii) found that common issues of fact or law predominated over individual issues, (iv) ruled that the representative parties and counsel would fairly and adequately protect the interests of the class; (v) held that a class action was an appropriate method for the fair and efficient adjudication of the controversy; and (vi) certified an unascertainable "fail-safe" class. *Id.* at *1-2. The trial court had certified a class that included "all hourly, non-

exempt Group O, Inc. employees who worked at the Joliet, Illinois Caterpillar facility and who were compensated on an hourly basis, and who were denied wages for all hours worked, including overtime wages, to which they were entitled to under Illinois law during the period from February 2009 through December 2013." *Id.* at *3. Plaintiffs specifically alleged that Defendant failed to pay them legally as a result of an impermissible hourly rounding practices. Plaintiffs claimed they were regularly asked to come in early or stay late, but Defendant had a policy to "round off" hours or edit the putative class members' hours to avoid paying employees the wages they earned. *Id.* at *3-4. Plaintiffs further alleged that Defendant maintained a standard policy and practice of requiring employees to work during their scheduled lunch breaks, but that Defendant's time-keeping system would still automatically deduct 30 minutes of pay. *Id.* at *4. The Appellate Court agreed with Defendant that the trial court abused its discretion when it concluded that common questions of law and fact would predominate over questions affecting only individual class members. *Id.* at *13. The Appellate Court stated that in granting Plaintiffs' motion for class certification, the trial court relied entirely upon the fact that all class members were subject to the time-keeping rounding procedure. *Id.* at *14. However, the Appellate Court determined that the law does not proscribe the rounding of non-work time. Federal regulations specifically provide that a rounding practice "will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." *Id.* Thus, the Appellate Court opined that the common issue of law or fact could not be that Defendant's time-keeping system automatically deducted time. Rather, the Appellate Court noted that the issue must be that employees were forced, by Defendant, to work during the time that was automatically deducted. *Id.* at *15. The Appellate Court stated that Plaintiffs failed to set forth any common policy or scheme that required all class members to work before or after their shifts or during lunch periods without compensation. Accordingly, the Appellate Court concluded that the trial court abused its discretion when it determined that common issues of law or fact would predominate over individual issues, and it reversed the decision.

***Rosenbach, et al. v. Six Flags Entertainment Corp*., 2017 Ill. App. LEXIS 812 (2d Dist. Dec. 21, 2017).** Plaintiff, as the mother of her minor son, brought a class action on behalf of herself and all others similarly-situated, alleging that Defendants Six Flags Entertainment Corp. ("Six Flags") and Great America LLC ("Great America") violated the Illinois Biometric Information Privacy Act ("BIPA") when her son purchased a season pass for Great America theme park and Defendants fingerprinted him using a biometric scanner without obtaining written consent or disclosing their plan for the collection, storage, use, or destruction of his biometric identifiers or information. *Id.* at *4. Defendants moved to dismiss on the grounds that Plaintiff was not a "person aggrieved by a violation" of the BIPA as required by the statute in order for a Plaintiff to have a right of action because Plaintiff alleged mere technical violations of the statute. *Id.* at *5. The trial court denied the motion to dismiss, but later certified two questions for review relating to whether a person aggrieved by a violation of the BIPA must allege some actual harm, including: (i) whether an individual is an aggrieved person under § 20 of the BIPA and may seek statutory damages authorized under the BIPA when the only injury he or she alleges is a violation that a Defendant collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining written consent; and (ii) whether an individual is an aggrieved person under § 20 of the BIPA and may seek injunctive relief authorized under the BIPA when the only injury he or she alleges is a violation that a Defendant collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining written consent. *Id.* *7. The Illinois Appellate Court answered both questions in the negative and held that a Plaintiff must allege an actual injury to be "aggrieved" under the BIPA. *Id.* at *7. In so holding, the Appellate Court analyzed the plain language of the statute and consulted various definitions of "aggrieved," including Black's Law Dictionary, to find that "there must be actual injury, adverse effect, or harm in order for [a] person to be 'aggrieved.'" *Id.* at *10. The Appellate Court further noted that if the Illinois legislature intended to allow for a private cause of action for every technical violation of the BIPA, it could have omitted the word "aggrieved" and stated that every violation was actionable. *Id.* at *12. The Appellate Court reasoned that a determination that a technical violation of the statute is actionable would render the word "aggrieved" superfluous. *Id.* at *13. Therefore, it held that a Plaintiff who alleges only a technical violation of the statute without alleging some injury or adverse effect is not an aggrieved person under § 20 of the BIPA. Accordingly, the Appellate Court concluded that "if a person alleges only a technical violation of the Act without alleging any injury or adverse effect, then he or she is not aggrieved and may not recover under any of the provisions in § 20." *Id.* *15.

(vi) Iowa

***Freeman, et al. v. Grain Processing Corp.,* 895 N.W.2d 105 (Iowa 2017).** Plaintiffs, a group of landowners, filed a class action alleging state common law claims based upon theories of negligence, nuisance, and trespass. Plaintiffs lived near a corn wet milling plant and alleged that air pollution from the Defendant's plant interfered with the use and enjoyment of their property. *Id.* at 109. The trial court granted Plaintiffs' motion for class certification and divided the class into two sub-classes. On Defendant's appeal, the Supreme Court of Iowa affirmed the trial court's decision granting class certification. *Id.* Defendant argued that Plaintiffs failed to satisfy the commonality requirement and that individual issues predominated over common questions of law or fact. *Id.* at 115. At the outset, the Supreme Court noted that Iowa's rules regarding class certification closely resembled Federal Rule 23. *Id.* As to commonality, the Supreme Court ruled that there were several common questions of law and fact. *Id.* at 117. Commonality was satisfied because Defendant engaged in a common course of conduct regarding all class member and almost identical evidence would be required to establish the level and duration of Defendant's emissions, the reasonableness of Defendant's operations, and the causal connections between the injuries suffered and Defendant's liability. *Id.* The Supreme Court rejected Defendant's argument that commonality was not satisfied because the named Plaintiffs did not suffer the same injury as other class members, reasoning that the trial court resolved this disparity by creating two sub-classes consisting of: (i) members who were in close proximity to the plant; and (ii) members who were in peripheral proximity. *Id.* at 118. The Supreme Court also ruled that common issues predominated over individual issues. The determination of whether a nuisance existed was capable of being made on a class-wide basis as several of the required elements, were objective common factors. Similarly, the negligence and trespass claims involved common evidence. Accordingly, the Supreme Court ruled that class action the most efficient way to adjudicate these issue, especially due to the complexity of the issues and the necessity of expert testimony. *Id.* at 122. The Supreme Court disagreed with Defendant's argument that the individual differences among class members was fatal to class certification. The Supreme Court ruled that Defendants would not be denied the opportunity to contest whether individual homeowners suffered injuries or damages because Plaintiffs proposed a formula for damages and Defendant could contest the appropriateness of that formula before the jury. *Id.* at 123. Finally Defendant argued that class certification offended due process because Defendant had a due process right to raise individual challenges and defenses to claims. *Id.* at 129. Because Plaintiffs planned to extrapolate harm to surrounding properties from testimony of representative class members, Defendant argued that this would violate due process as it masked individual issues. Defendant asserted that it should be allowed to pursue individual factors that might reduce certain class members' damages, such as the members' knowledge of the air pollution upon moving to the community. *Id.* However, the Supreme Court reasoned that the trial court did not limit the number of witnesses that Defendant was able to present, nor its exploration of individual defenses. As such, the Supreme Court opined that if individual defenses became unmanageable, the trial court had the discretion to bifurcate the trial, create additional sub-classes, or decertify the class. As such, the Supreme Court affirmed the trial court's class certification order. *Id.* at 130.

***Residents Of Royal View Manor, et al. v. Des Moines Municipal Housing Agency,* 2017 Iowa App. LEXIS 684 (Iowa Ct. App. July 6, 2017).** Plaintiffs, 55 tenants of Royal View Manor, filed a lawsuit alleging that Defendant breached warranties of habitability by failing to properly remedy a bed bug infestation in the apartment building. Plaintiffs filed a motion for class certification, and the trial court granted the motion. On appeal, the Iowa Court of Appeals affirmed the trial court's decision. Defendant asserted that the trial court erred in certifying the class claims because Plaintiffs failed to prove joinder of all class members was impractical and individual issues predominated over class questions. Royal View Manor is owned and operated by Defendant, which provides housing for low-income individuals. *Id.* at *3. In 2010, Defendant learned of a bed bug infestation at Royal View Manor and retained a pest-control firm to treat the infestation in individual apartment units based on resident complaints. However over the course of five years, a majority of the apartment units became infested. Plaintiffs filed a lawsuit against Defendant alleging it had breached express, implied, and statutory warranties of habitability. *Id.* at *4. Plaintiffs sought class certification for "[a]ll tenants of Royal View Manor who were subject to infestation of bed bugs from at least the date of 2007 to present," and estimated that the class could include between 300 and 600 residents. *Id.* Plaintiffs also sought declaratory and injunctive relief as a class in addition to damages on behalf of themselves and the class. The trial court found Plaintiffs had met the requirements for class certification, but limited the class to "all tenants of Royal View Manor from January 1, 2010, to present." *Id.* Defendant argued that the trial court abused its discretion in certifying the class because

Plaintiffs failed to establish the class was so large that joinder of members would be impractical. *Id.* at *6. The Court of Appeals found that the number of Plaintiffs already named in the action exceeded the numerosity threshold, and the estimated size of the class was five to ten times larger. *Id.* at *7. Accordingly, the Court of Appeal held that the trial court's determination that joinder was impracticable was neither untenable nor unreasonable. *Id.* at *7-8. Defendant also asserted that individual issues predominated over class questions. The Court of Appeal found that was a common nucleus of operative fact with regard to Defendant's conduct, which created a basis for its liability. *Id.* at *8. Plaintiffs alleged a widespread bed bug infestation existed at Royal View Manor for a number of years, which affected the majority of apartment units at some point in time. Plaintiffs further alleged that Defendant rented units at Royal View Manor with knowledge of the bed bug infestation while failing to disclose the condition. *Id.* at *10. Although Defendant argued there were questions concerning whether the infestation affected each class member's individual apartment unit, the Court of Appeal opined that the underlying basis for Plaintiffs' claim was that the bed bug infestation rendered Royal View Manor uninhabitable as a whole, regardless of whether the infestation was present in an individual's apartment unit. *Id.* at *11-12. The Court of Appeals therefore found that the trial court appropriately considered and weighed the factors before it in determining the class certification would provide a fair and efficient adjudication of the controversy. Accordingly, the Court of Appeals affirmed the trial court's ruling granting class certification.

***Wellmark, Inc. v. Iowa District Court For Polk County*, 890 N.W.2d 636 (Iowa Feb. 17, 2017).** 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 a variety of insurance statutes. The trial court granted Wellmark's motion for summary judgment. On Plaintiffs' appeal, the Iowa Supreme Court affirmed the trial court's ruling. The Supreme Court limited its holding affirming the trial court's decision granting summary judgment and stated that it was not foreclosing a rule of reason claim against Wellmark if it were shown that the anti-competitive consequences of its practices exceeded their pro-competitive benefits. *Id.* at *8. The Supreme Court stated that it was merely upholding the trial court's decision that Wellmark's arrangements with self-insured and the out-of-state BCBS licensees were not subject to the *per se* rule. *Id.* After the procedendo had issued, the trial court allowed Plaintiffs to file a fifth amended petition and proceed with an antitrust claim, even though Plaintiffs had previously stipulated that the antitrust claim was not included in their fourth amended petition. *Id.* at *15. Defendant subsequently petitioned the Supreme Court for writ of *certiorari* and the Supreme Court sustained the writ, stating that its prior ruling ended the civil action and the trial court had no power to authorize proceeding with a rule of reason claim after the procedendo had issued. *Id.* at *2. Plaintiffs argued that the rule of reason analysis survived summary judgment and could still be litigated and pointed to the language in the Supreme Court's decision that indicated that it was not adjudicating a rule of reason claim. *Id.* at *12. However, the Supreme Court clarified that the language in its ruling was carefully limited for purposes of *stare decisis* so as not to preclude other Plaintiffs in a new lawsuit from bringing a rule of reason claim against Defendant. *Id.* at *9. Plaintiffs also argued that Iowa Rule of Civil Procedure 1.271 restricted the trial court from entering summary judgment without giving notice to putative class members. *Id.* at *12. The Supreme Court held that the trial court had no obligation to notify the putative class members of the pending summary judgment motion or the named Plaintiffs' stipulation abandoning a rule of reason claim. *Id.* at *21. The Supreme Court ruled that the trial court erred in concluding that due process and Rule 1.271(2) required notice to other chiropractors who were not bound by the summary judgment. *Id.* at *21. As such, the trial court erred when it allowed the case to proceed as the Supreme Court's decision ended the action between the named parties. *Id.* at *22. Accordingly, the Supreme Court sustained the Defendant's petition for writ of *certiorari*. *Id.*

(vii) Kentucky

***Bridal Warehouse, Inc. v. Witak*, *et al.*, 2017 Ky. App. Unpub. LEXIS 833 (Ky. App. Nov. 17, 2017).** Plaintiffs, a group of bridal gown purchasers, filed a class action asserting that Defendant provided "used dresses off the rack" to customers rather than new gowns. Plaintiffs brought claims for fraud, violations of Kentucky's Consumer Protection Act, and breach of contract. *Id.* at *1-2. Plaintiffs also alleged that they were induced to pay an extra $20 fee even though Defendant had not ordered gowns directly from the manufacturer. During discovery, Defendant produced records demonstrating that none of the Plaintiffs had received a bridal gown that had been displayed on any of its retail sales floors and that Plaintiffs had indeed received gowns that had been shipped directly from a manufacturer to the warehouse. *Id.* at *7. Plaintiffs filed a motion for class

certification of two sub-classes, which the trial court granted. On appeal, the Kentucky Court of Appeals vacated the trial court's ruling. Plaintiffs first sub-class was defined as any customer who, from December 1, 2008, contracted with Defendant to purchase a wedding gown that Defendant promised to special order directly from the gown's manufacturer, but who instead received a gown either from the retail sales floor inventory of a store or from the warehouse stock. *Id.* at *13. The second sub-class was defined as any customer who was billed during the period for an undisclosed special order fee or fees. *Id.* at *13-14. The Court of Appeals found that the trial court abused its discretion by certifying the class because none of named Plaintiffs' claims fairly encompassed either of the proposed sub-class claims. *Id.* at *19-20. Since the proposed class representatives were not part of either of the sub-classes they purported to represent, the Court of Appeals ruled it would be impossible to conclude that they demonstrated the prerequisites for class certification. *Id.* at *20. The Court of Appeals held that Plaintiffs failed to demonstrate that they were promised by Defendant to order a gown specially from the manufacturer, but instead received a gown from the retail sales floor inventory of a store or a gown from the warehouse stock. *Id.* Similarly, the Court of Appeal opined that none of the Plaintiffs was charged an undisclosed fee. The Court of Appeal reasoned that Plaintiffs' admissions, the documentary evidence, and the testimony of Defendant's representatives excluded Plaintiffs from the proposed sub-classes. Therefore, the Court of Appeal concluded that Plaintiffs failed to show numerosity, commonality, typicality, or adequate representation. Accordingly, the Court of Appeal vacated the trial court's ruling granting class certification.

***United Propane Gas, Inc. v. Purcell, et al.,* 2017 Ky. App. LEXIS 523 (Ky. App. Sept. 15, 2017).** Plaintiff filed a class action on behalf of herself and similarly-situated consumers, alleging that Defendant dishonored thousands of agreements it had entered with its customers. Plaintiff asserted claims under the Kentucky Consumer Protection Act, and for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Plaintiff filed a motion for class certification and the trial court granted the motion. The trial court's order granting certification made no conclusions of fact or law, and certified a class of all residential customers who paid for a 2013-2014 "Pre-Purchase Prebuy Keepfull Gas Supply Agreement" from Defendant. *Id.* at *4. On appeal, the Kentucky Court of Appeals reversed the trial court's order granting class certification. At the outset, the Court of Appeals noted that Kentucky Rules CR 23.01 and CR 23.02 create a two-step analysis for the trial court to undertake when determining if certification of a class is appropriate. First, the trial court must determine if all four of the requirements set out in CR 23.01 – numerosity, commonality, typicality, and adequacy of representation – are present. *Id.* at *6. If all four are present, the trial court must look to CR 23.02 and determine if one of the three conditions of the rule are present. If all the requirements are met for class certification, the trial court "must determine by order whether to certify the action as a class action." *Id.* at *7. In that order, the trial court "must define the class and the class claims, issues, or defenses, and must appoint class counsel under CR 23.07." *Id.* The Court of Appeals determined that the trial court did not engage in the required "rigorous analysis." *Id.* at *8. The class certification order contained no findings of fact or conclusions of law. Further, the Court of Appeals noted that the order contained no discussion of CR 23.01's prerequisites, had no analysis of the class claims, and did not identify the class allegations and defenses, as required under CR 23.03(2). *Id.* The Court of Appeals also determined that the order indicated that the class was certified under 23.02(a), (b) and (c), and Plaintiffs conceded that their claims could only be certified as a class under CR 23.02(c). The Court of Appeals stated that the necessity of distinguishing under which sub-part of CR 23.02 the class is certified is more than just a mere formality, for the notice sent to prospective class members differs depending on whether the class is certified under CR 23.02(a), (b), or (c). *Id.* at *9. The Court of Appeals therefore reversed the trial court's order granting class certification. However, the Court of Appeal stated that it was not expressing an opinion on the propriety of certifying a class as its review was only concerned with issue of whether the trial court performed the proper analysis.

(viii) Louisiana

***Emigh, et al. v. West Calcasieu Cameron Hospital,* 2017 La. App. LEXIS 2001 (La. App. Nov. 2, 2017).** Plaintiffs, a group of hospital patients, filed a putative class action against various Defendants, alleging violations of La.R.S. 22:1874, known as the "Balance Billing Act." The trial court granted class certification to Plaintiffs, and on appeal, the Louisiana Court of Appeals affirmed. Defendant asserted that the trial court erred by: (i) finding that Plaintiffs satisfied the requirements of typicality and adequacy of representation set forth in Local Rule 591(A)(3) and (4); and (ii) finding that Plaintiffs could maintain this action as a class action where individualized questions of causation and injury would predominate over common issues. *Id.* at *4-5. The Court of Appeals

stated that testimony and evidence presented by Plaintiffs at the class certification hearing supported their allegations that Defendants acted in violation of the prohibitions set out in the Balance Billing Act. The Court of Appeals found that although each individual Plaintiff may have suffered varying damages as a result of the Defendants' conduct, they all alleged that those damages were the result of the same actions, such that any finding of liability will apply to all of the proposed class members. *Id.* at *19. As to adequacy, the Court of Appeals found that Defendants failed to produce any evidence to show that the named Plaintiffs' claims were in any way antagonist with each other or with any other potential class members. Given the discretion left to the trial court when deciding whether to certify a class, the Court of Appeals determined that it could not say that the trial court manifestly erred in finding that Plaintiffs could adequately represent the class. *Id.* at *21-22. As to Defendant's argument that Plaintiffs failed to meet the predominance requirement, the Court of Appeals disagreed and stated that the questions of law and fact common to the class members predominated over the questions affecting only individual members. In addition, the Court of Appeal was convinced that a class action would be the fairest and most efficient way to adjudicate this matter. *Id.* at *25. The Court of Appeals found that the main issues were Defendants' billing procedures and health insurers' failure to protect its insureds and enrollees from Defendants' practice. *Id.* The Court of Appeals opined that these were common issues of law and fact between Plaintiffs and the class members. The Court of Appeals therefore found no manifest error in the trial court's factual findings, and concluded that the trial court did not abuse its discretion in certifying the matter as a class action.

***Harvey, et al. v. Board Of Commissioners*, 2017 La. App. LEXIS 2450 (La. App. Dec. 22, 2017).** Plaintiffs filed a class action asserting that the Board of Commissioners for the Orleans Levee District was negligent in its design and construction of flood walls that collapsed during and in the aftermath of Hurricane Katrina, resulting in damages to their respective properties located in the Orleans Parish. Plaintiffs filed a motion for class certification, which the trial court denied on the grounds that Plaintiffs had failed to produce evidence to support the requirements of commonality and typicality. *Id.* at *3-4. On appeal, the Louisiana Court of Appeal affirmed the trial court's order. Plaintiffs argued that the trial court erred in finding that the class lacked commonality because they established at least three undisputed common facts that exist within the putative class, including: (i) that Defendants had a duty to build and/or maintain the levee walls properly; (ii) that the levee walls failed; and (iii) that every one of the members of the proposed class suffered direct and ascertainable damage to some degree as a result of the flooding. *Id.* at *18. The Court of Appeal held that although the damages in question were alleged to have been caused by the failure of the flood walls following Hurricane Katrina, the evidence presented at the certification hearing showed two Defendants along with at least two other actors whose fault must be considered, and the failure of floodwalls on two canals caused by different conduct by multiple actors that occurred at different times. *Id.* at *19. Further, it was shown that flooding was possibly caused by different sources that varied depending on the particular location and the particularities of each property, making it difficult if not impossible to quantify each actor's contribution to the flooding at any particular property. *Id.* The Court of Appeal therefore stated that "a myriad of property-specific facts" made it "difficult if not impossible to quantify each actor's contribution to the flooding at any particular property." *Id.* The trial court also had found that the superiority requirement had not been met because individual issues predominated. Plaintiffs argued that the trial court erred because "aggrieved persons may be without effective means of redress absent the class action device" and that "the alternatives (including joinder, intervention, consolidation, and the use of a test case) do not sufficiently protect the legal rights of the aggrieved parties." *Id.* at *22. The Court of Appeals determined that such statements were conclusions without supporting evidence. As such, the Court of Appeals held that Plaintiff failed to show that the trial court abused its discretion in finding a lack of superiority. *Id.* at *22-23. Accordingly, the Court of Appeals affirmed the trial court's ruling denying class certification.

***Lillie, et al. v. Stanford Trust Co.*, 2017 La. App. LEXIS 1983 (La. Ct. App. Nov. 1, 2017).** Plaintiffs, a group of individual investors, filed a class action against the Stanford Trust Co. ("Stanford Trust"), SET Investments Co. ("SET"), and the State of Louisiana, Office of Financial Institutions ("OFI") for alleged breaches of fiduciary, statutory, and contractual duties. *Id.* at *4-5. Plaintiffs filed a motion for class certification, which the trial court granted. On appeal, the Court of Appeal of Louisiana affirmed. Plaintiffs claimed that Stanford Trust induced them to invest either directly in Stanford International Bank Limited ("SIB") CDs held in trust with Stanford Trust as the trustee or to designate Stanford Trust as the custodian of their IRA accounts, whereby Stanford Trust converted the funds in the IRA accounts to SIB CDs. *Id.* at *5. With respect to the OFI, Plaintiffs asserted that

the agency wrongly allowed the SIB CDs to be marketed and sold to Stanford Trust without proper examination of the risk profile of the CDs or assurance that such information was being disclosed to investors. Plaintiffs further alleged that the OFI failed to disclose the perceived risks to investors who purchased or renewed SIB CDs, or to suspend the sale of the CDs in the state after discovering the risk associated with the CDs. *Id.* The trial court certified a class of: (i) persons who purchased SIB CDs in Louisiana between January 1, 2007 and February 13, 2009; (ii) persons who renewed any SIB CD in Louisiana between January 1, 2007 and February 13, 2009; and (iii) persons for whom Stanford Trust purchased SIB CDs in Louisiana between January 1, 2007 and February 13, 2009. *Id.* at *6. Stanford Trust and SET removed the action. Plaintiffs filed a motion to remand the entire action. OFT filed a separate motion with the trial court to sever the claims against it and to remand those claims, citing its immunity from suit under the Eleventh Amendment as the basis for remand. *Id.* at *9. The trial court granted the motion and the action against OFT proceeded in state court. OFT then appealed the trial court's class certification ruling. OFT argued that Plaintiffs failed to set forth any allegation concerning the elements required to prove the application of fraud on the market theory and Plaintiffs produced no evidence to support the trial court's reliance on the presumption created by that theory. *Id.* at *10. The Court of Appeal rejected Defendant's argument, finding that a review of the trial court's reasons for judgment showed that the trial court neither relied on nor applied that theory in determining class certification. *Id.* at *14. OFI also contended that the trial court erred in determining that there were questions of law or fact common to the class. The Court of Appeal noted that while the testimony of Plaintiffs varied as to how they came to invest in the SIB CDs, they all testified that they had no knowledge of the true value of the CDs or the riskiness of the investment. *Id.* at *22. The Court of Appeal thereby determined that the trial court did not err in finding the common question was that that Plaintiffs all invested in the CDs under a false understanding of the value and safety of the investment, and whether any communication by the OFI of its concerns regarding the risk and value of the CDs, pursuant to its regulatory authority, would have come to the knowledge of Plaintiffs or otherwise impacted the representations made to Plaintiffs. *Id.* at *23. OFI further contended that the trial court erred in finding that Plaintiffs sufficiently established numerosity. The Court of Appeal stated that the evidence showed that SIB CD accounts were owned by the identified individuals during the relevant time period and therefore they had the potential to be class members, and therefore satisfied numerosity. *Id.* at *26. The Court of Appeal also rejected the arguments raised by OFI to refute the trial court's finding that Plaintiffs met their burden of establishing the superiority of the class action procedure and the predominance of the issues common to the class. The Court of Appeal found no abuse of the trial court's discretion in certifying a class action and thereby affirmed the trial court's class certification order.

(ix) Massachusetts

***Rodriguez, et al. v. Massachusetts Bay Transportation Authority,* 92 Mass. App. 26 (2017).** Plaintiff brought an action against Defendant on behalf of a putative class of purchasers of monthly rail passes in January, February, and March of 2015 alleging that Defendant's service disruptions were in breach of its implied contract "to provide timely, reliable commuter rail service." *Id.* at 27. The trial court granted Defendant's motion to dismiss and concluded that even if Defendant had some form of contractual obligation to its monthly pass holders, "the complaint fails to allege an essential element of a breach of contract claim: an agreement between the parties on a material term of the contract at issue." *Id.* On appeal, the Massachusetts Court of Appeals affirmed. In the winter of 2015, the Boston area was beset by severe snowstorms with many inches of snowfall. Plaintiff alleged that the intervals between storms left "more than enough time to clear the snow and return to a full commuter rail schedule." *Id.* at 28. Defendant canceled all commuter rail, subway, and most bus service from 7:00 P.M. on Monday, February 9, through the end of the day on Tuesday, February 10. Defendant then utilized a "winter recovery schedule" with limited service until the snow was adequately removed. *Id.* The trial court concluded that Defendant had no express contractual obligation to provide normal or regular commuter rail service during and after the record-breaking snow storms in 2015, even though Plaintiff may have expected such rail service. *Id.* at 29. The trial court reasoned that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement. *Id.* The Court of Appeals agreed with the trial court that the complaint did not set forth the material terms of the claimed contract because it was silent regarding the source of the contractual obligation, the scope of the Defendant's expected performance in these circumstances, and the rights of its customers in the event of a breach. *Id.* at 30. Moreover, the Court of Appeals opined that the obligation to provide "timely and reliable service" was too indefinite to create an enforceable contract. *Id.* Even if,

as Plaintiff claimed, the terms of the contract were the "normal" or "regular" published schedules, the complaint did not allege that the Defendant intended or agreed to be bound by the regular schedule, and the Court of Appeals concluded it was not reasonable to draw that inference. Accordingly, the Court of Appeals determined that purchase of a monthly pass was not a guarantee of performance according to its published schedule in these extraordinary circumstances. *Id.* at 31. Because the complaint did not set forth the material terms of the claimed contract with sufficient precision, the Court of Appeals found that the trial court did not error in dismissing the breach of contract claim.

(x) Minnesota

***Flores, et al. v. Zorbalas,* 2017 Minn. Dist. LEXIS 6 (Minn. Dist. Ct. Aug. 11, 2017).** Plaintiffs, a group of residential renters**,** filed a putative class action alleging that Defendants were not properly licensed and violated various local housing ordinances and state laws when they failed to properly maintain rental properties and created unsafe and unhealthy living conditions for the class. *Id.* at *20. Plaintiffs sought injunctive relief and damages. Plaintiffs experienced repeated problems with their units, including broken windows, electrical outlets, and inoperable stoves, as well as problems with roach, bedbug, and rodent infestation that required repeated treatment. *Id.* at *18. The Court granted Plaintiffs motion to certify the class. At the outset, the Court rejected Defendant's argument that Plaintiffs lacked standing because some of the named Plaintiffs moved out of the units and several testified that their maintenance issues were addressed and resolved. The Court reasoned that there was no requirement that Plaintiffs must have a continuing injury to satisfy standing requirements. *Id.* at *38. The Court ruled that Plaintiffs had standing because they claimed a concrete injury as the result of having to reside in units rented in the conditions alleged. The Court also ruled that Plaintiffs satisfied Rule 23.01's numerosity, commonality, typicality, and adequacy requirements. *Id.* at *54. The Court determined that Plaintiffs met the requirements of both Rule 23.02(b) and 23.02(c). The Court reasoned that certification of the class was proper under Rule 23.02(b) because it allowed certification where Defendants acted or refused to act on grounds generally applicable to the class and made injunctive relief appropriate with respect to the class. The Court opined that this case represented the ideal occasion for class certification under Rule 23.02(b) because the class sought injunctive relief on grounds common to the class, who were all former or present tenants of Defendants' properties. The Court also ruled that class certification was warranted pursuant to Rule 23.02(c), because: (i) common questions predominated over individual issues; and (ii) class action was superior to other available methods for adjudication of the controversy. *Id.* at *58. The Court determined that there were many common issues of fact and law applicable to the class because Plaintiffs contended that Defendants deprived every class member of the same rights by the same wrongful conduct. Defendants maintained that common questions of law and fact did not predominate because some of the named Plaintiffs had moved, and some did not rely on express representations regarding Defendant's licensure. The Court found these arguments unavailing because Plaintiffs claimed that Defendants made implicit representations regarding their licensure, and Defendants violated their duty to disclose the true information to the class. These claims were common to the entire class. Similarly, the class representatives testified uniformly that they would not have leased their units from Defendants if they had known Defendants were not validly licensed. *Id.* at *60. The Court rejected Defendants' assertion regarding the individualized nature of class members' damages and ruled that this did not preclude certification, as proof of individual damages would not predominate over the common issues. *Id.* at *62. The Court held that class action was the superior method for adjudication of the controversy because class members did not have a substantial interest in controlling individual litigation in this case, for there were few individual issues to be resolved and the class members were individuals with varying claims for damages, ranging from very small to large amounts*. Id.* at *65*.* Accordingly, the Court granted Plaintiffs' motion for class certification.

(xi) Missouri

***Boergert, et al. v. Kelly Services*, 2017 Mo. Cir. LEXIS 82 (Cole County, Mo. Sept. 19, 2017).** Plaintiff, an applicant, filed a class action alleging that Defendant's background check form violated the Fair Credit Report Act ("FCRA") and related state laws. The Court previously had dismissed Plaintiff's claims for lack of subject-matter jurisdiction. After Plaintiff re-filed, Defendant filed a motion to dismiss and for judgment on the pleadings. The Court granted Defendant's motion, finding that Plaintiff failed to plead an injury-in-fact. The Court stated that even assuming Plaintiff pled an injury-in-fact, his claims failed because his alleged injury did not fall within the

zone of interests protected by the FCRA. The Court noted that the FCRA was enacted to reduce the risk that a job applicant unknowingly consents to a background check and to provide an opportunity to address inaccuracies that would result in adverse employment actions. *Id.* at *1. The Court found it dispositive that Plaintiff did not allege that he unknowingly consented to a background check or that his report was inaccurate. The Court further reasoned that use of federal case law on standing was proper because concurrent jurisdiction of federal statutes "militates in favor of consistency in the legal standards to be applied." *Id.* at *2. The Court thereby granted Defendant's motion to dismiss.

***Corozzo, et al. v. Wal-Mart Stores, Inc.,* 2017 Mo. App. LEXIS 733 (Mo. Ct. App. July 25, 2017).** Plaintiffs brought a putative class action alleging willful violations of the Fair Credit Reporting Act ("FCRA"), claiming that Defendant's disclosure form contained extraneous information, inaccurate and misleading statements, and did not provide "a clear and conspicuous disclosure in writing in a document that consisted solely of the disclosure that a consumer report may be obtained for employment purposes." *Id.* at *2. The trial court granted Defendant's motion to dismiss on the basis that Plaintiffs lacked Article III standing. On Plaintiffs' appeal, the Missouri Court of Appeals affirmed. *Id.* at *18. Defendant alleged that Plaintiffs did not assert an injury-in-fact because they asserted only a bare procedural violation of the FCRA, and therefore lacked standing pursuant to *Spokeo v. Robins,* 136 S. Ct. 1540, 1549 (2016). *Id.* at *11. The Court of Appeals ruled that Plaintiffs did not plead an actual injury, as Plaintiffs merely alleged that Defendant's disclosure form did not comply with the FCRA's requirements because it included extraneous information. *Id.* at *18. The Court noted that Plaintiffs did not claim that they did not receive or see a disclosure, or that they did not authorize Defendant to obtain their consumer reports. *Id.* The Court of Appeals therefore affirmed the trial court's decision because Plaintiffs merely alleged "a bare procedural violation, divorced from any concrete harm." *Id.*

***Hurst, et al. v. Nissan North America, Inc*., 2017 Mo. LEXIS 411 (Mo. Oct. 5, 2017).** Plaintiff, a consumer, brought an action alleging that Defendant violated the Missouri Merchandising Practices Act ("MMPA"), based on alleged misrepresentations concerning the dashboards in certain Nissan Infinity FX vehicles. *Id.* at *1-2. Following a jury trial, the trial court entered judgment requiring Defendant to pay $2,000 in damages to each class member identified in a claims process and $1.9 million in attorneys' fees. *Id.* at *2. On appeal, the Missouri Supreme Court reversed the judgment in favor of Plaintiffs and entered judgment in favor of Defendant. Plaintiffs claimed at trial that every class member suffered damage as a result of Nissan's alleged misrepresentations regarding FX vehicles because some included defective dashboards where "bubbling" occurred, which Plaintiffs claimed caused a general "stigma" that decreased the value of all FX vehicles. *Id.* at *4. On appeal, Defendant argued that the trial court erred in failing to grant its motions for a directed verdict and for judgment notwithstanding the verdict because Plaintiffs failed to make a viable case of misrepresentation under § 407.020.1 of the MMPA. *Id.* The Court noted that § 407.020.1 provides, in relevant part, that the "use or employment by any person of any . . . misrepresentation . . . of any material fact in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice." *Id.* at *5-6. Plaintiffs' theory of the case was that Defendant's statements – to the effect that the FX vehicles were "luxury" or "premium" vehicles – were false or misleading because the dashboards were defective, and therefore those statements were actionable "misrepresentations" under § 407.020.1. *Id.* at *6. Both parties focused their arguments on whether Defendant's statements were actionable or whether they are mere "puffery," *i.e.*, statements that may sound like objective facts but that are merely opinions unsusceptible of proof or refutation. *Id.* at *6-7. The Supreme Court explained that it was not addressing the question of whether "puffery" is actionable under the MMPA, as opposed to the common law in which such statements generally are not actionable. *Id.* at *7. The Supreme Court was willing to assume – for purposes of the present case – that, when a manufacturer represents a particular line of vehicles as "luxury" or "premium," those statements are sufficiently factual to leave to a jury the questions of whether those representations were false in a particular case and, if so, whether they were material. *Id.* at *8. The Supreme Court stated that even assuming Defendant's representations that the FX vehicles were "premium" and "luxury" were factual statements, those statements could not have been false or misleading representations unless there was proof the FX vehicles were constructed with low-end, "economy," or "standard" accoutrements. *Id.* The Supreme Court found that there was no evidence the dashboards included in the FX vehicles were low-end, "economy," or even "standard" dashboards. *Id.* Instead, the evidence was that they were luxury dashboards that were defective. Accordingly, the Supreme Court held that there was no evidence from which the jury could find the members of the class reasonably understood Defendant's

representation that the FX vehicles were "luxury" and "premium" to mean that every part in those vehicles was entirely free of defects. *Id.* The Supreme Court therefore reversed the trial court's ruling and entered judgment in favor of Defendant.

***Lucas Subway MidMo, Inc., et al. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116 (Mo. App. 2017).** Plaintiff filed a class action alleging that Defendant violated the Missouri Merchandising Practices Act. The trial court denied Plaintiff's request for class certification and ultimately granted summary judgment to Defendant on all counts. On appeal, the Missouri Court of Appeals reversed and remanded. Plaintiff owned and operated several Subway restaurants in Missouri. Defendant operated a corporate records service that prepares annual minutes for corporations. Defendant marketed its product through direct mail solicitations containing an annual minutes solicitations form ("Form"). Plaintiff purchased corporate minutes from Defendant for $125. The State of Missouri subsequently filed an action against Defendant for various remedies under the Missouri Merchandizing Practices Act ("MMPA"). Defendant was required to alter its solicitations, pay $3,500 in costs and penalties, and send written notice to all of its Missouri customers alerting customers that they have the right to a full refund of any payments made to Defendant if they were "not satisfied" with the corporate minutes they received. *Id.* at 119. Plaintiff did not request a refund, but filed suit alleging that Defendant: (i) engaged in the unauthorized practice of law; (ii) unlawfully received money from Plaintiff for legal services that it could not provide, and (iii) committed various violations of the MMPA. Plaintiff also sought class certification on behalf of Defendant's other Missouri customers from the time period beginning five years prior thereto. The trial court denied Plaintiff's request for class certification. Defendant filed a motion for summary judgment, which the trial court granted, finding that Defendant's actions did not constitute the unauthorized practice of law. On appeal, Plaintiff alleged that the trial court erred in determining that Defendant was not conducting the unauthorized practice of law. The Court of Appeal found that the trial court erred in dismissing Plaintiff's claims alleging that Defendant engaged in the unauthorized practice of law. *Id.* at 125. The Court of Appeals stated that a consumer receiving unlicensed legal aid, whether satisfied or not, has an imputed injury because, to protect the public, Missouri mandates that such aid be given by someone trained in the practice of law and yet their aid came from someone unqualified to offer such services. *Id.* at 126. The Court of Appeals also held that Plaintiff's proposed class met the requirements for class certification. The Court of Appeals found that the trial court's finding that class certification should be denied because Defendant had offered refunds to the putative class members was erroneous. The Court of Appeals stated that any monies Defendant received for legal work were unjustly held because it was not qualified to offer such a service, and therefore it did not matter whether a customer was satisfied with the legal work. Accordingly, the Court of Appeals reversed and remanded the trial court's order that had granted Defendant's motion for summary judgment and denied Plaintiff's motion for class certification.

***State ex rel. Van Alst, et al. v. Harrell,* 2017 Mo. App. LEXIS 846 (Mo. App. Aug. 29, 2017).** Plaintiffs, two former employees, filed an action alleging that Defendants discriminated against them on the basis of their race and age in violation of the Missouri Human Rights Act and failed to pay for all hours worked and for overtime compensation in violation of the Missouri Minimum Wage Law. Defendants moved to compel arbitration pursuant to an acknowledgment form containing an arbitration agreement signed by Plaintiffs at the commencement of their employment. Plaintiffs asserted that the acknowledgment was not a valid agreement to arbitrate because it lacked mutuality, and was not supported by adequate consideration. *Id.* at *4. The trial court granted Defendants' motion to compel arbitration. Plaintiffs filed a petition for a writ of mandamus or prohibition in the Missouri Court of Appeals, asking that it order the trial court to rescind its order compelling arbitration, and to instead deny the motion. The Court of Appeals issued a preliminary writ and subsequently issued a permanent writ. The Court of Appeals explained that orders granting motions to compel arbitration are not appealable and instead, "a writ of mandamus is an appropriate mechanism to review whether a motion to compel arbitration was improperly sustained." *Id.* The Court of Appeals noted that Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate. *Id.* at *7. The Court of Appeals found that the acknowledgment stated that Plaintiffs were at-will employees. Further, they were asked to agree to the acknowledgment during the course of their on-going employment with the company, and were required to execute the acknowledgment in order to retain their employment. Defendants argued that the consideration for the acknowledgment was the parties' mutual agreement to arbitrate disputes, and their mutual waiver of the right to pursue claims through the judicial system. Plaintiffs contended that they were the only ones who promised to arbitrate claims and waive judicial remedies. Plaintiffs Van Alst and Shelton argued that their unilateral promises

to arbitrate were unenforceable, because no consideration flowed to them in exchange for their promises. *Id.* at *8. The Court of Appeals stated that the plain language of the acknowledgment contained promises made only by Plaintiffs. The acknowledgment used the first-person singular pronoun "I" seven times, instead of using “we.” *Id.* The Court of Appeals agreed with Plaintiffs’ argument that "there is no 'I' in 'mutual.'" *Id.* The Court of Appeals further noted that the acknowledgment ended by specifying that employees must "acknowledge their agreement" to the acknowledgment; however, there was no suggestion that the employer must agree, or document its agreement in any particular fashion. *Id.* at *9 The Court of Appeals thereby determined that the acknowledgment did not contain mutually binding promises to arbitrate. Accordingly, because the acknowledgment was not supported by adequate consideration, it was not a valid and binding arbitration agreement, and the trial court erred by compelling arbitration based on this unenforceable agreement. The Court of Appeals therefore made permanent the preliminary writ of mandamus previously issued, and directed the trial court to vacate its order compelling arbitration, and to enter an order denying Defendants' motion to compel arbitration.

(xii) Montana

***Mitchell, et al. v. Glacier County,* 2017 Mont. LEXIS 649 (Mont. Oct. 25, 2017).** Plaintiff, a resident of Glacier County, filed a class action on behalf of herself and other residents, alleging that the County financially mismanaged taxes and the State failed to take legal action against the County. *Id.* at *1. The trial court dismissed the action on the ground that Plaintiffs did not have standing to sue either the County or the State. On appeal, the Montana Supreme Court affirmed the trial court’s ruling. Plaintiffs owned property and paid property taxes in Glacier County, and had been paying taxes under protest in response to an independent audit of the County's finances, which identified budget deficits in numerous County funds and stated that the County had exceeded its budgetary authority in many of those funds. *Id.* at *2-3. Plaintiffs alleged that the County and State failed to comply with budgeting and accounting laws. Plaintiffs asserted that it was foreseeable that the County's residents and taxpayers would be injured as a result of the State's failure to enforce the terms of the Single Audit Act to "insure strict accountability of all revenues received and money spent" by the County. *Id.* at *4. The trial court found that Plaintiffs failed to demonstrate that they suffered a concrete injury to their property or to their individual constitutional or statutory rights sufficient to establish standing under Montana law. *Id.* at *5. The trial court stated that Plaintiffs’ vague, speculative statement that it was foreseeable that the County's residents and taxpayers would be injured was insufficient to establish the injury requirement for standing. The trial court further reasoned that the legal provisions under which Plaintiffs alleged injury – Article VIII, Section 12, of the Montana Constitution and the Single Audit Act – did not establish private rights and did not grant Plaintiffs the right to judicial relief. On appeal, Plaintiffs argued that the State has not fulfilled its fiduciary duty to ensure "strict accountability" under the Constitution and that the State had abdicated its enforcement obligations under the Single Audit Act. *Id.* at *20. Plaintiffs asserted that these alleged failures violated their rights and granted them standing to sue. The Supreme Court noted that although the Single Audit Act granted the Department authority to take enforcement action against local government entities that fail to comply with their financial duties, it afforded the Department wide latitude in determining when and under what circumstances to take action. *Id.* at *21. The Supreme Court thus determined that Plaintiffs could not show that their claims against the State asserted a legally cognizable injury to a civil right sufficient to confer standing. The Supreme Court opined that the threshold problem was that Plaintiffs could not show, based on the audit report, that the threat of the County raising property taxes was "actual or imminent," rather than "conjectural or hypothetical.” *Id.* at *24. Further, the Supreme Court explained that neither the Single Audit Act nor the Local Government Budget Accounting Act contained any express provision granting private rights of action to individuals. The Supreme Court reasoned that even if the County violated one or more provisions of these laws, Plaintiffs failed to show, "at an irreducible minimum," that they had "suffered a past, present, or threatened injury" that "would be alleviated by successfully maintaining the action.” *Id.* at *25. Without demonstrating a concrete injury, the Supreme Court held that Plaintiffs failed to establish standing. Accordingly, the Supreme Court affirmed the trial court’s ruling dismissing Plaintiffs’ claims.

(xiii) Nebraska

***Henn, et al. v. American Family Mutual Insurance Co.,* 2017 Neb. LEXIS 24 (Neb. Feb. 17, 2017).** Plaintiff, an insured individual, brought a class action alleging that Defendant wrongfully failed to compensate her and

others similarly-situated by depreciating labor costs in the calculation of the actual cash value for loss or damage to a structure or dwelling under its homeowner's insurance policies. Plaintiff asserted claims for breach of contract, unjust enrichment, violation of Nebraska's Consumer Protection Act, fraudulent concealment, and equitable estoppel. The parties agreed that actual cash value was replacement cost minus depreciation, but disagreed as to whether the labor component could be depreciated. *Id.* at *5. Plaintiff submitted a homeowner's claim under her insurance policy issued by Defendant for hail damage to her home. The insurance policy was a replacement cost policy and provided that for valid claims, an insured could recover "the cost to repair the damaged portion or replace the damaged building, provided repairs to the damaged portion or replacement of the damaged building are completed," or "[i]f at the time of loss, . . . the building is not repaired or replaced, [American Family] will pay the actual cash value at the time of loss of the damaged portion of the building up to the limit applying to the building." *Id.* at *5-6. After inspecting the storm damage, Defendant provided Plaintiff with a written estimate that explained the calculations for replacement cost value, actual cash value, and depreciation for the claim. *Id.* at *7. The written estimate defined actual cash value as being "based on the cost to repair or replace the damaged item with an item of like kind and quality, less depreciation." *Id.* at *8. The estimate further stated that "replacement cost" was the "cost to repair the damaged item with an item of like kind and quality, without deduction for depreciation." *Id.* The estimate did not show how much it depreciated from building materials as opposed to labor. *Id.* Defendant filed a motion for summary judgment, arguing that the policy was unambiguous and that the issues could be resolved as a matter of law. *Id.* at *9. Plaintiff contended that the term "actual cash value" was ambiguous, that actual cash value should not include depreciation of labor, and that the policy provision should be construed in her favor. *Id.* The federal district court hearing the case found that resolution of the motion involved a question of law in Nebraska on which there was no controlling precedent in the decisions of the Nebraska Supreme Court. It therefore certified the question to the Nebraska Supreme Court of whether an insurer, in determining the actual cash value of a covered loss, can depreciate the cost of labor when the terms "actual cash value" and "depreciation" were not defined in the policy and the policy does not explicitly state that labor costs will be depreciated. *Id.* Plaintiff asserted that the language in the policy did not unambiguously allow for labor depreciation and that Defendant's depreciation of labor resulted in under-indemnification of her loss. The Supreme Court stated that it did not see how this distinction could be made under the plain meaning of actual cash value in the policy. The Supreme Court opined that the policy did not state that the insured would receive the actual cash value of the materials and the replacement cost value of the labor. *Id.* at *24. Since the policy did not distinguish between materials and labor, the Supreme Court declined to read that distinction into the policy. *Id.* at *25. The Supreme Court determined that payment of the full amount of labor would amount to a pre-payment of benefits to which the insured was not yet entitled. The Supreme Court stated that depreciating the whole was merely one way to arrive at a value that represented the depreciated value of the property to which the insured was entitled. *Id.* at *26. The Supreme Court accordingly found that payment of actual cash value, which depreciated both materials and labor, did not under-indemnify the insured. *Id.* The Supreme Court therefore concluded that actual cash value applied to the insured property as a whole and there was no ambiguity in the term "actual cash value." *Id.* at *27.

(xiv) Nevada

***Tesema, et al. v. The Eighth Judicial District Court Of Nevada,* 2017 Nev. Unpub. LEXIS 109 (Nev. Feb. 21, 2017).** Plaintiffs filed a class action. After some discovery, Plaintiffs filed a motion or class certification with the trial court. After the trial court had not ruled on the motion, Plaintiffs petitioned the Nevada Supreme Court for a writ of mandamus. The Supreme Court found that the trial court's delay in resolving Plaintiffs' motion for class certification was preventing Plaintiffs from attempting to bring their action to trial within Local Rule 41(e)'s five-year time-frame. *Id.* at *1. Accordingly, the Supreme Court granted Plaintiffs' request for relief and directed the trial court to enter an order deciding Plaintiffs' motion for class certification within 15 days from the date of its order. *Id.* The Supreme Court requested that Plaintiffs notify it if the trial court failed to do so within the allotted time-frame. However, the Supreme Court declined to consider whether to adopt a rule consistent with out-of-state law that would allow for tolling of local Rule 41(e)'s five-year time-frame during the period in which a trial court's inaction prevented a party from bringing an action to trial. *Id.* at *2. Therefore, the Supreme Court granted Plaintiffs' motion in part and issued a writ of mandamus directing the trial court to decide Plaintiffs' motion for class certification within 15 days from the date of the order.

(xv) New Jersey

***Dugan, et al. v. TGI Fridays,* 2017 N.J. LEXIS 975 (N.J. Oct. 4, 2017).** Plaintiffs, a group of restaurant patrons, filed two putative class actions – the *Dugan* action and the *Bozzi* action –alleging that Defendants engaged in unlawful practices with respect to disclosure for prices for beverages in violation of the New Jersey Consumer Fraud Act ("CFA") and the Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"). *Id.* at *3. Plaintiffs brought a motion for class certification in both cases, which the trial court granted. On Defendants' appeal, the New Jersey Appellate Division reversed. The Appellate Division ruled that Plaintiffs failed to meet Rule 4:32-1's requirement that common issues of fact predominated. *Id.* at *4. On Plaintiffs' further appeal, the Supreme Court of New Jersey ruled that the *Dugan* Plaintiffs' price inflation theory was incompatible with the CFA and Plaintiffs had not established predominance with respect the CFA claims. *Id.* The *Dugan* Plaintiffs claimed an ascertainable loss and causation on the difference between a "reasonable" price for the beverages and the prices that Defendant charged. *Id.* However, because New Jersey case law authorities have consistently rejected such "price-inflation" theories, the Supreme Court ruled that the *Dugan* Plaintiffs failed to establish predominance with respect to their CFA claim and affirmed the Appellate Divisions' decision. *Id.* at *4. The CFA claim in *Bozzi* focused on customers, who were charged different prices for beverages of the same brand and volume, during the same visit. *Id.* at *5. The Supreme Court ruled that the *Bozzi* Plaintiffs met the requirements for class certification with respect to their CFA claim, if the class was limited as such and remanded the matter to the trial court for certification of a class with a revised definition. *Id.* at *6. The Supreme Court concluded with respect to the claims based on the TCCWNA that all Plaintiffs failed to satisfy the predominance requirement and it reversed the trial court's class certification determinations in both cases and remanded for a determination of Plaintiffs' individual TCCWNA claims. The Supreme Court opined that in order to obtain a remedy under the TCCWNA, Plaintiff must be an aggrieved consumer who satisfies the elements of the TCCWNA. To be found liable under the TCCWNA, a Defendant must have violated a clearly established legal right or responsibility. Plaintiffs contended that by failing to list prices for beverages on the menus, the restaurants failed to meet their "clearly established" legal responsibilities under N.J.S.A. 56:8-2.5, and when Defendants' employees presented menus without prices to members of the putative TCCWNA class, they offered contracts that violated the statute. The Supreme Court concluded that with respect to the TCCWNA claims, Plaintiffs did not meet the predominance requirement in either appeal because to establish that a Plaintiff was an aggrieved consumer under TCCWNA claim would give rise to a range of individual questions regarding the interaction between the customer and the server. Further, whether Defendants' restaurants violated a "clearly established legal right" raised the specter of disparate results for different members of the class. No case law existed that established that offering food or beverages to customers without listing the prices for those items on their menu violated New Jersey law. As such, the Supreme Court affirmed and modified the Appellate Division's judgment concerning class certification as to the CFA claim in *Dugan* and remanded the matter to the trial court for the determination of the individual CFA claim. As to *Bozzi*, the Supreme Court affirmed in part and reversed in part the trial court's class certification order as to the CFA claim, and remanded to the trial court to certify a class with a revised definition. *Id.* .at *64. As to the TCCWNA claims, the Supreme Court affirmed the Appellate Division's decision denying class certification as to both putative classes, and remanded to determine individual claims pursuant to TCCWNA.

***Foti, et al. v. Toyota Motor Sales, USA, Inc.*, Case No. A-5215-15T3 (N.J. App. Div. April 24, 2017).** Plaintiff, a consumer, brought a class action alleging that Defendant violated the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA") when it leased her a car and included a warranty notice that misstated consumers' rights under the New Jersey Lemon Law. *Id.* at 4. Defendant filed a motion to compel arbitration and Plaintiff cross-moved for partial summary judgment. The trial court granted Defendant's motion, entered an order compelling arbitration, and required Plaintiff to pursue her claims on an individual basis. On appeal, the New Jersey Appellate Division affirmed the trial court's order. As a condition of leasing a new car, Plaintiff signed a written lease agreement that contained a broad arbitration provision that provided that any controversy or claim between Plaintiff and Defendant would be determined by neutral binding arbitration. *Id.* at 3. Plaintiff argued that the trial court's ruling was in error because: (i) there was no meeting of the minds and therefore no enforceable arbitration agreement; (ii) that as non-signatory to the lease, Defendant was not entitled to enforce the arbitration agreement; (iii) that the agreement did not apply to Plaintiff's claims because issues concerning the warranty were exempt from its terms; (iv) because Plaintiff's complaint was brought as a private attorney general action, it was beyond the scope of the arbitration agreement; and (v) the agreement was unenforceable as to the

putative class. *Id.* at 4-5. The Appellate Division found that the arbitration agreement specifically included Defendant and it rejected her argument that the agreement was "confusing." *Id.* at 6. The Appellate Division further held that the agreement covered Plaintiff's claims, as it clearly stated that it pertained to "any claims arising from or relating to the lease or related agreements or relationships…including, without limitation, claims in contract, tort, pursuant to statute, regulation or otherwise." *Id.* at 7. The Appellate Division determined that the Lemon Law required Defendant to provide the notice and was clearly a related agreement that arose from the lease itself. *Id.* at 7-8. Further, the Appellate Division noted that the U.S. Supreme Court has held that the Federal Arbitration Act ("FAA") preempted the line of state case law authority that class arbitration waivers in consumer contract were unconscionable. Accordingly the Appellate Division determined that the arbitration agreement's class action waiver applied. *Id.* at 8. Finally, the Appellate Division found that Plaintiff's assertion that she filed the complaint as a private attorney general action, which was expressly excluded by the arbitration agreement was without merit. The Appellate Division determined that there was no support for this contention, and there was nothing in the arbitration agreement that exempted Plaintiff's individual claims from arbitration. The Appellate Division thereby affirmed the trial court's ruling that granted Defendant's motion to compel arbitration.

***Gambrell, et al. v. Hess Corp.,* 2017 N.J. Super. Unpub. LEXIS 1328 (N.J. App. Div. June 1, 2017).** Plaintiff, a group of consumers who purchased mislabeled gasoline, filed a class action alleging that Defendant violated the New Jersey Motor Fuel Retail Sales Act and the Truth in Consumer Contract, Warranty and Notice Act. The parties ultimately settled the matter. The settlement required Defendant to provide class members with gift cards totaling $125 to $425. The agreement further provided that class counsel could file an application for attorneys' fees and costs. *Id.* at *5. Plaintiffs filed a motion for preliminary settlement approval, which the trial court granted. Plaintiffs subsequently sought final approval of the settlement, and filed an application on the award of attorneys' fees in the amount of $310,536.50, with an enhancement of 25% to 50%, and costs of $7,830.53. The trial court granted final approval of the settlement, but reduced the number of hours for which class counsel should be compensated. The trial court also refused to apply a fee enhancement because the case did not involve any novel legal issues, Defendant had conceded liability, and the matter did not involve any issue of significance to the public. *Id.* at *6. The trial court thereby awarded class counsel $274,576.50 in attorneys' fees, and the full amount of the costs requested, for a total of $282,407.03. Class counsel then filed a supplemental fee application, seeking additional attorneys' fees in the amount of $42,556.50 and costs of $957.51, which were incurred from July 31, 2015 to February 16, 2016. *Id.* at *7. The trial court denied the supplemental application for attorneys' fees, but awarded class counsel costs in the amount of $957.51. The trial court found that class counsel had already been "generously awarded" more than $282,000 and that the time entries in the supplemental application did not reflect time expended to benefit the class and the settlement. *Id.* at *7-8. On appeal, Plaintiffs argued that the trial court erred by not granting the application for supplemental attorneys' fees. The New Jersey Appellate Division found that the trial court's denial of the supplemental fee application was not a mistaken exercise of discretion and Plaintiffs' arguments on that issue were without sufficient merit to warrant extended discussion. The Appellate Division opined that class counsel had already been appropriately compensated with the award of fees in the amount of $274,576.50, and additional fees would not be reasonable under the circumstances. The Appellate Division found that the trial court's determination was supported by the record, and it was not inconsistent with the settlement agreement, which expressly recognized that the trial court may only award attorneys' fees that are reasonable. *Id.* at *13. Accordingly, the Appellate Division affirmed the trial court's award of attorneys' fees and costs.

***Green, et al. v. Morgan Properties*, 2017 N.J. Super. Unpub. LEXIS 2385 (N.J. App. Div. Sept. 21, 2017).** Plaintiffs, a group of current or former tenants of Defendants' apartment complex, filed a class action alleging that Defendants' practice of charging $400 in attorneys' fees as additional rent violated New Jersey's Consumer Fraud Act. Plaintiffs sought class certification of all tenants "who were charged a legal fee for eviction" from September 1, 2007 until the date of class certification. *Id.* at *5. The trial court found that Plaintiffs' class failed to meet the requirements of numerosity, commonality, typicality and adequacy of representation under Rule 4:32-1(a)(1) through (4), and that Plaintiffs could not demonstrate under Rule 4:32-1(b)(3) that common questions of law or fact predominated and a class action was superior to other methods for adjudicating the controversy. *Id.* at *15. On appeal, the New Jersey Appellate Division agreed with the trial court that a proposed class of all tenants who were charged attorneys' fees under the 2007 and 2010 leases was not maintainable. *Id.* at *16. The

Appellate Division thereby narrowed the class definition to a class of tenants who were charged legal fees by Defendants under their leases but did not quit their apartments owing more than those charges. As this number was at least 5,294 tenants, the Appellate Division found that Plaintiffs met the numerosity requirement. *Id.* at *21. The Appellate Division explained that the central question was whether the $400 fee charged to Plaintiffs was reasonable or unconscionable. The parties conducted extensive fact discovery and engaged experts who prepared comprehensive reports directed entirely to the question of whether the $400 fee in the lease was a reasonable approximation of the fees Defendants could expect to incur in a summary dispossess action or an unconscionable overreach. *Id.* at *25. Therefore, the Appellate Division opined that evidentiary questions regarding the reliability or admissibility of those opinions and the credibility of the experts could be uniformly applied to all members of the class. *Id.* The Appellate Division found that a jury may appropriately consider the basis on which the fees were calculated, whether the costs Defendants include in the operating expenses for the legal department were fairly allocated, whether the $400 fee included in the leases was a reasonable approximation of Defendants' expected costs for a summary dispossess action, whether Defendants may base the $400 fee on its collections of fees charged instead of its costs for services performed, and whether those costs are reasonable in comparison to the fees charged by outside lawyers for the same work. *Id.* at *25-26. If the jury decided the $400 lease charge was unconscionable, it could then decide what lease charge would be reasonable, and then form basis for determining whether individual class members suffered an ascertainable loss. *Id.* at *26. Weighing the significance of the common questions, the benefit of resolving those questions, as well as at least some individual questions of ascertainable loss, through a class action against alternatives, the Appellate Division was satisfied that the common questions predominated over any questions affecting only individual members. *Id.* at *27-28. Finally, given the class members' "lack of financial wherewithal," and the relatively low value of the individual claims, the likelihood of any individual tenant challenging the $400 lease charge against Defendants was slim, and therefore class action was the superior form of adjudication. *Id.* at *28. Accordingly, the Appellate Division concluded that the smaller, more narrowly defined class should be certified. The Appellate Division therefore vacated the order denying class certification and remanded for further proceedings.

***Griffoul, et al. v. NRG Residential Solar Solutions, LLC,* Case No. 17-L-1503 (N.J. Super. July 14, 2017).** Plaintiff, a property owner installing Defendant's solar panel system, filed a class action alleging that Defendant made misrepresentations and false statements in its lease agreement in violation of the New Jersey Consumer Fraud Act ("NJCFA"). Defendant filed a motion to compel arbitration and to dismiss Plaintiffs' claims, and the Court denied the motion. The Court explained that the arbitration agreement in Plaintiff's lease provision stated that "any dispute, disagreement, or claim between you and NRG RSS arising out of or in connection with this Lease, or Solar System, which cannot be amicably resolved by the parties shall be submitted to final and binding arbitration." *Id.* at 6. The Court noted that the agreement lacked an explanation that Plaintiff was waiving his right to seek relief in the court system for breach of his statutory rights, including violations of the NJCFA. *Id.* The Court also found that the class waiver contained in the arbitration agreement was invalid because when read in the context of the whole provision, it was contradictory. *Id.* at 7. The class waiver stated that "each party may bring claims against the other party only in its individual capacity and not as a Plaintiff or class member in any purported class or representative proceeding." *Id.* at 7-8. The Court opined that the provision thereby prevented Plaintiff from bringing any claims in the court system, but the class action waiver appeared to allow Plaintiff to bring claims in his individual capacity. The Court found that the provision was therefore invalid due to its lack of consistency and clarity. *Id.* at 8. Accordingly, the Court denied Defendant's motion to compel arbitration or to dismiss Plaintiff's complaint.

***JPRC, Inc. v. New Jersey Department Of Labor & Workforce Development,* 2017 N.J. Super. Unpub. LEXIS 1981 (N.J. App. Div. Aug. 4, 2017).** Plaintiff appealed from a final administrative decision of the New Jersey Commissioner of the Department of Labor and Workforce Development ("DOL"). The DOL determined that exotic dancers who worked at Defendant's place of business from 2002 to 2005 were employees and assessed Defendant approximately $9,000 for unpaid contributions to the unemployment compensation fund and the State disability benefits fund. *Id.* at *1. On appeal, the New Jersey Appellate Division affirmed the decision. Prior to 2003, Plaintiff treated dancers as employees. Beginning in 2003, Plaintiff unilaterally restructured its relationship with dancers, in an attempt to avoid having them classified as employees. *Id.* at *2. Plaintiff stopped paying dancers any wages, and instead began charging them a fee for the right to "perform,"

and required them to obtain all their compensation from the tips customers gave them and the fees the dancers charged customers for "private dances." *Id.* The DOL determined that the evidence Plaintiff produced at the hearing failed to satisfy the "ABC" test set forth in N.J.S.A. 43:21-19(i)(6). *Id.* at *2-3. The ABC test provides that individuals are considered employees when: (i) they have been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; (ii) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (iii) such an individual is customarily engaged in an independently established trade, occupation, profession, or business. *Id.* at *2-3. Plaintiff contended that dancers did not perform services "for remuneration" within the meaning of N.J.S.A. 43:21-19(i)(6). The Appellate Division agreed with the DOL that Plaintiff's evidence was insufficient to satisfy its burden of proof as to the ABC test. For example, Plaintiff's advertising belied its claim that the dancers were merely incidental or peripheral to Plaintiff's business of serving food and drink. As the Commissioner noted, the Appellate Division stated that Plaintiff presented little evidence concerning the individual dancers it alleged were independent contractors. Further, the Appellate Division opined that Plaintiff's imposition of a new mode of operation on its existing employees – for the avowed purpose of enabling Plaintiff to avoid paying unemployment taxes – did not demonstrate the dancers' independence as "contractors." *Id.* at *5. Rather, the Appellate Division ruled that it evinced Plaintiff's control over their working conditions. In summary, the Appellate Division found that the DOL's decision was supported by substantial credible evidence and, accordingly, it affirmed.

***Kernahan, et al. v. Home Warranty Administrator Of Florida, Inc.*, Case No. 16-A-1355 (N.J. App. Div. June 23, 2017).** Plaintiff, a consumer, filed a class action alleging that Defendants violated the New Jersey Consumer Fraud Act ("NJCFA") and the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA") by misrepresenting the terms of a service agreement it provided her for repair of home appliances. *Id.* at 2. Plaintiffs asserted that Defendants' contracts promised that upon a consumer's request, they would arrange for a service provider to repair or replace the appliances listed in the contract. Plaintiff alleged that the coverage period in the contract listed two different terms, one stating that the coverage period was for three and a half years and one stating that the coverage period began 30 days after acceptance of the application and lasted for one year. *Id.* at 3. Plaintiff further claimed that the "mediation" section of the agreement failed to advise her that she was waiving her right to file an action in Court. *Id.* Defendant moved to dismiss, or in the alternative, to compel arbitration of Plaintiff's claims pursuant to a provision in the agreement. The trial court denied Defendants' motion and found that the arbitration agreement "is not written in a clear and straightforward manner and is not satisfactorily distinguished from other contract terms." *Id.* at 4. On appeal, Defendants argued that the arbitration provision was enforceable. The New Jersey Appellate Division affirmed the trial court's ruling. The Appellate Division stated that an arbitration clause that fails to "clearly and unambiguously signal" to parties that they are surrendering their right to pursue a judicial remedy renders the agreement unenforceable. *Id.* at 8. The Appellate Division found that here, the language in the agreement failed to contain any waiver language, and simply stated that arbitration is the "exclusive" remedy. *Id.* at 9. The Appellate Division concluded that this was insufficient. The Appellate Division held that it must be clear to the parties that arbitration is a substitute for the right to seek relief in the Court system, and that by agreeing to the provision, the parties have waived their right to a Court action. Accordingly, the Appellate Division affirmed the trial court's decision denying Defendants' motion to dismiss, or in the alternative, to compel arbitration of Plaintiff's claims.

***Moore, et al. v. Capital Title Loans,* 2017 N.J. Super. Unpub. LEXIS 350 (N.J. App. Div. Feb. 13, 2017).** Plaintiff, a car loan purchaser, filed a putative class action against Defendant alleging that Defendant breached its contract with Plaintiff. Defendant demanded arbitration in accordance with the arbitration provision in the loan contract. Plaintiff entered into a title loan contract with defendant in Delaware. Under the terms of the agreement, Plaintiff received $3,000 and was charged interest at an annual percentage rate of 180.43%, totaling $457.50, and was required to pay back $3,542.50 one month later. Plaintiff secured the loan using her car as collateral, granting Defendant a security interest in the vehicle. In the event of a dispute, the contract included a binding arbitration provision entitling either party to demand arbitration upon written notice, excluding "any claim of $2,500 or less which is within the jurisdictional limits of a small claims or equivalent court." *Id.* at *2. Plaintiff ultimately defaulted on the loan, Defendant repossessed Plaintiff's vehicle, and Defendant sent her a notice that she needed to pay $3,085 plus interest totaling $5,048.25, $575 in repossession fees, and a daily storage fee of

$25 to have it returned. *Id.* Plaintiff filed a class action, and sought certification of a class of New Jersey consumers who entered into title loan contracts with Defendant charging interest at a rate greater than 30% per annum and certification of a proposed sub-class of consumers who received notices similar to Plaintiff after their cars were repossessed. Specifically excluded from the proposed class were persons whose combined claims exceeded $2,500. Defendant moved to dismiss Plaintiff's complaint and compel arbitration. Plaintiff argued that the arbitration clause expressly excluded "any claim of $2,500 or less which is within the jurisdictional limits of small claims or equivalent court." *Id.* at *3. Plaintiff asserted that her class action complaint, which sought less than $2,500 per putative class member, was cognizable in small claims court and thus not subject to arbitration. The trial court granted Defendant's motion to dismiss the complaint and compel arbitration, concluding that the complaint failed to fit within the jurisdictional limits of the small claims court "because of the putative class action based on allegations of New Jersey statutes." *Id.* at *5-6. The New Jersey Appellate Division reversed the trial court's decision. The Appellate Division concluded that the contract contained a valid and binding provision for arbitration of disputes. *Id.* at *7. Therefore, the Appellate Division examined whether the contractual language clearly and unmistakably established that Plaintiff's complaint fell within the scope of the exclusion clause of the arbitration provision. *Id.* at *8-9. The Appellate Division determined that the clear and unambiguous language of the arbitration agreement stated that under the exclusion clause of the arbitration agreement, arbitration did not apply "[t]o any claim of [$2,500] or less which is within the jurisdictional limits of a small claims or equivalent court so long as there is a right to appeal a decision of the small claims court to a higher court." *Id.* at *10. The Appellate Division stated that it was clear that the drafter's intention was to exclude from arbitration claims of $2,500 or less that were subject to the jurisdictional limits of a small claims court. The Appellate Division thus held that the arbitration agreement was enforceable and the exclusion provision was unambiguous. Accordingly, the Appellate Division concluded that Plaintiff should be permitted to litigate her individual statutory claims in small claims court rather than in arbitration, and reversed and remanded the trial court's decision.

***Sharpe, et al. v. New Meadowlands Racetrack, LLC,* 2017 N.J. Super. Unpub. LEXIS 127 (N.J. App. Div. Jan. 20, 2017).** 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 a racetrack on land owned by the New Jersey Sports and Exposition Authority ("NJSEA") through an agreement with that public agency. 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. 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 that entered into an agreement with the State to furnish building services, as required for application of the SBSCA. *Id.* at *2. The trial court determined that Plaintiff was not covered by the SBSCA because the contract between the State and Defendant was not primarily a building services contract, as required for coverage by the statute and regulation. The trial court therefore granted Defendant's motion to dismiss. On appeal, the New Jersey Appellate Division affirmed. *Id.* at *3. The Appellate Division stated that the New Jersey Department of Labor ("NJDOL") promulgated regulations that gave further definition to the requirements of SBSCA. Under § 12:64-1.3, a "contract" is defined as "those agreements entered into by the State for the principal purpose of furnishing building services." *Id.* at *3. The Appellate Division held that the contract between NJSEA and Defendant was not for the principal purpose of furnishing building services, but rather to run a racetrack. The Appellate Division found that § 12:64-1.3 was not inconsistent with the SBSCA. *Id.* The Appellate Division stated that the NJDOL was specifically tasked with the responsibility to provide regulatory standards that guide the application of the SBSCA in order to effectuate the Legislature's intent. *Id.* at *4. The Appellate Division determined that the NJDOL's definition of a contract as one for the "principal purpose of furnishing building services" further defined the language of the SBSCA, which itself explicitly limited application of the mandate to "employees of contractors and subcontractors furnishing building services." *Id.* Therefore, the Appellate Division held that the regulation reinforced the SBSCA's application criteria. Accordingly, the Appellate Division affirmed the trial court's ruling and upheld the decision granting Defendant's motion to dismiss.

***Stanley, et al. v. Capri Training Center, Inc.,* 2017 N.J. Super. Unpub. LEXIS 2257 (N.J. App. Div. Sept. 12, 2017).** Plaintiff, a consumer, brought an action alleging that the fees she and other putative class members paid

Defendant for cosmetology services exceeded those permitted under the Cosmetology and Hairstyling Act of 1984 (the "Act") in violation of the Consumer Fraud Act ("CFA"); the Truth-in-Consumer Contract, Warranty and Notice Act ("TCCWNA"); breach of the covenant of good faith and fair dealing; and unjust enrichment. *Id.* at *2. Defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted. The trial court granted Defendant's motion to dismiss. On appeal, the New Jersey Appellate Division reversed the trial court's decision and remanded for further proceedings. Defendant argued that Plaintiff's claims turned on an interpretation of what constituted the "cost of materials" under the Act, and therefore the New Jersey Board of Cosmetology and Hairstyling (the "Board") had exclusive jurisdiction over the claims. *Id.* at *3. Plaintiff argued that the trial court erred to the extent it determined the Board has exclusive jurisdiction over her claims. Plaintiff contended that the Act did not contain an express grant of exclusive authority to the Board and therefore the trial court had jurisdiction over the asserted causes of action. *Id.* at *4. Defendant argued that the trial court did not hold that the Board has exclusive jurisdiction, but that in any event, the Act granted the Board exclusive jurisdiction to enforce the Act. The Appellate Division stated that trial courts have uniformly rejected claims that administrative agencies have exclusive jurisdiction over common law and statutory causes of action where there is no express statutory grant of such jurisdiction to the agency. Even where an agency's governing statute expressly provides that an agency has exclusive jurisdiction over certain matters, trial courts have carefully limited the scope of the agency's exclusive jurisdiction and permitted the prosecution of claims of common law and statutory claims in trial courts. Upon review of the record, the Appellate Division found that Act did not include any express grant of exclusive authority to the Board over Plaintiff's statutory and common law claims. The Appellate Division further found the trial court stated there was no private cause of action under the Act. However, the Appellate Division noted that Plaintiff's complaint raised claims under the CFA, TCCWNA, breach of the covenant of good faith and fair dealing, and unjust enrichment. The Appellate Division ruled that Plaintiff could assert claims under those statutes and common law doctrines regardless of whether there is a private right of action under the Act. *Id.* at *13-14. Accordingly, the Appellate Division reversed the trial court's ruling on Defendant's motion to dismiss and remanded for further proceedings.

(xvi) New York

***Desrosiers, et al. v. Perry Ellis Menswear, LLC,* Case Nos. 121-122 (N.Y. Dec. 12, 2017).** In this consolidated appeal, the New York Court of Appeals addressed the issue of whether the notice provisions of § 908 of the New York Civil Practice Law and Rules ("CPLR") applied only to certified class actions, or also applied to putative class actions that were settled or discontinued before the class had been certified. The New York Appellate Division had granted Defendants' leave to appeal to the Court of Appeals in the cases of *Desrosiers, et al. v. Perry Ellis Menswear, LLC,* 139 A.D. 3d 473 (N.Y. App. Div. May 10, 2016), and *Vasquez, et al. v. National Security* 85 A.D.2d 149 (N.Y. App. Div. May 12, 2016), and certified the question of whether the Appellate Division's orders – requiring that notice based on § 908 should be given to putative class members that the respective cases had been settled – were proper. *Id.* at 4. The Court of Appeals affirmed the Appellate Division's decision in both cases. Section 908 provides that notice of the proposed dismissal, discontinuance, or compromise of a class action shall be given to all members of the class. *Id.* at 1. In rendering its decision, the Court of Appeals opined that that the text of § 908 was ambiguous. Defendants asserted that the reference to a class action in § 908 only encompassed a certified class action. Plaintiffs contended the opposite, *i.e.,* that an action is a class action within the meaning of the statute from the moment the complaint containing class allegations was filed. The Court of Appeals concluded that § 908 of the CPLR applied in pre-certification context. Because of this ambiguity, the Court of Appeal looked to the legislative history surrounding the enactment of § 908 and cited to the State Consumer Protection Board's statement that the purpose of the statute was to safeguard the putative class against a "quickie settlement" that primarily benefitted the named Plaintiff without substantially aiding the class. *Id.* at 6. The Court of Appeal concluded that the only appellate-level decision in New York to address this issue was *Avena v*. *Ford Motor Co.*, 85 A.D. 2d 149 (N.Y. App. Div. Feb. 25, 1982), which held that § 908 applied to settlements reached before certification, and because *Avena* had not been overruled and the New York Legislature had not amended § 908 in the decades since *Avena* was decided, this was persuasive evidence that the Court of Appeal's interpretation of § 908 was correct. Accordingly, the Court of Appeals affirmed the orders of the Appellate Division in both the *Desrosier*s and *Vasquez* cases.

Editor's Note: The ruling of the New York Court of Appeals in *Desrosiers* is at odds with the federal rules, as amended in 2003. The current version of Rule 23(e) requires notice of settlement or voluntary dismissal only

where a class has been certified. As a result, this will complicate defense strategy for employers facing class actions in New York.

***Gordon, et al. v. Verizon Communications, Inc.,* 2017 N.Y. App. Div. LEXIS 740 (N.Y. App. Div. Feb. 2, 2017).** Plaintiff filed a putative class action on behalf of herself and other shareholders against Defendant, Verizon Communications, alleging that the board of directors breached its fiduciary duty to the shareholders by causing Defendant to pay an excessive price for Verizon Wireless stock in a transaction and that Defendant failed to disclose material information in the proxy statements regarding the transaction. Subsequently, the parties engaged in settlement negotiations and reached an agreement. The proposed settlement agreement included certain additional disclosures of the terms of the transaction as well as a corporate governance reform proposal, but it did not include any monetary compensation for the putative class members. Defendant agreed that it would not oppose the request of Plaintiff's counsel for an award of attorneys' fees and expenses that did not exceed $2 million. The trial court preliminarily certified the class action and approved the settlement. The court set a fairness hearing and two objectors offered argument and testimony. After the hearing, the trial court reversed its decision to preliminarily approve the settlement and indicated that it wanted to take a "second look" at the terms of the agreement to determine whether it was in the nest interest of the class members. *Id.* at *7. On Plaintiff's appeal, the New York Appellate Division reversed and found that approval of the settlement was warranted and remanded the matter for a hearing to determine the appropriate amount of attorneys' fees to be awarded to Plaintiff's counsel. The New York Appellate Division acknowledged that non-monetary settlements have been historically disfavored, but commentators have called for a more balanced approach in evaluating non-monetary class action settlements. In determining that settlement approval was appropriate, the New York Appellate Division considered various factors, including: (i) the likelihood of Plaintiff's success on the merits; (ii) the extent of support from the parties; (iii) the judgment of counsel; (iv) the presence of bargaining in good faith; (v) the nature of the issues of law and fact; and (vi) the best interests of the putative shareholders and the corporation. The New York Appellate Division found that all these factors weighed in favor of settlement approval and it reversed the trial court's decision. The Appellate Division noted that negotiations were presumed to be in good faith as there was no evidence to the contrary. The nature of the issues and law also weighed in favor of the settlement. Accordingly, the New York Appellate Division determined that the settlement should be approved and the benefit to the shareholders warranted an award of attorneys' fees. The Appellate Division remanded for a hearing to determine the appropriate amount of attorneys' fees to be awarded to Plaintiff's counsel that was commensurate with the benefit obtained by the class.

***In The Matter Of Buffalo Teachers Federation, Inc., et al. v. New York State Pubic Employee Relations Board,* 2017 N.Y. App. Div. LEXIS 6841 (N.Y. App. Div. Sept. 29, 2017).** Plaintiffs, a group of teachers, filed an action asserting that Defendant violated the New York Civil Service Law. Defendant New York State Public Employment Relations Board ("PERB") reversed a determination of the Administrative Law Judge ("ALJ"), who ordered the reinstatement of teachers with back pay, on the grounds that the order was arbitrary and capricious because the determination was inconsistent with Defendant's own precedent. In May 2005, the Buffalo City School District ("District") passed a resolution naming a single health insurance carrier for the District's teachers. *Id.* at *2. This changed the existing collective bargaining agreement ("CBA") between the District and Plaintiffs, the teachers' bargaining representative. Subsequently, the District explained that it was forced either to make that change to the CBA or to make "massive cuts" in other areas. *Id.* Plaintiffs filed a class grievance seeking to prevent that change to the CBA. The District then informed 88 teachers by letter that they were to be laid off because the failure to reach an agreement on a single health insurance carrier had forced the District to make budgetary cuts elsewhere. *Id.* The grievance went to arbitration and the arbitrator concluded that the District had discharged the teachers "wrongfully, in furtherance of its ill-conceived effort to force the Union into submissive acceptance of the unilateral modification" to the CBA. *Id.* at *3. The arbitrator's award directed the District to reinstate the teachers with back pay. The trial court confirmed the arbitration award. On appeal, however, the New York Appellate Division concluded that "the arbitrator acted in excess of the power granted to him with respect to that part of the award concerning the teachers." *Id.* The Appellate Division therefore vacated that part of the award with respect to the reinstatement of the teachers. Thereafter, the improper practice charge proceeded on a stipulated record before an ALJ. *Id.* The ALJ concluded that the discharge of the 88 teachers was "the final step in the pre-conceived scheme designed to pressure [petitioner] to drop the single carrier grievance" and thus violated the statute. *Id.* at *4. The ALJ ordered the District to reinstate the teachers with

back pay. Defendant appealed again and asserted that the July 2005 letters from the District announced the lay-offs as a decision that had already been made and explained the underlying reason for the lay-offs, *i.e.*, the need to cut costs, and thus the discharge of the teachers did not violate the statute. *Id.* Defendant contended that the determination was arbitrary and capricious inasmuch as it departed from its own precedent in refusing to defer to the arbitration award. The Appellate Division found that although an administrative body acts arbitrarily and capriciously in departing from its own precedent and failing to explain the reasons for the departure, Defendant's determination here was consistent with its own precedent. Notably, the Appellate Division stated that Defendant will defer to an arbitration award only in limited circumstances, and it usually does not do so where the charging party alleges a violation of the New York Civil Service Law. *Id.* at *5. Moreover, to the extent that the arbitrator made findings with respect to the lay-offs, it was reasonable for Defendant not to defer to the arbitration award because the arbitrator exceeded the scope of his authority and his findings were inconsistent with Defendant's interpretation of the statute. *Id.* at *5-6. The Appellate Division noted that the District had explained that lay-offs were a cost-cutting measure made necessary by the failure to reach an agreement on health insurance. Based upon its review of the record, the Appellate Division concluded that it was rational for Defendant to determine that the lay-offs were not motivated by an improper purpose. *Id.* at *6. Accordingly, the Appellate Division confirmed the determination of the ALJ.

***Jaclyn S., et al. v. The National Football League*, Case No. 804088/2014 (N.Y. Sup. May 18, 2017).** Plaintiffs, a group of cheerleaders, filed a class action alleging that Defendants misclassified them as independent contractors and thereby denied them minimum wages in violation of the New York Labor Law ("NYLL"). Plaintiffs filed a motion for partial summary judgement to the extent that, as a matter of law, they were non-exempt employees misclassified as independent contractors and that Defendants Cumulus Radio Co., Stejon Productions Corp., and Stephanie Mateczun were Plaintiffs' joint employers. *Id.* at 1. The Court granted Plaintiffs' motion. The Court found that the agreements that cheerleaders were required to sign as a condition of their participation on the team were unenforceable and that Plaintiffs were non-exempt employees misclassified as independent contractors. *Id.* at 3. The Court, however, denied Plaintiffs' motion for partial summary judgment to the extent that there was a question of fact as to the role of Defendant Buffalo Bills Inc. as an alleged joint employer. The Court ruled that the agreement containing the independent contractor language in question was incorporated at the insistence of other Plaintiffs and not the Bills, and therefore raised a question as to whether the Bills had status as a joint employer. *Id.* Accordingly, the Court granted Plaintiffs' partial motion for summary judgment in part.

***Onadia, et al. v. City Of New York,* 2017 N.Y. Misc. LEXIS 30 (N.Y. Super. Ct. Jan. 9, 2017).** Plaintiffs, a group of individuals incarcerated by the New York City Department of Correction ("DOC"), filed a putative collective action in state court against Defendant alleging that it routinely and unlawfully maintained custody of Plaintiffs after they were supposed to be released from jail because the U.S. Immigration and Customs Enforcement ("ICE") was investigating them. The putative class was defined as all people that were routinely held by DOC prior to December 21, 2012, based solely on an ICE detainer that either indicated that an investigation had been commenced or failed to indicate a reason for the continued detainment. The Court granted Plaintiffs' motion to certify the proposed class. Defendant objected on the basis that the definition of the putative class did not satisfy the commonality requirement because the class would include people that were held in custody for various reasons. The Court ruled that the putative class did not serve as an "umbrella" under which all people held past their release date based upon any ICE detainer would be included. *Id.* at *4. The Court noted that because the class excluded people whose detainer forms indicated that they should be held based upon a warrant for their arrest or a deportation order, common questions of law and fact would predominate. Therefore, the Court ruled that the commonality requirement was satisfied and granted Plaintiffs' motion for class certification.

(xvii) North Carolina

***Chambers, et al. v. Moses H. Cone Memorial Hospital,* 2017 NCBC LEXIS 22 (N.C. Super. Ct. May 13, 2017).** Plaintiff filed a putative class action against Defendant asserting claims of breach of contract, breach of the covenant of good faith and fair dealing, and breach of constructive trust, and sought declaratory judgment, restitution, and injunctive relief. *Id.* at *4. Plaintiff received an emergency appendectomy at Defendant's hospital and signed a contract agreeing to pay the regular rate for services. Defendant billed Plaintiff for the services that

he received, which totaled $14,558.14. Plaintiff asserted that the bill was calculated using Defendant's Chargemaster rates, which he argued were grossly inflated rates. *Id.* at *9. Plaintiff asserted that he was only obligated to pay the reasonable value of the services for which he was billed, which he claimed was no more than $6,000. *Id.* Defendant brought a separate collection action against Plaintiff based upon Plaintiff's failure to pay his hospital bill. *Id.* at *10. Another patient, Robin Hayes, subsequently filed a motion to intervene as a named Plaintiff in the action, and alleged that she too was billed under Chargemaster rates that were much higher than the reasonable value for the services that she received. *Id.* at *12. Defendant filed a motion to dismiss Plaintiff's claims after it dismissed its collection claims against Plaintiff. The Court granted Defendant's motion to dismiss, and ruled that Plaintiff's claims against Defendant were moot because Defendant voluntarily dismissed its collection suit against Plaintiff. *Id.* at *11. The Court further determined that dismissal was warranted as none of the five mootness exceptions that precluded dismissal applied. *Id.* at *20. As to Hayes' motion to intervene, the Court ruled that she was not entitled to intervene because she could not intervene as a matter of right as she had no direct interest in the case. *Id.* at *24. The Court ruled that Hayes' claims were barred by accord and satisfaction because her attorney negotiated and settled with Defendant concerning Defendant's lien in her personal injury case for which she sought medical treatment. *Id.* In sum, the Court granted Defendants' motion to dismiss Plaintiff's complaint and denied Hayes' motion to intervene.

***Elliot, et al. v. KB Home North America,* 2017 NCBC LEXIS 38 (N.C. Super. Ct. April 17, 2017).** Plaintiffs, a group of homeowners, brought a class action against Defendant alleging breach of contract and violation of building codes, which caused water damage in the homes resulting from Defendant's failure to install a weather resistant barrier in the homes. *Id.* at *3. The parties eventually entered into a class action settlement. Subsequently, Plaintiffs moved, unopposed, for final approval of the settlement and an award of attorneys' fees pursuant to Rule 23 of the North Carolina Rules of Civil Procedure. The Court certified the classes for settlement, approved the settlement, and granted the attorneys' fees motion. The Court followed a two-step process in determining whether to approve a class action settlement by considering: (i) whether the proposed class satisfied the North Carolina Rule of Civil Procedure 23; and (ii) whether the settlement was fair, reasonable, and adequate. *Id.* at *5. The Court certified the two classes consisting of previous and current homeowners, finding that they satisfied Rule 23's requirements. *Id.* at *7. The Court determined that the settlement was fair and reasonable considering the likelihood that the class would prevail should litigation go forward and the class' reaction to the settlement, as only one class member objected. *Id.* at *13. While Plaintiffs established a likelihood of prevailing at trial, the Court noted that Plaintiffs would be faced with numerous risks that threatened the class if it were to proceed, such as decreased members of homeowners in the class as well as a risk of potential decertification of the class. *Id.* at *13-14. The Court balanced these risks against the benefits offered to the class and found that the benefits were in line with what they would receive if successful at trial. *Id.* at *16. The benefits included the option for class members to select a cash-benefit ranging from $6,500 to $17,000 based upon the size of the home or instead to opt for repairs to their homes. Similarly, the class of former homeowners could select between a lump sum cash benefit of $3,250 or the actual documented decrease in sale value of their home. Accordingly, the Court found that the settlement was fair and reasonable. *Id.* at *17. The Court applied the factors in Rule 1.5 of the Rules of Professional Conduct of the North Carolina Bar prohibiting excessive attorneys' fees and approved the award of fees that Plaintiffs' counsel requested of $1,925,000. *Id.* at *19. The Court found that the fee request was reasonable, as Plaintiffs' counsel worked over 6,400 hours over a period of eight years that included several appeals. *Id.* at *21. Plaintiffs' counsel also established their experience, skill, and ability to successfully conduct complex litigation. *Id.* The Court found that the attorneys' rates of $500 per hour per partners and $250 per associate were reasonable relative to rates charged by attorneys in the local community. Accordingly, the Court approved the Plaintiffs' motion for settlement and award of attorneys' fees.

***Miles, et al. v. The Company Store,* Case No. 16-CVS-2346 (N.C. Super. Ct. Nov. 16, 2017).** Plaintiff, a customer, filed a class action alleging that Defendant provided a copy of her receipt revealing the first six digits and the final four digits of her credit card number in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). Defendant filed a motion to dismiss for lack of subject-matter jurisdiction, which the Court granted. Plaintiff claimed that Defendant knowingly, willingly, intentionally, and recklessly violated FACTA's requirements and exposed Plaintiff to an increased risk of identity theft. Plaintiff did not allege that anyone else saw her receipt. *Id.* at 2. The Court explained that the North Carolina Court of Appeals has identified that the existence of

standing most often turns on whether a party has alleged an injury-in-fact. *Id.* Further, an injury-in-fact is an "invasion of a legally protected interested that is: (i) concrete and particularized; and (ii) actual or imminent." *Id.* The Court stated that Plaintiff had only alleged that Defendant provided her a copy of her own personal information exceeding federal statutory limits. Since Plaintiff already had access to her own personal information, the Court opined that there was no injurious effect or other personal state in the controversy sufficient to assure a concrete injury-in-fact. *Id.* at 3. Accordingly, the Court held that Plaintiff lacked standing to pursue her claims and the Superior Court lacked subject matter jurisdiction. The Court thereby granted Defendant's motion to dismiss.

(xviii) Ohio

***Eighmey, et al. v. City Of Cleveland,* 2017 Ohio App. LEXIS 1887 (Ohio App. 8th Dist. May 18, 2017).** Plaintiff, a citizen, filed a class action alleging that Defendant issued unlawful traffic citations generated by unmarked traffic cameras. The trial court granted Plaintiff's motion for class certification. On appeal, the Ohio Court of Appeals reversed the trial court's ruling, finding that Plaintiff could not establish typicality. Plaintiff received a traffic ticket from a mobile traffic camera and paid the ticket. Plaintiff then filed an action asserting that the mobile unit that recorded her traffic violation failed to comply with the notice requirements of § 413.031(g) of the Cleveland Codified Ordinances ("CCO") because the unit contained "no distinguishable markings whatsoever." *Id.* at *2. Defendant argued that the trial court erred in granting class certification because Plaintiff failed to meet the typicality requirement of Rule 23(A). The Court of Appeals noted that Plaintiff claimed she was injured by having to pay Defendant a fine that was wrongfully generated by an unmarked mobile unit. However, the Court of Appeals found that Plaintiff admitted in her complaint that she voluntarily paid the ticket. The Court of Appeals explained that § 413.031(k) of the COO provides, in relevant part, that "the failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the ticket." *Id.* at *6. Thus, by paying her ticket, the Court of Appeals determined that Plaintiff waived her right to contest the ticket and she was barred from any recovery. The Court of Appeals explained that Plaintiff would neither benefit from, nor be harmed by, the litigation of other potential class members who might pursue viable claims, and therefore she lacked standing and was unable to represent the class. Plaintiff argued that her claims were not barred for failing to exhaust her administrative remedies because an appeal through the administrative process would have been futile. The Court of Appeals agreed that parties are not required to pursue administrative remedies "if doing so would be a futile or vain act." *Id.* However, the Court of Appeals held that the administrative proceedings set forth in § 413.031 and R.C. 2506.01, which authorizes appeals of administrative decisions to the common pleas court, provided an adequate remedy at law to aggrieved motorists in receipt of civil traffic violations. Therefore, because an appeal of Plaintiff's civil traffic violation would not have been futile, the Court of Appeals concluded that her failure to pursue the appeal barred her from representing the class. Accordingly, the Court of Appeals reversed the trial court's ruling.

***Smith, et al. v. Ohio State University*, Case No. 2015-00919 (Ohio Ct. Cl. Feb. 21, 2017).** Plaintiffs, a group of job applicants, filed a class action alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") by providing applications with a background check disclosure form that contained extraneous information. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6), and the Ohio Court of Claims granted the motion. Defendant argued that Plaintiffs failed to allege a concrete injury-in-fact. At the outset, the Court of Claims noted that it was not bound by Article III of the Constitution and that it had construed standing more broadly than federal jurisprudence. *Id.* at 3. Plaintiffs argued that they had statutory standing because the FCRA contains an express grant of statutory standing to "any consumer" to bring an action in "any court of competent jurisdiction" against "any person" who willfully fails to comply with "any requirement" under the FCRA. *Id.* at 4. Plaintiffs further argued – and submitted case law examples to support their position – that Ohio law specifically recognized statutory standing that may exist in the absence of any concrete injury. *Id.* The Court of Claims determined that Plaintiffs demonstrated that Ohio law allows statutory standing in the absence of an injury-in-fact. However, the Court of Claims stated that none of the case law Plaintiffs presented related to the issue at hand, *i.e.*, a state court considering whether a Plaintiff has statutory standing based on the alleged violation of a federal statute. *Id.* at 5. The Court of Claims ruled that it would therefore defer to the U.S. Supreme Court's interpretation of Congress' legislative intent as to the existence of statutory standing under the FCRA in the absence of a concrete injury-in-fact. *Id.* The Court of Claims held that Plaintiffs had pled no injury-in-fact, nor did

they have statutory standing to pursue their claims in the absence of a cognizable injury. Accordingly, the Court of Claims granted Defendant's motion to dismiss.

***Smith, et al. v. Ohio State University,* 2017 Ohio App. LEXIS 5265 (Ohio App. 10th Dist. Dec. 5, 2017).** Plaintiffs, a facility manager and a housekeeper, filed a class action alleging that Defendant provided a background check disclosure and authorization to each of them that improperly included extraneous information and a liability release in violation of the Fair Credit Reporting Act ("FCRA"). Defendant filed a motion to dismiss for lack of standing, which the Ohio Court of Claims granted. On appeal, the Ohio Court of Appeals affirmed. Defendant contended that, as under federal pleading standards, Plaintiffs lacked standing to bring their claims under Ohio state law because they alleged no injury-in-fact resulting from the alleged violations of the FCRA. *Id.* at *2. Plaintiffs argued that Ohio law recognizes standing, even in the absence of an injury-in-fact, when that standing is conferred by statute. The Court of Claims agreed with Defendant and found that Plaintiffs failed to plead any particularized injury-in-fact and lacked statutory standing to pursue their claims in the absence of a cognizable injury. *Id.* at *2-3. Plaintiffs had relied on the concept of "statutory standing" as the basis for the Court of Claims' jurisdiction to hear their FCRA claims against Defendant. *Id.* Plaintiffs asserted that Ohio case law authorities had consistently found standing to exist where the text of a statute provides a party with a cause of action to sue for a violation of its requirements, even in the absence of an alleged injury-in-fact. The Court of Appeal noted that "statutory standing" in Ohio has been described as the statutory grant of authority to sue. *Id.* at *5. In addition to standing authorized by "common-law," which requires injury-in-fact, causation, and redressability, "standing may also be conferred by statute." *Id.* at *7. For a statute to confer standing in the absence of a concrete injury, the statute must "clearly express an intention to abrogate the common-law requirements for standing." *Id.* The Court of Appeal explained that under this framework, the "common-law" standing requirements must be established unless the party is suing pursuant to a statute that expresses a clear intent to abrogate those requirements. *Id.* Thus, Ohio and federal law have diverged on the issue of whether a party may have standing to sue in the absence of an injury-in-fact. *Id.* However, the Court of Appeal found that even though Ohio case law precedents have, in some circumstances, found standing despite no allegation of concrete injury, Plaintiffs failed to cite any case in which an Ohio court has analyzed and found standing to exist on the basis of a federal statute despite the absence of an alleged injury-in-fact. *Id.* at *8. Accordingly, to the extent the "statutory standing" doctrine constitutes an exception to the traditional principles of standing in Ohio, the Court of Appeals declined to extend that exception to this circumstance involving the application of a federal statute. To find statutory standing in this case, the Court of Appeal stated that it would need to find that Congress intended to abrogate the Ohio common law requirements. *Id.* at *9. However, there was no indication that Congress intended the pertinent FCRA statute to supplant the traditional requirements of standing under Ohio state law. Further, the Court of Appeals opined that such a finding would be improper as it would permit Congress to affect the parameters of standing under Ohio law, even though it was well-settled that Ohio law determines standing in Ohio state law forums. *Id.* Finally, the Court of Appeals determined that permitting Congress to abrogate Ohio common law standing principles, even though Congress cannot abrogate essentially the same principles in federal courts, would constitute a significant anomaly. *Id.* at *10. Accordingly, the Court of Appeals found that the trial court correctly determined that Plaintiffs lacked standing to sue Defendant for its alleged violations of FCRA procedural requirements.

***Stewart, et al. v. Woods Cove,* 2017 Ohio App. LEXIS 4700 (Ohio. App. 8th Dist. Oct. 27, 2017).** Plaintiffs, a group of landowners whose property tax delinquencies had been certified by the Treasurer of Cuyahoga County and then sold to Defendant Woods, filed a putative class action and sought relief in the form of a declaratory judgment, permanent injunction, writ of mandamus, and damages. *Id.* at *2. The trial court dismissed Plaintiff's claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. *Id.* at *7. On Plaintiffs appeal, the Ohio Court of Appeals reversed and remanded. *Id.* at *14. Plaintiffs argued that the trial court improperly determined that the claims were not ripe for adjudication because foreclosure actions had not yet been filed. The trial court reasoned that the constitutional arguments raised by Plaintiffs could be raised if a foreclosure case was filed, and it agreed with Defendants that Plaintiffs' claims were speculative and premature. The Court of Appeals ruled that when considering the allegations in the complaint as true and construing all reasonable inferences in favor of Plaintiffs, it did not appear that Plaintiffs could prove no set of facts that entitled them to the relief requested. Hence, the Court of Appeals held that the trial court erred in dismissing Plaintiff's claims because Plaintiffs made specific constitutional and statutory challenges to the tax certificate statute and

tax certificate sale/purchase agreements, and claimed that they had been damaged by them. The Court of Appeals concluded that the trial court erred in granting Defendants' motions to dismiss in light of the liberal pleading standard that disfavored of motions to dismiss. *Id.* at *12. Plaintiff also asserted that the trial court erred because it failed to exclude evidence outside of the complaint and failed to provide notice to the parties that it was going to consider such evidence and essentially treated the motions to dismiss as motions for summary judgment. *Id.* at *10. The Court of Appeals agreed and opined that the trial court erred when, without notice to the parties, it effectively considered factual issues outside the pleadings and improperly determined that no foreclosure actions had been brought against the properties at issue. *Id.* at *13. In its ruling on the motions to dismiss, the trial court based its determination of the ripeness of Plaintiffs' claims on the factual issue of whether foreclosure actions had been brought against the property owners. The Court of Appeals found that the trial court committed reversible error when it considered factual issues outside the pleadings and improperly determined that no foreclosure actions had been brought against the properties. Accordingly, the Court of Appeals reversed and remanded.

(xix) Oklahoma

***Truel, et al. v. A. Aguirre LLC,* 2017 Okla. LEXIS 108 (Okla. Dec. 19, 2017).** Plaintiffs, a group of alcoholic beverage consumers, filed complaints alleging that Defendants – a group of restaurants and hospitality businesses – violated § 576(B)(2) of the Oklahoma Beverage Act, which imposed a 13.5% sales tax on mixed alcoholic beverages. Plaintiffs contended that Defendants failed to combine the retail sale price with the tax in their advertised prices and overcharged Plaintiffs by 13.5%. Plaintiffs sought a declaratory judgment that Defendants violated § 576(B)(2). The trial court ruled that § 576(B)(2) required Defendants to include the price of the drink and the 13.5% tax in the advertised prices of mixed beverages. *Id.* at *5. The trial court thereafter issued an order certifying its rulings on the consolidated cases for immediate interlocutory appeal. On Defendants' interlocutory appeal, the Supreme Court of Oklahoma reversed, remanded, and ordered the trial court to dismiss Plaintiffs' complaints. The Supreme Court held that § 576(B)(2) was solely a tax statute and was not intended to protect consumers from having a tax listed separately from the price of the drink. *Id.* at 9. The Supreme Court reasoned that there was nothing in the statute that implied that the statute was written for the protection of consumers and under Plaintiffs' theory all retailers would be required to include sales taxes in advertised prices of products. Accordingly, the Supreme Court remanded and ordered the trial court to dismiss Plaintiffs' complaints.

(xx) Pennsylvania

***Cardinale, et al. v. R.E. Gas Dev., LLC,* 154 A.3d 1275 (Pa. Super. Ct. 2017).** Plaintiffs, a group of landowners, filed a putative class action against Defendant alleging that Defendant breached contracts with Plaintiffs. Defendant delivered its standard oil and gas lease to Plaintiffs. All of the standard leases were identical with the exception of the lessors' identities and property identifications, and the amount of pre-paid rental or bonus that was to be paid within 60 days of receipt of the signed lease, subject to Defendant's "inspection, approval of the surface, geology and title" of the land. *Id.* at 1277. Plaintiffs signed and returned the executed agreements. Plaintiffs allege that Defendant breached the contracts because after the 60 days expired, Defendant rejected the lease agreements and refused to pay Plaintiffs the bonuses or rents due. The trial court denied Plaintiffs' motion to certify a class on the grounds that common questions of law or fact did not predominate over individual questions. The trial court reasoned that the finder of fact would have to analyze each property in question and the circumstances on refusal to pay the bonus in order to determine whether Defendant breached the contracts. On appeal, the Pennsylvania Superior Court ruled that the trial court abused its discretion and vacated the order denying class certification. The Superior Court held that the commonality requirement was satisfied because the common claim of the class was that Defendant "failed to pay the class members the stated 'bonus' within the specified time period and failed to reject the parties' agreement within the allowable deadline." *Id.* at 1289. The Court noted that Plaintiffs presented evidence that Defendant rejected 97% of the leases after the 60 day period had expired, so for the vast majority of the class, the fact-finder would not have to consider the title, surface, the trial Court's order or geology of the Plaintiffs' property. Accordingly, the Superior Court vacated and remanded.

***Dittman, et al. v. UPMC,* 2017 Pa. Super. LEXIS 13 (Pa. Super. Ct. Jan. 12, 2017).** Plaintiffs, a group of current and former employees, brought a class action alleging that Defendants 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"). Plaintiffs contended that their confidential personal information was stolen from Defendants' computer systems, and that a duty of care should be imposed on Defendants to protect the confidential information of its employees. *Id.* at *2. The trial court sustained Defendants' objections, and dismissed Plaintiffs' complaint. On appeal, the Pennsylvania Superior Court affirmed the trial court's decision. Plaintiffs argued that the trial court erred in finding that Defendant did not owe a duty of reasonable care in its collection and storage of the employees' information and data. *Id.* at *6. The Superior Court stated that employees and consumers alike derived substantial benefits from efficiencies resulting from the transfer and storage of electronic data. *Id.* at *7. The Superior Court opined that although breaches of electronically-stored data were a potential risk, this generalized risk does not outweigh the social utility of maintaining electronically-stored information. *Id.* at *9. The Superior Court held that it was unnecessary to require employers to incur potentially significant costs to increase security measures when there was no true way to prevent data breaches altogether. *Id.* at *10. Plaintiffs further claimed that the trial court erred when it dismissed their breach of contract claim after finding no implied contract existed between the parties. Specifically, the trial court found that Defendants did not agree to enter into an implied contract to protect Plaintiffs' personal information. The Superior Court agreed, and found that Plaintiffs did not give their information to Defendants for the consideration of its safe-keeping, but instead for employment purposes. *Id.* at *15. Thus, the Superior Court determined that no consideration supported an implied contract between the parties. Accordingly, the Superior Court held that the trial court did not err in dismissing Plaintiffs' breach of contract claim. The Superior Court therefore upheld the trial court's order dismissing Plaintiffs' complaint.

***Hites, et al. v. Pennsylvania Interscholastic Athletic Association,* 2017 Pa. Commw. Unpub. LEXIS 784 (Pa. Cmmw. Oct. 10, 2017).** Plaintiffs, a group of student athletes, filed a putative class action alleging that Defendant was negligent for failure to adequately implement baseline testing for concussions and educate schools regarding proper concussion protocols. *Id.* at *3. Plaintiffs sought damages from concussion-related injuries sustained during participation in high school sports that Defendant regulated. Defendant objected on the basis that Plaintiffs' complaint was legally insufficient. The trial court overruled Defendant's preliminary objections as to the negligence count. *Id.* at *20. On Defendant's interlocutory appeal, the Commonwealth Court of Pennsylvania affirmed. *Id.* at *2. Defendant asserted that Plaintiff failed to state a claim for which relief could be granted because Plaintiffs: (i) alleged claims that were non-justiciable because of the Safety in Youth Sports Act ("SYSA"); (ii) were barred from recovery because of the inherent risk/no duty rule; (iii) were unable to establish that Defendant owed any duty to Plaintiffs as a matter of public policy; and (iv) failed to plead facts to establish causation. *Id.* at *20. Defendant asserted that because of the duties imposed by SYSA, Plaintiffs' negligence claims involved non-justiciable issues that were reserved for the legislature. *Id.* at *46. Defendant argued that the trial court must not usurp the legislature's policy and authority by imposing duties clearly not required by statute. *Id.* The Commonwealth Court rejected Defendant's argument, noting that the SYSA did not mention Defendant and also provided that the SYSA shall not be construed to limit civil liability on the part of any school entity. *Id.* at *54. The Commonwealth Court also ruled that the trial court properly concluded that dismissal of Plaintiffs' negligence claims based upon the SYSA would be premature at this stage. *Id.* at *55-56. Second, Defendant argued that Plaintiffs' negligence claims must be dismissed pursuant to the "inherent risk/no duty rule" because the alleged injuries were inherent to the activities in which they occurred. *Id.* at *58. The Commonwealth Court disagreed. *Id.* at *64. The inherent risk/no duty rule provides that a Defendant owes no duty of care regarding risks that are common, frequent and inherent in an activity. However, Plaintiffs' claims did not relate to the specific concussions incurred, but rather focused on the consequences suffered because of Defendant's alleged pre-concussion and post-concussion negligent conduct. *Id.* at *65. Third, Defendant argued that the duties that Plaintiffs alleged could not be imposed on Defendant as a matter of public policy. *Id.* at *68. Defendant maintained that its relationship to Plaintiffs was significantly more remote than that of families, coaches, trainers, doctors, principals, and the school, and there was greater social utility achieved by having those more directly involved and qualified, ultimately responsible. *Id.* at *74. Furthermore, Defendant argued that imposing such a duty went against the legislative intent of the SYSA. *Id.* Defendant asserted that there were other more appropriate means in place to protect athletes and from which to seek recovery for failures to protect athletes. The Commonwealth Court rejected Defendant's position, ruling that it could not be established, at this

stage, that as a matter of public policy the duties Plaintiffs alleged may not be imposed on Defendant. *Id.* at *85. Finally, Defendant argued that Plaintiffs failed to adequately plead proximate cause. The Court ruled that the complaint supported the trial court's determination that Plaintiffs pled sufficient facts to allege that Defendant's pre-concussion and post-concussion acts or omissions were a substantial factor in bringing about the harm that Plaintiffs allegedly suffered. *Id.* at *93. Accordingly, the Commonwealth Court of Pennsylvania affirmed the decision of the trial court. *Id.*

***Kurach, et al. v. Truck Exchange,* 2017 Phila. Ct. Com. Pl. LEXIS 150 (Pa. Common Pleas Ct. April 20, 2017).** Plaintiffs, a group of homeowner's insurance policy owners, filed putative class actions involving identical policies issued by Defendant. *Id.* at *1. Plaintiffs each sustained homeowner damage that Defendant agreed was reasonably likely to require the services of a general contractor. *Id.* at *7. Plaintiffs did not carry out the repairs and the amount that Defendant paid did not include the costs of general contractor overhead and profit. Plaintiffs alleged that Defendant's insurance policies wrongfully excluded general contractor costs from the true meaning and value of "replacement cost," and by excluding general contractor costs from its definition of actual cash value, this ended up meaning replacement cost, minus depreciation and general contractor costs. Plaintiffs argued that this formulation was contrary to Pennsylvania insurance law. The policies provided that actual cash value settlements would not include estimated general contractor fees or charges unless the insured incurred and paid the fees and charges, but only if the law of the insured's state did not require that general contractor fees and charges be paid with the actual cash value settlement. *Id.* at *11. The Court agreed with Plaintiffs that Pennsylvania law required estimated general contractor overhead and profit to be included in actual cash value payments when the use of a general contractor was reasonably likely to be necessary to repair damage to a home. *Id.* at *21. Accordingly, the Court granted Plaintiffs' motions for summary judgment on their class claims. *Id.*

***Prince Law Offices, P.C., et al. v. McCausland, Keen & Buckman*, 2017 Pa. Super. Unpub. LEXIS 4617 (Pa. Super. Ct. Dec. 18, 2017).** Plaintiff, a law firm, hired Defendants to assist in a class action lawsuit against the City of Philadelphia through an independent contractor fee sharing agreement that included terms of compensation and a provision requiring that disputes be resolved by arbitration in accordance with the rules of the American Arbitration Association. *Id.* at *1. After the underlying lawsuit was settled, a dispute arose between the parties over the proper allocation of legal fees as a result of the respective law firms' efforts in prosecuting the class action. *Id.* at *2. The dispute was submitted to arbitration, and the arbitrator entered an award to Defendants that included a portion of the requested attorneys' fees and costs, administrative fees, and arbitrator compensation. Plaintiff filed a petition to vacate the arbitration award and Defendant filed a cross-petition to confirm the arbitration award. The trial court denied the petition to vacate arbitration award and granted the petition to confirm arbitration award. On appeal, the Pennsylvania Superior Court affirmed. The Superior Court explained that "arbitrators are the final judges of both law and fact, and an arbitration award is not subject to reversal for a mistake of either." *Id.* at *4. Therefore, "the award of an arbitrator is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award." *Id.* Plaintiff asserted that the arbitrator did not explain the basis of his determination in awarding compensation, attorneys' fees, and costs to Defendants. The Superior Court rejected this argument on the basis that the rules of the AAA provide that "the arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." *Id.* at *5. Thus, there was no requirement for the arbitrator to provide a reasoned award because the parties had agreed to a standard award plus a calculation of hours and rates. *Id.* Plaintiff also asserted that the arbitrator did not include calculations in the award to enable the parties to determine whether the award was accurate. The Superior Court determined that the arbitrator's partial final award clearly contained several pages of calculations of each party's billable hours, multiplied by the party's hourly rate, as well as applying a credit for sums already paid. *Id.* at *7. Plaintiff's final contention was that the arbitrator awarded attorneys' fees to Defendants when they were not successful or justified in their arbitration claim. *Id.* The Superior Court found that parties' agreement contained no provision requiring total victory. The Superior Court concluded that it could discern no error or abuse of discretion in the trial court's determination and none of Plaintiff's objections identified a fundamental flaw in the process that deprived Plaintiff of a fair hearing. Accordingly, the Superior Court affirmed the trial court's ruling.

***United Union of Roofers, Waterproofers, & Allied Workers, Local Union No. 37, et al. v. North Allegheny School District,* 2017 Pa. Commw. Unpub. LEXIS 271 (Pa. Commw. April 18, 2017).** Defendant, a school district, appealed an order of the trial court granting a preliminary injunction to Plaintiff, a union, enjoining Defendant from conducting background checks mandated by the Public School Code of 1991 and the Child Protective Services Law on Union members assigned to roofing projects on Defendant's property because they did not show that the workers will have "direct contact with children." *Id.* at *1. Defendant argued that the trial court erred in granting the preliminary injunction because Plaintiff failed to establish any of the legal prerequisites for injunctive relief. The Pennsylvania Commonwealth Court agreed, and reversed the trial court's ruling. Pursuant to the project manual between Fox Chapel Area School District and the Pennsylvania Roofing Co., each employee of Pennsylvania Roofing Co. was required to obtain criminal background checks as required by § 111 of the School Code, and § 6344 of the Child Protective Services Law prior to beginning projects. As a result of the background checks, 14 Union members were denied clearance to work on roofing projects. *Id.* at *3. Plaintiff sought a declaratory judgment that: (i) Defendant's members were exempt from the requirements of § 111 of the School Code and § 6344 of the Child Protective Services Law; (ii) the Criminal History Record Information Act prohibited school districts from refusing to employ Union's members based on criminal background checks; and (iii) Defendant's exclusion of Plaintiff's members was a violation of due process. *Id.* at *4. Plaintiff also sought a preliminary injunction to enjoin Defendant from disqualifying Plaintiff's members from projects based on criminal background checks. Plaintiff alleged that its members were exempt from background checks under Section 111(a.1) of the School Code, 24 P.S. § 1-111(a.1), and Section 6344(a.1) of the Child Protective Services Law, because they did not have "direct contact with children." *Id.* at *6. The trial court granted a preliminary injunction that: (i) allowed previously disqualified Union members access to Defendant's worksites; and (ii) prohibited Defendant from doing background checks on Union members unless the position applied for involved direct contact with children. In doing so, the trial court largely focused on the level of interaction between Plaintiff's members and children at Defendant's project sites and determined that Plaintiff was likely to succeed on the merits of its declaratory judgment action because its members did not have direct contact with children. *Id.* at *11. The Commonwealth Court disagreed, and found that by enjoining Defendant from performing the standard background checks, the trial court disturbed the status quo. The Commonwealth Court explained that the aim of a preliminary injunction is to preserve the status quo as it existed before the acts complained of, while a trial court decides on the merits of permanent injunctive or declaratory relief. *Id.* at *12. The Commonwealth Court stated that since at least 2011. Defendant had been doing background checks on employees of independent contractors required by § 111 of the School Code without ascertaining whether those employees had direct contact with children. *Id.* at *15-16. Therefore, requiring Defendant "to show a causal connection between any criminal offenses and the position for which employees are to work to justify an exclusion" did not preserve the status quo. *Id.* at *16. Instead, the injunction instituted a new status quo by revising Defendant's longstanding background check practices. Accordingly, the Commonwealth Court reversed the trial court's ruling granting the preliminary injunction.

(xxi) Texas

***Kamel, et al. v. Advocare International L.P.*, 2017 Tex. App. LEXIS 2635 (Tex. App. 5th Dist. Mar. 28, 2017).** Plaintiff, a former independent distributer, his attorney, and the attorney's law firm, appealed the trial court's finding that Plaintiffs brought baseless claims against Defendant and ordered them to pay Defendant $3,500 in attorneys' fees as a sanction. *Id.* at *1. On appeal, the Texas Court of Appeals upheld the trial court's order. Defendant sells nutrition and other health-related products exclusively through independent distributors. Plaintiff Kamel became a distributor with Defendant in March 2013. In late 2013, Defendant blocked Kamel's purchase of 800 boxes of gingerbread bars due to what it contended was suspicious activity and ultimately suspended Kamel's account. In December 2013, Kamel accused another distributor, Aly Gwin, of sending him a text message that made disparaging remarks about his race and national origin. *Id.* at *2. Gwin informed Defendant about Kamel's accusations and denied sending the text message, and Defendant investigated the matter and found no evidence of the alleged message. The investigation revealed that Gwin's phone did not contain or send the alleged text message. Defendant advised about the results of the examination of Gwin's phone, and Kamel responded that the "results were fabricated" and he had "100% proof that those texts were sent from her number." *Id.* Ultimately, Kamel refused to assist with Defendant's investigation and said his phone was broken while on vacation. Defendant concluded that Kamel sent the text message to himself and lied about it, and it terminated his distributorship agreement in January 2014. *Id.* at *3. Subsequently, Defendant

suspended the distributorship agreements of 55 distributors due to concerns that the distributors had violated Defendant's policies and procedures by stockpiling products and selling them on eBay. *Id.* Defendant also filed a petition for pre-suit discovery seeking to depose another distributor and to require him to produce certain documents. Kamel and the other distributor then filed a counter-petition in the same cause number as the petition for pre-suit discovery purporting to represent "[a]ll persons or entities who are Texas citizens and from January 31, 2014 to the present had their distributorships suspended or terminated by AdvoCare for alleged excessive purchases." *Id.* at *3-4. The class action petition alleged that Defendant breached its contract in connection with Kamel's purchase of the gingerbread bars, "promoted racism" against "distributors with an Egyptian heritage," and "supported by inaction" the racist text message allegedly sent to Kamel by Gwin. *Id.* at *4. Defendant moved for sanctions against Plaintiffs, contending the allegations were groundless. The trial court held an evidentiary hearing, at which Kamel stated that he did not have "100% proof" of the text message prior to filing the counter-petition. *Id.* at *5-6. Defense counsel stated that Defendant spent $5,000 on filing the motion for sanctions. The trial court granted Defendant's motion for sanctions in the amount of $3,500. *Id.* at *6. On appeal, Plaintiff raised three issues, including: (i) that the sanctions order was defective because it did not state with sufficient particularity the reason for the sanction; (ii) that there was insufficient evidence to support a finding of sanctionable conduct; and (iii) that there was no evidence to support the amount of the sanction. *Id.* at *10-11. As to the first issue, the Texas Court of Appeals found that although Plaintiff filed a motion for new trial in which he argued that the sanctions order was not supported by sufficient evidence, he did not argue that the sanctions order failed to comply with specificity rules. As a result, the Court of Appeals concluded that the issue was not preserved for appellate review. As to whether there was insufficient evidence to support the sanctions order, the Court of Appeals held that the trial court had before it evidence of Defendant's investigation showing Gwin did not send the text message from her phone, Kamel's refusal to cooperate with the investigation, and Kamel's admission that he did not have 100% proof Gwin sent the text message at the time he made that statement. *Id.* at *11. Based on the evidence, the Court of Appeals found it reasonable that the trial court could have concluded that the allegations of racism against Defendant did not have evidentiary support and were not likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. *Id.* Finally, as to Plaintiff's argument that "the testimony was too indefinite and insufficient to support the award" of sanctions, the Court of Appeals determined that Defendant presented evidence of $5,000 in attorneys' fees incurred as a result of their sanctionable conduct. The Court of Appeals therefore determined that the trial court's assessment of $3,500 in sanctions was not based on testimony too indefinite or insufficient to support an award. Accordingly, the Court of Appeals upheld the trial court's order granting sanctions.

***Redflex Traffic Systems v. Watson, et al.,* 2017 Tex. App. LEXIS 9391 (Tex. App. 2d Dist. Oct. 5, 2017).** Plaintiff filed a putative class action on behalf of a group of people who paid a fine under a red-light camera ordinance alleging common law misrepresentation and violations of state and federal law. *Id.* at *2, 3. Defendant filed a motion to dismiss under the Texas Citizens Protection Act ("TCPA") asserting that Plaintiff's claims against it were in response to the notice of violations it mailed to him and violated his right to exercise free speech and its right to petition. *Id.* at *10. Plaintiff argued that the TCPA did not apply to his claims because the notice of violation was neither an exercise of the right to free speech nor the right to petition and constituted commercial speech, which was not protected by the TCPA. *Id.* at *11. The trial court denied Defendant's motion to dismiss and did not give a basis for its ruling. *Id.* On Defendant's appeal, the Texas Court of Appeals ruled that Plaintiff's claims were exempt from application of the TCPA under the plain language of its commercial-speech exemption. *Id.* at *15. Therefore, the Court of Appeal affirmed the trial court's order denying Defendant's motion to dismiss.

(xxii) Washington

***Romney, et al. v. Franciscan Medical Group,* 399 P.3d 1220 (Wash. App. Feb. 21, 2017).** Plaintiffs, a group of medical professionals, filed a putative class action alleging wage violations. Defendant moved to compel arbitration pursuant to the parties' agreements. The trial court granted the motion and Plaintiff appealed in *Romney v. Franciscan Medical Group*, 349 P.3d 32 (2015), asserting that the arbitration agreement was unconscionable. *Id.* at *1. The Washington Court of Appeals ruled that the agreement was not unconscionable and affirmed the trial court's decision. *Id.* On remand, the trial court compelled individual arbitration, rather than class arbitration. *Id.* On Plaintiff's second appeal, the Court of Appeals reversed and remanded. Plaintiff argued that the trial court erred by determining whether the arbitration agreement permitted class arbitration and

asserted that this was an issue for the arbitrator to decide. The Court of Appeals disagreed and concluded that this was a threshold issue of arbitrability and was for the trial court to decide. *Id.* at *4. The Court of Appeals rejected Plaintiff's argument that Washington law required that an arbitrator decide the issue because it was covered by the substantive scope of the arbitration agreement. While the agreement incorporated the American Arbitration Association ("AAA") rules, the AAA rules only applied once a dispute is submitted to arbitration and not when it is pending before the trial court. *Id.* at *8. Accordingly, the Court of Appeals concluded that the trial court did not err in determining whether the agreement permitted class arbitration. *Id.* Plaintiff also argued that the agreements permitted class arbitration because it was implied by the failure of the parties to exclude it from the agreements. *Id.* at *9. The Court of Appeals disagreed, and ruled that the agreements did not permit class arbitration because they were silent on the issue and consent to commit to class arbitration could not be inferred from silence. *Id.* As such, Plaintiff failed to show that Defendant consented to class arbitration. *Id.* at *13. However, the Court of Appeals agreed that Defendant waived its contractual right to compel individual arbitration. *Id.* The Court of Appeals ruled that Defendant's motion to compel individual arbitration, rather than class arbitration of Plaintiff's claims, was improperly granted because Defendant waived its right to compel individual arbitration by its inconsistent conduct in the trial court and during the first appeal, and because its delay in asserting the right was prejudicial to Plaintiff. The Court of Appeals pointed to the fact that Defendant did not include any objections to class arbitration in its original motion to compel arbitration and did not mention individual arbitration. *Id.* at *15. Further, when discovery was addressed while the first appeal was pending, Defendant never hinted that it believed that class arbitration was unavailable under the arbitration agreements. *Id.* at *16. Instead, Defendant referred repeatedly to the putative class and opposed class discovery on the ground that a class had not been certified. *Id.* The Court of Appeals reasoned that Plaintiff suffered prejudice in the form of delay and litigation costs. *Id.* at *20. There was an approximately two-year delay between when Plaintiff brought suit and when Defendant first asserted its right to individual arbitration. As such, the Court of Appeals ruled that Defendant waived its right to object to the putative class proceeding to arbitration, and it reversed and remanded for the trial court to enter an order sending the putative class to a single arbitrator. *Id.* at *21.

***Washington Public Employees Association, et al. v. Washington Center For Childhood Deafness & Hearing Loss,* Case No. 49224-5-II (Wash. App. Oct. 31, 2017).** Several unions representing state employees appealed the trial court's order denying their motion for a permanent injunction preventing the state agencies from disclosing information about their employees in response to a public records request by the Freedom Foundation. *Id.* at 3. On appeal, the Washington Court of Appeals found that the trial court erred by denying the unions' motion for a permanent injunction preventing the release of state employees' names associated with their birthdates. The Court of Appeals explained that for a person named in a record to obtain an injunction preventing disclosure of public records under the Washington Public Records Act ("PRA"), the person must show: (i) the record in question specifically pertains to that person; (ii) an exemption applies; (iii) the disclosure would not be in the public interest; and (iv) disclosure would substantially and irreparably harm that party or a vital government function. *Id.* at 6. The Court of Appeals found that the purpose of the PRA was not served by the public disclosure of the information sought. The Court of Appeals thus held that although the PRA may allow the disclosure of the information, it does not justify the intrusion into the state employees' constitutionally protected expectation of privacy. *Id.* at 11. Moreover, the Court of Appeals determined that the public disclosure of birthdates would substantially and irreparably harm the state employees because the information would then be available to anyone, which would invade their constitutionally protected expectation of privacy, and expose them to on-going risk of identity theft and other potential personal harm. *Id.* at 12. The Court of Appeals found that the unions also had met their burden to satisfy the general requirements of a permanent injunction because: (i) the employees had a clear and equitable right because they have a constitutionally protected expectation of privacy; (ii) there was a well-grounded fear of immediate invasion of that right; and (iii) public disclosure of the information would result in actual and substantial injury. *Id.* at 12. Accordingly, the Court of Appeals reversed the trial court's order denying the permanent injunction and remanded for further proceedings.

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 2017 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 2017, 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

***Doran, et al. v. J.P. Noonan Transportation, Inc.,* 853 F.3d 66 (1st Cir. 2017).** Plaintiffs, a group of truck drivers, filed a putative class action in state court, raising a variety of statutory and common law claims. Defendants removed the matter to District Court pursuant to the CAFA. The District Court subsequently granted Defendants' motion for summary judgment as to all of Plaintiffs' statutory claims and all but one of Plaintiffs' common law claims. Shortly thereafter, the District Court issued an order in which it determined that "the jurisdictional amount is measured as of the time of removal, and that '[e]vents subsequent to removal that reduce the amount-in-controversy do not divest [the District Court] of CAFA jurisdiction.'" *Id.* at 68. Accordingly, the District Court concluded that it continued to retain "original jurisdiction over this action" even though its grant of partial summary judgment reduced the amount-in-controversy below $5 million. *Id.* Following a trial on the named Plaintiff's remaining common law claim, a jury ruled in favor of Defendant. The District Court then stated that the case should be remanded to state court. *Id.* Plaintiffs agreed with the District Court's suggestion of a remand, because "even though the [District] Court had original jurisdiction at the time the case was removed," the summary judgment ruling divested it of "original jurisdiction." *Id.* The District Court then remanded the case to state court. Plaintiffs appealed the District Court's order granting Defendants' motion for summary judgment issued before the case was remanded to state court. *Id.* at 69. The First Circuit noted that Plaintiffs' notice of appeal did not mention or even hint at any attempt to appeal the order. The First Circuit explained that Federal Rules of Appellate Procedure provide that a notice of appeal "must . . . designate the judgment, order or part thereof being appealed." *Id.* The First Circuit found that it had no basis to review an order not so designated. Plaintiffs' brief explained the order of remand designated in his notice as a "final judgment." *Id.* Although Plaintiff did not say so, the First Circuit opined that it could infer from Plaintiffs' description that his appeal was an effort to invoke the practice of reading a notice of appeal from the "final judgment" as effectively designating all interlocutory rulings that "merge in the judgment." *Id.* However, the First Circuit noted that if the order of remand is a final judgment, then it is a final judgment to which Plaintiffs affirmatively acquiesced. The First Circuit stated that if a party consents to a final judgment in order to appeal prior orders leading up to that judgment, the party may appeal those orders so long as it reserves the right to do so. *Id.* While an "unequivocal" statement of an intent to appeal may serve as sufficient evidence of such a reservation, the First Circuit held that Plaintiffs never voiced any such intention. *Id.* The First Circuit stated that even if it were to treat the remand order as the equivalent of a "final judgment," then it would be a judgment to which Plaintiffs consented without clearly reserving the right to appeal any ruling that may have merged into that judgment. *Id.* The First Circuit therefore dismissed Plaintiffs' appeal, without affirming or reversing the District Court's summary judgment ruling.

(ii) Second Circuit

***Boyd, et al. v. NYCTL 1996-1 Trust*, 2017 U.S. App. LEXIS 10598 (2d Cir. June 15, 2017).** Plaintiffs, a group of residents of New York City, claimed that the way New York City collected debts arising from unpaid water bills violated the Fair Debt Collection Practices Act ("FDCPA") and various state laws. The District Court dismissed the FDCPA claim on summary judgment (*Boyd I)* and declined to exercise supplemental jurisdiction over the state law claims. Plaintiffs next sued a nearly identical group of Defendants ("*Boyd II*") asserting RICO and state law claims based on the same facts. Plaintiffs asserted jurisdiction both on the basis of their federal RICO claim and the CAFA. The District Court dismissed all their claims pursuant to Rule 12(b)(6) on *res judicata* grounds. Plaintiffs appealed dismissal of the state law claims. On appeal, the Second Circuit affirmed the District Court's ruling. The Second Circuit explained that when there has been a "final judgment on the merits," *res judicata* prevents a Plaintiff in the initial case from bringing a second lawsuit against the same Defendants arising from

the same "transaction, or series of connected transactions" in order to "relitigate issues that were or could have been raised" in the first case. *Id.* at *2. Plaintiffs did not dispute that the parties in both *Boyd* cases were the same, or that the claims in both arose from the same set of transactions. *Id.* Plaintiffs argued that the decision in *Boyd I* was not a final judgment because dismissal was without prejudice, that Defendants waived their right to argue *res judicata*, and that the issue of federal jurisdiction under the CAFA could not have been raised in *Boyd I. Id.* at *3. Plaintiffs argued that Defendants waived their *res judicata* defense by asking the District Court in *Boyd I* to dismiss the state law claims for lack of jurisdiction. *Id.* The Second Circuit opined that it may be that *res judicata* generally does not apply when Defendants acquiesce to the splitting of claims, but Defendants' motion to dismiss in *Boyd I* did not constitute acquiescence or waiver. *Id.* The Second Circuit found that Defendants took the position that Plaintiffs could try to bring their claims in state court, not that they could try again in the District Court. *Id.* Finally, Plaintiffs argued that they could not have raised CAFA jurisdiction in *Boyd I* because there was no "reasonable probability" that they could claim at least $5 million in damages, as required by the CAFA. *Id.* at *4. The Second Circuit disagreed, finding that Plaintiffs' initial complaint in *Boyd I* alleged that named class members were overcharged by thousands of dollars, that there were thousands of other class members, and that the claims of named Plaintiffs were typical of the claims of the other class members. *Id.* Accordingly, the Second Circuit held that there was a "reasonable probability" that Plaintiffs' damages totaled at least $5 million, and Plaintiffs could have invoked jurisdiction under the CAFA in *Boyd I. Id.* Accordingly, the Second Circuit affirmed the District Court's ruling dismissing Plaintiffs' claims.

***Ramirez, et al. v. Oscar De La Renta,* 2017 U.S. Dist. LEXIS 72781 (S.D.N.Y. May 12, 2017)**. Plaintiffs, a group of unpaid interns, filed a putative class action against Defendant alleging wage & hour violations of the New York Labor Law. *Id.* at *2. Defendant removed pursuant to the CAFA and Plaintiff moved to remand. *Id.* at *3. At the outset, the Court denied Plaintiff's motion, rejecting her argument that Defendant's removal, more than two years after the complaint was filed, was untimely. The Court ruled that the Second Circuit's "bright line rule" for the CAFA's time-requirements was not triggered until Plaintiff served Defendant with a pleading or document from which the amount-in-controversy could be ascertained. *Id.* at *4. The Court rejected Plaintiff's argument that Defendant failed to apply a "reasonable amount of intelligence" by failing to investigate or review its records to determine the number of interns in the proposed class (approximately 600), as Defendant had no duty to investigate whether the case was removable. *Id.* at *7. The Court ruled that Defendant had no obligation to look beyond pleadings and other papers from Plaintiff to ascertain removability. *Id.* at *8. Similarly, the Court rejected Plaintiff's argument that Defendant should have ascertained removability based upon Plaintiff's discovery requests, noting again that it was Plaintiff's duty to provide such information. *Id.* at *9. The Court also rejected Plaintiff's argument that Defendant should have investigated the amount-in-controversy earlier in litigation, as this ran contrary to the policy of the CAFA to encourage Plaintiffs to estimate damages early in litigation. *Id.* at *11. The Court ruled that Defendant established the CAFA's jurisdictional minimum of $5 million. *Id.* The Court rejected Plaintiff's argument that remand was proper under the local controversy and home-state exceptions, as Plaintiff failed to present any evidence that more than two-thirds of the putative class members were citizens of New York. *Id.* at *21. The Court also rejected Plaintiff's argument that the interest of justice exception applied and warranted remand, as Plaintiff had not established the threshold requirement that one-third of the class were citizens of New York. *Id.* at *24. The Court ruled that the national interests surrounding the use of unpaid interns in international businesses and the potentially national composition of the proposed class weighed heavily against remand. *Id.* Accordingly, the Court denied Plaintiff's motion to remand.

(iii) Third Circuit

***Archavage, et al. v. Professional Account Services,* 2017 U.S. Dist. LEXIS 46348 (M.D. Pa. Mar. 29, 2017).** Plaintiff brought an action in state court asserting Pennsylvania claims for unfair and deceptive debt collection activities on behalf of himself and other persons similarly-situated under: (i) the Fair Credit Extension Uniformity Act (FCEUA"); (ii) common law fraud; (iii) the Unfair Trade Practices and Consumer Protection Law; (iv) the Wiretapping and Electronic Surveillance Control Act; and (v) for unjust enrichment. *Id.* at *1. Defendant removed the action on the basis of subject-matter jurisdiction pursuant to the CAFA. Plaintiff filed a motion to remand, which the Court granted. Plaintiff alleged that Defendant conducted collection activity for unpaid medical bills under the guise of being the original creditor, wrongfully cloaking itself with the identity of the creditor and referring to itself as the original creditor. *Id.* at *2. Plaintiff further alleged that in an attempt to ascertain information about the outstanding hospital bills, Defendant made a telephone call to his workers' compensation

carrier's third-party administrator, unlawfully recorded the telephone call, failed to identify herself as a debt collector, falsely claimed that she was calling from the hospital, requested and received the name and contact information of the workers' compensation claims adjuster, and failed to secure the appropriate consent from Plaintiff. *Id.* at *3. Plaintiff's complaint explicitly stated that the total amount-in-controversy was $5 million or less, and that the members of the class were less than or equal to 100 in number. *Id.* at *4. Defendant contended that Plaintiff strategically fashioned the pleadings to avoid federal jurisdiction. Defendant maintained that it is a Tennessee corporation with a principal place of business located in Tennessee and that it had no physical presence in Pennsylvania. However, the Court opined that Plaintiff asserted that Defendant "either has its principal place of business in Pennsylvania, or does sufficient business in, or has sufficient minimum contacts with, or intentionally avails itself of the markets of the Commonwealth of Pennsylvania through its business operation in Pennsylvania." *Id.* at *9. Since Defendant admitted in its removal brief that it "has a business office located at c/o Corporation Service Company, 2595 Interstate Drive, Suite 103, Harrisburg, PA 17110," the Court found that Defendant sufficiently proved that it was a corporation organized under the laws of Tennessee. *Id.* Further, since Defendant failed to submit any proof that Tennessee and not Pennsylvania was its principal place of business, it was left to decide the issue based on Plaintiff's uncontradicted allegation that Defendant's principal place of business was Pennsylvania. *Id.* at *10. The Court stated that under the circumstances, and resolving all doubts in favor of remand, it therefore found that Defendant failed to prove diversity of citizenship. *Id.* As to the amount-in-controversy, Defendant submitted that Plaintiff's settlement demand of $45,000 represented the value of Plaintiff's claims and all class members' claims. *Id.* at *12. However, the Court stated that Defendant previously offered a settlement amount of $8,000 on one occasion and $11,000 on another occasion. The Court found that the offers of settlement multiplied by 100 potential class members fell short of the threshold to invoke federal jurisdiction even if attorneys' fees and punitive damages were added. Therefore, the Court concluded that Defendant could not prove that removal on the basis of amount-in-controversy was warranted. *Id.* at *13. Finally, Defendant contended that Plaintiff's complaint alleged that Defendant violated the FCEUA, which mirrors the FDCPA, and therefore federal question jurisdiction should be invoked. However, the Court found that Defendant made no argument supporting federal question jurisdiction other than to conclude that the facts as pled by Plaintiff supported federal court jurisdiction based upon diversity of citizenship "and/or" a federal question. *Id.* at *14. The Court noted that Plaintiff's complaint did not request a ruling on the FDCPA or any other federal law. Accordingly, the Court held that Defendant failed to demonstrate that it had original jurisdiction, and thereby remanded the action.

***Ellis, et al. v. Montgomery County,* 2017 U.S. Dist. LEXIS 12128 (E.D. Pa. Jan. 27, 2017).** Plaintiffs, a group of inmates, brought 0061 putative state law class action on behalf of themselves and all others whose arrest records and personal information were made available through the inmate locator maintained by Defendants Montgomery County and the Montgomery County Correctional Facility ("MCCF"), in violation of the Pennsylvania Criminal History Records Information Act ("CHRIA"). Defendants filed a motion to dismiss for lack of subject-matter jurisdiction, arguing both that Plaintiffs did not have standing to bring the lawsuit and that two mandatory exceptions to CAFA-based jurisdiction – the "home state" exception and the "local controversy" exception – required the Court to decline jurisdiction over this matter. *Id.* at *3. The Court granted Defendants' motion. The Court found that through discovery, Defendants demonstrated that more than 90% of inmates at the MCCF reported a Pennsylvania address when they were booked. *Id.* at *20. The Court stated that Defendants need not prove the citizenship of every member of the class with precision; rather, they must only show that was is more likely than not that more than two-thirds of Plaintiffs are citizens of Pennsylvania. *Id.* at *20-21. Given that there was no evidence to suggest that individuals booked at the MCCF were unusually transient or that the class members who were Pennsylvania residents migrated to other states after their release from the MCCF, the most likely conclusion from Defendants' sample was that the proportion of class members still residing in Pennsylvania after their release from the MCCF approximated the 90% share of the MCCF inmates who reported a Pennsylvania address at their booking. The Court stated that the proposed class consisted of persons booked in a local jail in Pennsylvania located in a suburban county that does not border another state, and Plaintiffs had not provided evidence that Pennsylvania had any major event to cause widespread displacement to other states during the relevant time period. *Id.* at *22. Considering the record as a whole, the Court found that Defendants showed by a preponderance of the evidence that more than two-thirds of the members of the proposed class were citizens of Pennsylvania. Since it was undisputed that the proposed class exceeded 100 members and that Defendants were citizens of Pennsylvania, the finding that more than two-

thirds of the class members were also citizens of Pennsylvania thereby triggered CAFA's home state exception and required the Court to decline jurisdiction. *Id.* at *23. Accordingly, the Court granted Defendants' motion to dismiss.

***Ramirez, et al. v. Vintage Pharmaceuticals,* 852 F.3d 324 (3d Cir. 2017).** Plaintiffs, a group of 113 birth control users, filed an action in state court asserting that Defendant made packaging errors on pills. Plaintiffs were residents of 28 different states. Plaintiffs' complaint divided the 113 Plaintiffs into three categories based on their state residency. Plaintiffs collectively "requested a jury trial" and "an award of damages in such amount to be determined at trial." *Id.* at *327. Defendant removed the action as a "mass action" under the CAFA. Plaintiffs sought to remand on the ground that they had not presented a "mass action" within the purview of the CAFA. The District Court ultimately granted the motion to remand, concluding that the "CAFA precludes federal jurisdiction in this matter because Plaintiffs did not propose to try their claims jointly." *Id.* On appeal, the Third Circuit noted that "claims [that] have been consolidated or coordinated solely for pretrial proceedings" will not qualify as a mass action under the CAFA. *Id.* at *328. The Third Circuit found that for purposes of determining whether an action qualifies as a mass action, a proposal for a joint trial may be either explicit or implicit. The Third Circuit further explained that here, Plaintiffs gave three explicit indications in the complaint that they proposed a joint trial, including: (i) Plaintiffs "respectfully requested a jury trial" and never multiple or separate trials; (ii) Plaintiffs sought "an award of damages in such amount to be determined at trial;" and (iii) Plaintiffs warned Defendant that if they failed to enter an appearance and file their defenses and objections to Plaintiffs' claims, "a judgment" may be entered against them. *Id.* at *329. Further, the Third Circuit noted that Plaintiffs specified that their "claims arise out of a common set of operative facts" and that these facts are "common to all counts." *Id.* The Third Circuit determined that these instances of singular language, taken together, provide strong evidence of a proposal for a joint trial. The Third Circuit found that the structure of Plaintiffs' complaint also implied that they proposed to try all 113 of their claims jointly, and when a single complaint joins more than 100 separate claims involving common questions of law and fact, there is a presumption that those Plaintiffs have implicitly proposed a joint trial. *Id.* at *330. Finally, the Third Circuit noted that a clear and express statement in the complaint evincing an intent to limit coordination of claims to some sub-set of pre-trial proceedings would effectively shield this action from removal under the CAFA. However, the Third Circuit concluded that the language Plaintiffs ultimately chose to include in their complaint was far from precise or definitive enough to signal their intent to limit coordination to pre-trial matters. The Third Circuit held that Defendant met its burden to prove that Plaintiffs meant to try their claims jointly, and thereby reversed the District Court's order remanding the action.

***Truglio, et al. v. Planet Fitness, Inc.*, 2017 U.S. Dist. LEXIS 133105 (D.N.J. Aug. 21, 2017).** Plaintiff filed a class action in state court alleging that Defendants' membership cancellation policy violated the New Jersey Truth-in-Consumer Contract Warranty and Notice Act ("TCCWNA") and various other state law statutes. Defendants removed the matter under the CAFA, asserting that the amount-in-controversy exceeded $5 million. The Court then granted Defendants' motion to dismiss all aspects of the claim but Plaintiff's TCCWNA claim. Plaintiff's TCCWNA claim would result in a $100 statutory remedy per class member. The Court subsequently ordered Defendants to show cause whether subject-matter jurisdiction still existed pursuant to the CAFA. Defendants submitted declarations from its legal manager and managing member and operator. *Id.* at *5. The first declaration stated that there were a total of 71,569 membership agreements for the three Defendant Plant Fitness gyms in New Jersey that were the same as or substantially similar to the agreement signed by Plaintiff in that they contained the same cancellation provision that Plaintiff alleged to be misleading and were signed during the putative class period between September 28, 2009, and September 28, 2015. *Id.* The second declaration stated that there were a total of 61,749 membership agreements for the nine Defendant Fit To Be Tied-operated New Jersey gyms that were the same or substantially similar to the agreement signed by Plaintiff in that they contained the same cancellation provision that Plaintiff contended to be misleading and were signed during the putative class period between September 28, 2009, and September 28, 2015. *Id.* at *6. The Court concluded that Defendants established, by a preponderance of the evidence, that they met the CAFA's amount-in-controversy requirement because, based on the combined membership number of 133,318 for the three gyms operated by Defendant Planet Fitness and nine gyms operated by FTBT in New Jersey, an award of $100 in statutory damages to each class member would result in an aggregate award of more than $13 million, thereby

exceeding the CAFA's $5 million threshold. *Id.* at *7. Accordingly, the Court held that it had subject-matter jurisdiction over the case pursuant to the CAFA.

***Watson, et al. v. Prestige Delivery Systems, Inc.,* 2017 U.S. Dist. LEXIS 21665 (W.D. Pa. Feb. 16, 2017).** Plaintiffs, a group of delivery drivers, filed a class action in state court alleging that Defendant improperly classified drivers as independent contractors in violation of Pennsylvania state labor laws. Plaintiffs moved for class certification of a class including all drivers from September 10, 2006 to the present. After Plaintiffs' motion was granted (and a class was certified of all persons who are or were Pennsylvania residents who worked for Defendant as package pick up and delivery drivers in Pennsylvania for one week or more, and who were designated by Defendant as 'independent contractors' during the period of September 10, 2006 to the present), Defendant sought to remove the case. *Id.* at *3-4. Defendant asserted that the matter should be removed under the CAFA because the amount-in-controversy exceeded $5 million. Plaintiffs argued that Defendant's removal was untimely. Plaintiffs asserted that Defendant failed to remove the action within the 30 day period prescribed by 28 U.S.C. § 1446(b). Defendant claimed that it was not on notice that the putative class period ran from 2006 to the present, and thus was not aware that the amount-in-controversy exceeded $5 million, until the final class certification order on November 7, 2016. *Id.* at *5. The Court stated that the record clearly belied Defendant's claim, because Plaintiffs' motion for remand showed that all iterations of their complaint and motion for class certification defined the class as extending from "September 10, 2006 to the present." *Id.* at *6. The Court found that these litigation documents put Defendant on notice that the class period extended from 2006 to the present. The Court held that because Defendant knew that Plaintiffs sought to certify a class that covered the period 2006 to the present – and that the amount-in-controversy exceeded $5 million, years before it filed its removal notice – removal was not timely. *Id.* at *10. Accordingly, the Court granted Plaintiffs' motion to remand.

(iv) Fourth Circuit

***Hamilton, et al. v. Raleigh General Hospital, LLC*, 2017 U.S. Dist. LEXIS 29377 (S.D.W.Va. Mar. 2, 2017).** Plaintiff, a hospital patient, filed an action in state court alleging that Defendant overcharged her and others similarly-situated for copies of medical records in violation of West Virginia law. Defendants removed the action pursuant to the CAFA, asserting that the amount-in-controversy exceeded $5 million. Plaintiff moved to remand on the basis that: (i) Defendants failed to prove that the amount-in-controversy exceeded $5 million; (ii) that the "home state" or "local controversy" exceptions to the CAFA were applicable, as at least two-thirds of the plaintiff class members were West Virginia residents, Raleigh General is a West Virginia citizen and is the primary Defendant, and the events took place in West Virginia; (iii) that a discretionary CAFA exception should be applied because remand was in the interest of justice; and (iv) that removal was untimely. *Id.* at *8. Plaintiff's proposed class included all persons who requested copies of their medical records from Defendants and were invoiced for the services provided by Defendants to obtain their medical records in excess of the amount allowed by West Virginia law. *Id.* at *5. Defendants asserted that they serviced approximately 80,000 requests for records made to health care providers in West Virginia by patients or patients' attorneys and that the statutory penalties associated with the alleged violations, based on the same state-wide records, totaled at least $64 million. *Id.* at *5-6. Plaintiff argued that the complaint was brought only on behalf of Raleigh General patients who sought records. *Id.* at *10. Plaintiff also asserted that Defendants' amount-in-controversy calculations included the entirety of fees charged, rather than only the amounts charged in excess of the legally permitted fees, and by failing to distinguish between unlawful and lawful charges, Defendants provided an irrelevant number. *Id.* at *10-11. The Court found that Plaintiff's proposed class only included individuals or their representatives who sought medical records from Raleigh General during the relevant period and were charged excessive fees. Therefore, the Court concluded that Defendants' averments regarding the total number of medical records requests invoiced in the state could not support a finding that the amount-in-controversy exceeded $5 million. *Id.* at *11. Accordingly, the Court found that there was no need to address the remaining arguments presented by Plaintiff in favor of remand. The Court therefore granted Plaintiff's motion to remand.

***Scott, et al. v. Cricket Communications,* 865 F.3d 189 (4th Cir. 2017).** Plaintiff purchased two cellular phones from Defendant that he alleged were locked and therefore unusable. Plaintiff filed a putative class action in state court alleging that Defendant's actions violated Maryland's express warranties and implied warranties of merchantability and fitness for a particular purpose and the Magnuson-Moss Warranty Act ("MMWA"). Plaintiff sought to certify a class of all Maryland citizens who purchased a mobile telephone from Defendant that was

locked between July 12, 2013 and March 13, 2014. *Id.* at 192. Defendant removed the case to the CAFA. Defendant asserted that during the relevant period, customers purchased at least 50,000 handsets that were shipped to and activated in Maryland. *Id.* Defendant applied a conservative estimate of $200 per phone and asserted that "the total amount-in-controversy is, at a minimum, $10,000,000." *Id.* Plaintiff moved to remand the case, arguing that Defendant did not satisfy its burden to allege jurisdiction under the CAFA because the class it described in its notice of removal was broader than Plaintiff's defined class. According to Plaintiff, Defendant's assertion that it sold 50,000 phones that were shipped to and activated in Maryland failed to meet the CAFA's requirements because the proposed class only consisted of Maryland citizens who purchased a phone. *Id.* Defendant's opposition alleged that Defendant's records indicated that between July 12, 2013 and March 13, 2014, customers who listed addresses located in Maryland on their accounts purchased at least 47,760 locked handsets. *Id.* Using the conservative estimate of $200 per phone, Defendant asserted that the revised amount-in-controversy was $9,552,000, still well above the CAFA's threshold. *Id.* at 193. Defendant urged the District Court to make the "'reasonable inference" that the vast majority of Defendant's Maryland customers were Maryland citizens. *Id.* at 194. The District Court declined to do so and granted Plaintiff's motion to remand. The District Court found that, although Defendant sufficiently alleged federal jurisdiction under the CAFA, it failed to prove jurisdiction by a preponderance of the evidence. Although the District Court concluded that Defendant failed to prove federal jurisdiction, it did not make any finding of fact as to the amount-in-controversy. On appeal, Defendant maintained that the evidence showed it was more likely than not that the putative class included more than 100 members and the amount-in-controversy exceeded $5 million. *Id.* The Fourth Circuit stated that whether remand was appropriate turned on whether the District Court had subject matter jurisdiction under the CAFA. *Id.* at 195. The Fourth Circuit agreed with the District Court that Defendant's initial statement that it sold at least 50,000 telephones that were shipped to and activated in Maryland during the relevant time period was sufficient to allege jurisdiction under the CAFA. However, the Fourth Circuit concluded that although Defendant assertion was broader than the proposed class, that did not, as Plaintiff argued, make the notice of removal "incurably defective." *Id.* The Fourth Circuit noted that in many removal cases, a Defendant's allegations relied on reasonable estimates, inferences, and deductions; therefore, it found Defendant's evidence was over-inclusive and was not dispositive. The Fourth Circuit opined that a removing Defendant can use over-inclusive evidence to establish the amount-in-controversy so long as the evidence shows it is more likely than not that "a fact-finder might legally conclude that" damages would exceed the jurisdictional amount. *Id.* at 196. The Fourth Circuit thus ruled that the District Court committed legal error in disregarding Defendant's evidence as over-inclusive, and it therefore declined to engage in appellate review to determine whether Defendant met its burden to prove jurisdiction. Accordingly, the Fourth Circuit vacated the District Court's judgment and remanded for reconsideration.

(v) Fifth Circuit

***Haynes, et al. v. Valero Marketing & Design,* 2017 U.S. Dist. LEXIS 59495 (S.D. Tex. April 19, 2017).** Plaintiffs brought a putative class action arising out of a water contamination event in the City of Corpus Christi, Texas that resulted in a four-day ban on the use of municipal tap water (the "contamination event"). Plaintiffs, a group of Corpus Christi individuals and businesses, filed suit in state court alleging that Defendants' negligent conduct caused the contamination event, and seeking a temporary restraining order and damages. Plaintiffs asserted state law claims against Defendants for negligence, gross negligence, negligence *per se*, strict liability for ultra-hazardous activity, public and private nuisance, and trespassing. Defendants removed the action, alleging jurisdiction over Plaintiffs' claims under the CAFA on the basis that: (i) it purports to be a class action, (ii) the amount-in-controversy exceeded $5,000,000; (iii) a member of the class of Plaintiffs is a citizen of a different state; (iv) no Defendants are states, state officials, or government entities; and (v) the putative class exceeded 100 members. *Id.* at *4. Plaintiffs filed a motion to remand contending that the matter fell within the CAFA's local controversy exception. Defendant urged the Court to deny Plaintiffs' motion to remand solely on the basis of its allegation that Plaintiffs "have failed to allege specific facts regarding the conduct of any local Defendant." *Id.* at *8. Plaintiffs asserted that the allegations in their complaint satisfied Texas' notice pleading standard, and that "the live pleadings" and "extrinsic, publicly available evidence" in this case showed "that Defendants each had a role in the [contamination event]." *Id.* As to the merits of Plaintiffs' motion to remand, the only element of the "local controversy" exception at issue between the parties was § 1332(d)(4)(A)(i)(II)(bb), which demands that the alleged conduct of at least one local Defendant form a "significant basis of all the claims asserted." *Id.* at *9. The Court noted that Plaintiffs sued five Defendants, at least two of whom the parties agreed

were proper Defendants and Texas citizens, and Ergon, a Mississippi Defendant. *Id.* The Court stated that if the alleged conduct of at least one proper Defendant with Texas citizenship "forms a significant basis for the claims asserted by the proposed plaintiff class," Plaintiffs therefore satisfied their burden to show that the "local controversy" exception to the CAFA applied. *Id.* Plaintiffs alleged that Defendants' conduct caused the backflow incident at the plant in Corpus Christi. The Court held that this allegation was at the root of Plaintiffs' claims of negligence, gross negligence, negligence *per se*, strict liability for ultra-hazardous activity, public and private nuisance, and trespassing against Defendants. *Id.* The Court opined that Plaintiffs' live complaint detailed a series of allegations relating to the operation of Defendants' plant, and satisfied their burden to show that the local Defendants' conduct "forms a significant basis for the[ir] claims" under § 1332(d)(4)(A)(i)(II)(bb) irrespective of any extrinsic evidence. *Id.* at *10. The Court found that Plaintiffs directly identified the plant as the site of the contamination event, and pled that Defendants' negligent conduct in operation of the plant rendered them liable on a number of common law claims. Accordingly, the Court granted Plaintiffs' motion to remand.

(vi) Sixth Circuit

***Davenport, et al. v. Lockwood, Andrews, & Newman,* 2017 U.S. App. LEXIS 7273 (6th Cir. April 25, 2017)**. Plaintiffs, a group of residents of Flint, Michigan, filed a putative class action alleging negligence, intentional and negligent infliction of emotional distress, and unjust enrichment after they were exposed to lead from Flint's public water system. *Id.* at *2. The Flint River was not treated with corrosion-inhibiting chemicals that led to serious problems with the water. *Id.* Defendants were hired by Flint to advise with respect to using the Flint River as its water source. *Id.* Defendant removed the case under the CAFA. *Id.* The District Court remanded, finding that Plaintiffs met the requirements for the local controversy exception to the CAFA. *Id.* at *3. On appeal, the Sixth Circuit reversed on the basis that the local controversy exception did not apply to this case. *Id.* at *13. The parties agreed that the requirements of the first element of the local controversy exception was satisfied, but disputed whether the second element was satisfied. *Id.* at *6. The second element is satisfied if during the three-year period preceding the filing of that class action, no other class action was filed asserting the same or similar factual allegations against Defendants. *Id.* at *4. Plaintiffs argued that even though other similar class actions had been filed within the preceding-three years, the legislative intent of the CAFA was that "other class action" not include class actions filed within a single state. *Id.* at *5. The Sixth Circuit rejected this argument, reasoning that a plain-meaning reading of the text of the CAFA required a finding that the exception did not apply, as similar class actions had been filed. *Id.* at *7. The Sixth Circuit also found that Congress intended for the CAFA to be read broadly to grant federal jurisdiction, which supported the view that the local controversy exception did not apply. *Id.* at *11. Accordingly, the Sixth Circuit reversed the District Court's order remanding the action.

***Durham, et al. v. Cincinnati Children's Hospital Medical Center*, 2017 U.S. Dist. LEXIS 17897 (S.D. Ohio Feb. 8, 2017).** Plaintiff, a patient, brought a state court action alleging that Defendant used or allowed the use of a biologic medical device called Infuse in manners not specifically approved by the Food and Drug Administration ("FDA"), or "off-label use." Plaintiffs asserted that Plaintiffs' counsel had brought similar claims against Defendant on behalf of 185 known individuals, and that this action was on behalf of all those who have not yet acquired representation but have been affected. *Id.* at *3. Defendant removed the action on the basis of federal question jurisdiction under 28 U.S.C. § 1331 and pursuant to the CAFA. Plaintiff filed a motion for remand challenging both bases for jurisdiction. Specifically, Plaintiff argued that the federal law question was not substantial, and that it was not capable of resolution without disrupting the federal-state balance approved by Congress. *Id.* at *5. The Court agreed with Plaintiff that the federal issues presented in the case were not substantial to a degree that would grant the Court subject-matter jurisdiction. *Id.* at *6. Defendant also argued that the Court had jurisdiction over the matter pursuant to the CAFA. The Court noted that the CAFA gave it original jurisdiction over any class action in which the putative class consists of more than 100 members and the amount-in-controversy is in excess of $5,000,000. *Id.* Plaintiff conceded that these jurisdictional requirements were met, but argued that multiple exceptions to jurisdiction contained in CAFA applied. *Id.* at *9. The Court stated that under the CAFA, it must decline jurisdiction if greater than two-thirds of the members of all proposed classes in the aggregate are citizens of the state in which the action was originally filed and at least one significant Defendant is a citizen of the state in which the action was originally filed. *Id.* at *10. The Court explained that it must also decline jurisdiction if greater than two-thirds of the members of all proposed classes in the aggregate are citizens of the state in which the action was originally filed and all of the primary Defendants are citizens of that state. *Id.* The only Defendant in this case was a citizen of Ohio. Further, the Court

extrapolated from the available data that less than two-thirds of potential class members in the case were residents of Ohio. Accordingly, neither of the two CAFA exceptions contained in 28 U.S.C. § 1332(d)(4)(A)-(B) that would require the Court to decline to exercise jurisdiction applied here. *Id.* at *12. Additionally, the Court opined that despite its holding that the federal issues in the case did not rise to the level required to grant the Court federal question jurisdiction, the need to interpret the FDA regulations weighed in favor of the Court's exercising jurisdiction under the CAFA. *Id.* at *13. Finally, the fact that a substantial minority of potential Plaintiffs were from states other than Ohio also weighed in favor of the Court accepting jurisdiction. The Court held that this case was not a "local controversy" confined to Ohio; rather it was a multi-state class action with a geographically diverse set of Plaintiffs that had broad implications for future litigation across the country. Accordingly, the Court denied Plaintiff's motion to remand.

***Roberts, et al. v. Mars Petcare US, Inc.*, 2017 U.S. App. LEXIS 21926 (6th Cir. Nov. 2, 2017).** Plaintiff filed a class action in state court alleging that Defendant conspired with other pet food manufacturers, veterinarian clinics, and a retailer to employ a "prescription-authorization" requirement to sell pet food at above market prices in violation of the Tennessee Trade Practices Act. *Id.* at *2. Defendant removed the action by invoking diversity jurisdiction under the CAFA. *Id.* Plaintiff filed a motion to remand, which the District Court denied. On appeal, the Sixth Circuit reversed the District Court's decision and remanded for further proceedings. The Sixth Circuit stated that under the CAFA, a District Court may hear class actions with minimal diversity, such that only one Plaintiff and one Defendant need be citizens of different states, there are 100 or more class members, and an aggregate amount-in-controversy of at least $5 million. *Id.* at *3. Defendant is incorporated in Delaware and headquartered in Tennessee, and therefore a citizen of both states. The question before the Sixth Circuit therefore was whether the CAFA grants jurisdiction over a class action brought by a group of Tennessee citizens against a company that is a citizen of both Tennessee and Delaware. If the Sixth Circuit treated Defendant as a citizen of Tennessee and Delaware, the District Court lacked jurisdiction; however, if it treated Defendant as a citizen of Tennessee or Delaware, the District Court had jurisdiction. The Sixth Circuit opined that it must look to the statutory construction of the provision, which states that a corporation is a citizen of the state in which it was incorporated and the state of its principal place of business. *Id.* at *4. The Sixth Circuit found that since the passage of 28 U.S.C. § 1332(c)(1) in 1958, case law authorities have considered corporations simultaneously citizens of both states for diversity purposes, and therefore a District Court has no jurisdiction to hear a case between a citizen of a state and a corporation headquartered in the same state under the ordinary grant of diversity jurisdiction in § 1332(a)(1), even if the corporation was incorporated elsewhere. *Id.* Defendant argued that Plaintiff's complaint defined the putative class as "all persons in the State of Tennessee who purchased Prescription Pet Food" manufactured by Defendant, a category that, standing alone, would include non-Tennessee citizens. *Id.* at *8. Further, Defendant asserted that Plaintiff's complaint stated only that he was a resident of Tennessee and not a citizen of the state. *Id.* The Sixth Circuit noted that it must read the complaint as a whole and draw all reasonable inferences in Plaintiff's favor. The Sixth Circuit stated that the complaint also asserted that "the proposed class is strictly limited to citizens of Tennessee," and sought relief on behalf of "a Tennessee class" and "similarly-situated Tennessee consumers." *Id.* at *9. The Sixth Circuit found that read as a whole, the complaint necessarily provided that putative class members are Tennessee citizens and that they purchased prescription pet food from Defendant. Finally, the Sixth Circuit held that it could not exercise its power under Rule 19 to join another Defendant to the lawsuit in order to create federal jurisdiction. The Sixth Circuit opined that diversity jurisdiction must exist at the time of removal, and an act of joinder under Rule 19 would itself be an exercise of federal jurisdiction. In the absence of jurisdiction over the existing lawsuit, a District Court would have no power to join another party to the proceeding. *Id.* at *11. Accordingly, the Sixth Circuit reversed and remanded the District Court's ruling denying Plaintiff's motion to remand.

(vii) Seventh Circuit

***Barnes, et al. v. ARYZTA, LLC*, 2017 U.S. Dist. LEXIS 209018 (N.D. Ill. Dec. 20, 2017).** Plaintiff filed a class action in state court alleging that Defendant's use of a time clock with a fingerprint scanner violated the Illinois Biometric Information Privacy Act ("BIPA"). Defendant removed the action pursuant to the CAFA. Defendant contended that the time clock at issue did not collect or store an employee's fingerprint or any other biometric identifier or biometric information to establish any statutory liability under the BIPA on behalf of Plaintiff or a purported class. *Id.* at *2. Defendant further argued that Plaintiff could not succeed on his claims because he had not suffered any injury and was therefore not a "person aggrieved" by a violation of the BIPA, and would not

succeed on a claim for negligence under Illinois law. *Id.* After removal, Defendant moved to dismiss Plaintiff's complaint for lack of subject-matter jurisdiction based on the argument that Plaintiff lacked a concrete injury-in-fact sufficient to confer Article III standing pursuant to the U.S. Supreme Court's ruling in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016). *Id.* at *4. Defendant then withdrew the motion. Plaintiff filed a motion to remand the case, which the Court granted. The Court stated that the question at issue was what was the consequence of Defendant raising a *Spokeo* standing argument in a Rule 12(b)(1) motion to dismiss for lack of jurisdiction after having removed the case based on the representation that subject-matter jurisdiction existed, and then subsequently withdrawing its Rule 12(b)(1) motion. *Id.* at *5. Defendant insisted that because the Court had an independent obligation to satisfy itself of the existence of jurisdiction before passing on the merits of a claim, the Court should rule on whether Plaintiff had Article III standing regardless of whether some other threshold matter compelled remand. *Id.* The Court disagreed, and determined that the jurisdictional issue was "easily and readily" resolved based on the parties' post-removal agreement that federal jurisdiction was lacking. *Id.* at *7. Defendant asserted that it was not arguing in favor of Plaintiff having an Article III injury sufficient to confer federal jurisdiction but only taking the position that the issue need not be resolved at this time. *Id.* at *7-8. The Court explained that the problem with Defendant's position was that it negated the basis on which Defendant filed its removal petition because burden of proving federal jurisdiction was on Defendant, the party which removed the case. *Id.* at *8-9. The Court stated that it would decline to decide whether there was Article III standing because neither party was willing to address the issue. On the one hand, Plaintiff sought remand and therefore did not want to argue he sustained a concrete injury-in-fact because then he would be conceding subject-matter jurisdiction. *Id.* at *10. Defendant, on the other hand, would likely argue that Plaintiff had not sustained an Article III injury, but had withdrawn any argument to that effect so as to avoid remand. *Id.* The Court reasoned that the difference between the two parties was that Plaintiff did not have to take a position on the standing issue while Defendant did, because Defendant bore the burden of establishing jurisdiction. *Id.* Since Defendant did not attempt to persuade the Court that federal jurisdiction existed, the Court granted Plaintiff's motion to remand to state court.

***Saskatchewan Mutual Insurance Co. v. CE Design LTE*, *et al.*, 865 F.3d 537 (7th Cir. 2017).** Defendant filed a class action in state court against Homegrown Advertising, a former Canadian marketing form, alleging that it sent junk faxes to it in violation of Illinois law and the Telephone Consumer Protection Act ("TCPA"). The parties settled that matter for $5 million plus interest and costs. However, Homegrown failed to notify Plaintiff, its insurance company, about the litigation, and instead hired its own counsel in Illinois. Defendant then filed a citation to discover Plaintiff's assets in an effort to recover some or all of the judgment from Plaintiff. The state court entered judgment for Defendant. Defendant also attempted enforcement of the Illinois judgment in Saskatchewan, where Plaintiff is based. The court in Saskatchewan ruled that it had not received sufficient notice of the Illinois judgment and thus that it was unenforceable. *Id.* at *539. The court in Saskatchewan also awarded Plaintiff costs of $1,000. Plaintiff then filed a motion to enforce the Saskatchewan judgment in the District Court. The District Court found the CAFA inapplicable because the class was a Defendant, and the Seventh Circuit has held that the CAFA only applies to Plaintiff classes. *Id.* at *540. As for diversity jurisdiction, the District Court concluded that no individual class member could satisfy the $75,000 amount-in-controversy requirement, and none of the exceptions to the general prohibition on aggregating claims applied. On appeal, the Seventh Circuit agreed that the CAFA only applies to a Plaintiff class. However, Plaintiff argued that it was the *de facto* Defendant and so the CAFA applied by its terms. Plaintiff argued that it was a Defendant in the Saskatchewan action and it was merely enforcing the resulting judgment. The Seventh Circuit found that Plaintiff invoked the District Court's authority, and registration of a judgment (or a stand-alone action on a foreign judgment) is not always a rote administrative task. *Id.* at *541. The Seventh Circuit stated that a District Court sitting in diversity usually applies recognition and enforcement rules of the state in which it sits. Further, the Seventh Circuit reasoned that comity considerations supported the approach of denying jurisdiction. The Seventh Circuit explained that the CAFA is a jurisdictional statute, and it therefore was inappropriate for the District Court to insert itself into litigation that has been on-going in Illinois and Saskatchewan for a considerable time. *Id.* at *542. Accordingly, the Seventh Circuit affirmed.

***Tri-State Water Treatment, Inc. v. Bauer, et al.*, 2017 U.S. App. LEXIS 227 (7th Cir. Jan. 5, 2017).** Plaintiff/Counterclaim Defendant, a water treatment company, originally filed a small claims collection action against Defendants/Counterclaim Plaintiffs, Michael and Stacey Bauer, in state court alleging that they failed to

pay for a water-treatment system installed at their house. The Bauers filed an answer and a multi-state class action counterclaim against Tri-State Water Treatment, Inc. alleging fraud in connection with the sale of its water-treatment system. The Bauers subsequently filed an amended class action counterclaim adding Home Depot USA., Inc. as an additional Counterclaim Defendant. Home Depot filed a notice of removal under the Class Action Fairness Act ("CAFA") asserting that even though it was not an original Defendant in the underlying case, its status as an additional Counterclaim Defendant was sufficient under the CAFA to allow it to remove the case. The Bauers filed a motion to remand, asserting that the CAFA did not permit a Counterclaim Defendant, original or additional, the right to remove the action. The District Court agreed and remanded the case. Home Depot appealed, and the Seventh Circuit affirmed the District Court's decision. Home Depot argued that any party who joins a case through service of process should be regarded as a Defendant for purposes of the CAFA and permitted to remove the case. The Seventh Circuit disagreed, holding that an additional Counterclaim Defendant is not entitled to remove a class action under the CAFA. In reaching its conclusion, the Seventh Circuit relied upon the plain meaning of "Defendant" and interpreted the modifier "any" in the CAFA as being intended to eliminate the unanimity requirement. The Seventh Circuit noted that its ruling was consistent with the Fourth and Ninth Circuits on this issue.

(viii) Eighth Circuit

***Black, et al. v. Bayer Corp.,* 2017 U.S. Dist. LEXIS 92268 (E.D. Mo. June 15, 2017).** Plaintiffs, a group of 95 Essure permanent birth control users, filed a state court action alleging that they suffered severe injuries and damages from Defendant's failure to warn of the risks, dangers, and adverse events associated with Essure. *Id.* at *3. Defendants removed the action on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a), federal question jurisdiction under 28 U.S.C. § 1331, and diversity jurisdiction under pursuant to the CAFA. *Id.* Plaintiffs filed a motion to remand, arguing there was no diversity jurisdiction because their joinder in one action was proper, that no federal question arose from their complaint, and that the CAFA did not confer diversity jurisdiction because there were less than 100 Plaintiffs and there has been no motion to consolidate multiple complaints. *Id.* at *5. Defendants argued that the Court had diversity jurisdiction because the non-Missouri Plaintiffs' claims were fraudulently misjoined. *Id.* at *9. However, the Court noted that Plaintiffs' claims were focused on the same product, arose out of the same development, distribution, marketing, and sales practices, and had common issues of law and fact. *Id.* at *9-10. The Court held that while there would certainly be differences between Plaintiffs' claims, those differences did not render joinder fraudulent. *Id.* at *10. The Court found that Defendants failed to establish fraudulent joinder, and that it did not have diversity jurisdiction. Further, the Court determined that the federal issues raised in Plaintiffs' complaint, which were based on state law, were not substantial and not capable of resolution without disrupting the federal-state balance contemplated by Congress. Therefore, the Court declined to exercise federal question jurisdiction. *Id.* at *12. Finally, Defendants argued that although the matter involved only 95 Plaintiffs, it should be considered along with other similar Essure cases to form a single mass action involving more than 100 Plaintiffs. Defendants asserted that these cases were part of the same mass action because the complaints contained the same substantive allegations, alleged the same causes of action, were filed by the same counsel, and were filed in the same jurisdiction. *Id.* The Court found that the case did not involve the claims of 100 or more persons, and there was no indication in the record it would be consolidated or that Plaintiffs wished to have the case tried jointly with any other case. *Id.* at *13. The Court therefore concluded that it also lacked jurisdiction under the CAFA. Accordingly, the Court granted Plaintiffs' motion to remand.

***Dammann, et al. v. Progressive Direct Insurance Co.,* 856 F.3d 580 (8th Cir. 2017).** Plaintiffs, a group of insured individuals, filed an action alleging that Defendant sold insurance policies with benefits below the statutory minimum required by Minnesota law. Plaintiffs suffered covered losses and incurred more than $20,100 in medical expenses as a result. *Id.* at 582. Because their policies included a $100 deductible for medical expense payments and a maximum coverage of $20,000, Plaintiffs each received a payment of $19,900 from Defendant. *Id.* at 583. Plaintiffs filed suit in Minnesota state court alleging that Defendant's practice of selling policies with deductibles that reduced benefit payments below $20,000 for medical expenses and for economic losses violated Minnesota law. Plaintiffs sought to represent a class of all similarly-situated individuals. Defendant removed the case to pursuant to the CAFA. Plaintiffs then moved to remand on the ground that the CAFA's jurisdictional requirements were not met because the amount-in-controversy did not exceed $5 million. *Id.* After the District Court denied the motion to remand, Plaintiffs appealed. Plaintiffs argued

that the District Court erred when it determined that the amount-in-controversy exceeded $5 million. Specifically, Plaintiffs argued that the District Court should have restricted its analysis of the amount-in-controversy to what could be recovered by the class of individuals identified in the complaint, *i.e.*, individuals who had actually made claims for covered losses and were paid less than the statutory minimum. *Id.* According to Defendant, over 600 individuals belonged to the class. When the District Court calculated the amount-in-controversy, however, it relied on premiums collected on all of Defendant's policies which included the challenged deductibles, regardless of whether the policyholders had made claims that led to application of the deductibles. *Id.* Plaintiffs argued that the evidence provided by Defendant to satisfy the CAFA's amount-in-controversy requirement was over-inclusive because it included all premiums collected on policies with the challenged deductibles, not just the premiums collected from members of the narrowly defined class. *Id.* The District Court concluded that Defendant carried its burden of establishing by a preponderance of the evidence that the amount-in-controversy exceeded the CAFA's jurisdictional minimum. *Id.* at 584. The Eighth Circuit explained that after a party seeking to remove has shown the CAFA's jurisdictional minimum by a preponderance of the evidence, "remand is only appropriate if the Plaintiff can establish to a legal certainty that the claim is for less than the requisite amount." *Id.* The Eighth Circuit concluded that Plaintiffs failed to show that it was legally impossible for them to recover more than $5 million. *Id.* While Plaintiffs put Defendant's sales practices at issue and sought a refund of their premium payments, they had not offered evidence to establish the amount they collectively paid in premiums. Without such information, the Eighth Circuit stated that it could not determine whether it would be legally impossible for Plaintiffs to recover $5 million. *Id.* The Eighth Circuit therefore concluded that the District Court properly denied the motion for remand.

***Drake, et al. v. Steak N Shake Operations, Inc.,* 2017 U.S. Dist. LEXIS 210630 (E.D. Mo. Dec. 22, 2017).** Plaintiffs, a group of current and former salaried managers, filed a collective action alleging that Defendant failed to properly pay them overtime wages in violation of the FLSA and Missouri law. Defendant argued that Plaintiffs were exempt from overtime protections because their primary job duties were executive or administrative. *Id.* at *1. The Court had previously granted the parties' joint stipulation of conditional certification of a collective action. Plaintiffs subsequently filed a motion for class certification pursuant to Rule 23, consisting of "all persons who worked as Defendant Managers at all corporate owned retail restaurants located in the State of Missouri at any time from September 8, 2012 to the present." *Id.* at *1-2. At the same time, Defendant filed a motion for decertification of the FLSA collective action. The Court granted Plaintiffs' motion and denied Defendant's motion. Defendant argued that Plaintiffs were not similarly-situated with respect to the key issues underlying their claims, the experiences of one Plaintiff was not representative of any other and, as such, the claims of the group could not be adjudicated without inquiring into each individual's particular circumstances. *Id.* at *3. The Court concluded that Plaintiffs' testimony suggested the existence of "a single, FLSA-violating policy" affecting the entire membership of the collective action, as Plaintiffs uniformly testified that their primary job duties were neither managerial nor administrative, that they spent a significant majority of their time doing work nearly identical to hourly production employees, that their work was closely supervised by their superiors, and that their participation in employment matters was rare and limited. *Id.* at *13. While it noted that Defendant could identify several factual differences in Plaintiffs' employment experiences, considering Plaintiffs' largely uniform description of their actual experiences, the Court opined that the differences Defendant identified did not outweigh the similarities. *Id.* at *13-14. The Court also found that Defendant's individual defenses were not sufficient to compel decertification. The Court further concluded that proving liability on a collective-wide basis was possible in this case, and the only relevant issue, *i.e.*, Defendant's routine classification of managers as exempt, applied the same to all Plaintiffs. *Id.* at *17-18. Accordingly, the Court denied Defendant's motion to decertify the collective action. As to Plaintiffs' motion for class certification, the Court held that Plaintiff met the commonality requirement as the question of whether a manager was exempt was the fundamental legal question at issue, and the jury could resolve all of Plaintiffs' claims in one stroke. *Id.* at *27. The Court also determined that Plaintiffs met all of the other Rule 23(a) requirements. As to Rule 23(b), the Court ruled that Plaintiffs met the predominance requirement as their claims turned on whether Defendant appropriately classified managers as exempt executive or administrative employees, which in turn depended on a Defendant's manager's primary duties. *Id.* at *28. The Court stated that Plaintiffs also demonstrated superiority because there was no compelling reason to host numerous individual trials when the central question in all of them was the same. *Id.* Accordingly, the Court granted Plaintiffs' motion for class certification.

***Hargett, et la. v. Revclaims, LLC,* Case No. 17-1339 (8th Cir. April 14, 2017).** Plaintiff was injured in a car accident and received medical treatment at a hospital. The hospital contracted with Defendant to pursue any claim Plaintiff might have against the driver responsible for her injuries, in lieu of collecting from Plaintiff's Arkansas Medicaid insurance. *Id.* at 3. Plaintiff filed an action in state court asserting that Defendant's practice violated Arkansas law. Defendant removed the suit to the District Court pursuant to the CAFA. Plaintiff moved to remand and contended that the CAFA's local-controversy exception applied to her claims. The District Court granted Plaintiff's motion to remand. On appeal, the Eighth Circuit reversed and remanded. The District Court had found that Plaintiff met all the requirements of the local-controversy exemption with her class defined as "all Arkansas citizens who were Arkansas Medicaid-eligible beneficiaries." *Id.* at 4. The Eighth Circuit, however, determined that the District Court erred in holding that merely alleging a proposed class of Arkansas residents was sufficient to satisfy 28 U.S.C. § 1334(d)(4). The Eighth Circuit reasoned that Plaintiff could have met her burden by producing evidence or by defining her class to include on Arkansas citizens, but merely alleging residency was not enough. *Id.* at 5-6.

***McKeage, et al. v. TMBC, LLC*, 847 F.3d 992 (8th Cir. 2017).** Plaintiff filed a class action in state court alleging that Defendant's nationwide practice of charging a document fee when selling boats and trailers under form contracts governed by Missouri law was illegal. Plaintiff requested certification of a nationwide class action. The state court certified a class, but limited it to customers whose purchases occurred in Missouri. *Id.* Plaintiffs sought review from the Missouri Supreme Court, contending that the trial court should have certified a nationwide class. The Missouri Supreme Court agreed, noting that Plaintiffs chose Missouri law for the standardized form contracts it used nationwide. Pursuant to the Missouri Supreme Court's decision, the state trial court then certified a nationwide class. Defendant subsequently removed the action pursuant to the CAFA. After removal, Defendant brought a motion to decertify the class, which the District Court denied. Defendant then filed a motion for summary judgment asserting that: (i) charging a document fee did not amount to unauthorized law because employees did not exercise legal judgment when filling out documents for customers; (ii) some individuals had been improperly identified as customers who signed contracts governed by Missouri law; (iii) that Missouri law should not be applied nationwide to customers who signed contracts with TMBC outside of Missouri; and (iv) that damages should not be calculated based on the entire document fee because portions of the fee went to services that did not constitute an unauthorized law business. *Id.* at 997. The District Court rejected Defendant's arguments and determined that the class members were properly identified, Defendant's conduct in charging a document fee constituted an unauthorized law business, Missouri law applied to transactions that occurred outside Missouri, and damages should be awarded based on the entire document fee. *Id.* On appeal, Defendant contended that: (i) the class should not have been certified because individualized proof was required to determine whether each customer's contract contained a Missouri choice-of-law provision; (ii) the District Court misinterpreted Missouri case law regarding the unauthorized law business in granting summary judgment to the class; and (iii) the District Court erred in applying Missouri law to conduct which occurred outside of Missouri. The Eighth Circuit found that the class was ascertainable because the District Court used an intensive file-by-file review process specifically for the purpose of excluding customers whose contracts did not contain the Missouri choice-of-law provision and who therefore did not have rights under Missouri law. *Id.* In addition to the class being clearly ascertainable, the Eight Circuit found that the commonality and predominance requirements of Rule 23(b) were satisfied because the identified class members were customers that entered into a contract identical or substantially similar to the one entered into by Plaintiffs, and evidence from discovery showed that it was Defendant's corporate policy to require all customers to sign the standard form contract governed by Missouri law. *Id.* at 999. Accordingly, the Eighth Circuit concluded that the District Court did not abuse its discretion in finding that the class met the requirements of Rule 23 and certifying the case as a class action. Defendant also asserted that the District Court misconstrued Missouri law when it concluded that Defendant's practice of charging a document fee constituted unauthorized law business under Mo. Rev. Stat. §§ 484.020 and 484.010. *Id.* at 1000. The Eighth Circuit stated that in situations where the unauthorized charge was separate from the legitimate portions of the parties' transaction, damages may be based upon the entire unauthorized fee, even if some of the documents were not legal in nature. *Id.* Finally, Defendant argued that the District Court erred in applying Missouri law to sales that occurred outside of Missouri. *Id.* at 1001. The Eighth Circuit found that the question was whether a corporation headquartered in Missouri could choose that Missouri law govern its conduct in standard form contracts it used nationwide. The Eighth Circuit held that there was nothing inherently unconstitutional about enforcing a corporation's choice to

have its contractual duties governed by the law of a particular state. *Id.* at 1002. Accordingly, the Eighth Circuit affirmed the District Court's ruling on the issues Defendant appealed.

***Rozo, et al. v. Principal Life Insurance Co.*, 2017 U.S. Dist. LEXIS 82183 (S.D. Iowa May 12, 2017).** The Court certified a class of approximately 41,000 plan participants who invested in a Principal Fixed Income Option ("PFIO") under Defendant's 401(k) plan between 2008 and 2013. Plaintiffs alleged that Defendant breached its fiduciary duty of loyalty under the ERISA and engaged in prohibited transactions. Specifically, Plaintiffs alleged that Defendant reaped unreasonable profits from these investments by paying Plaintiffs too small a portion of the returns that Defendant received from the underlying investments. Plan participants invested in the PFIO, which Defendant then invested in various fixed-income securities. These investments produced a return, a part of which Defendant retained and distributed in part to participants. Plaintiffs alleged that: (i) Defendant's discretionary control of how much of the return it retained made it a functional fiduciary over participants' plan assets; and (ii) Defendant violated the ERISA by retaining any of the returns. The proposed class was defined as all participants in and beneficiaries of defined contribution employee pension benefit plans who invested funds in the PFIO contract. The Court concluded that Plaintiffs met the requirements of Rule 23(a), noting that: (i) joinder would be impracticable with 40,999 participants who invested in the PFIO during the class period; (ii) questions of law and fact were common to the entire class, *i.e.*, that the PFIO is a single pool of assets governed by a contract with standardized terms, which were then applied uniformly across the proposed class and Defendant's pricing decisions were applied to the PFIO group as a whole; and (iii) Plaintiffs were typical because they were investors from 2008 to 2013. The Court also found certification appropriate under Rule 23(b)(1). The Court reasoned that the core of the case was Defendant's administration of the PFIO plan, which was governed by a standard contract and applied equally to all plan participants.

(ix) Ninth Circuit

***Agredano, et al. v. Southwest Water Co.,* 2017 U.S. Dist. LEXIS 82451 (C.D. Cal. May 30, 2017).** Plaintiff, a construction worker, filed an action in state court asserting that Defendant violated various provisions of the California Labor Code. Defendant removed the case pursuant to the CAFA. Defendant asserted that: (i) there was diversity between at least one class member and one Defendant; and (ii) that the amount-in-controversy exceeded $5 million. *Id.* at *6. Plaintiff filed a motion to remand, and argued that Defendant failed to demonstrate by a preponderance of the evidence that the amount-in-controversy exceeded $5 million and that the action fell within the local controversy exemption. *Id.* at *7. The Court analyzed the amount-in-controversy on a claim-by-claim basis. First, Defendant asserted that Plaintiff put $3,169,729.50 in controversy in alleging meal and rest period violations, by assuming that each putative class member suffered one meal period and one rest period violation five days per week during the relevant time period ("100% violation rate assumption"). *Id.* at *14. Plaintiff challenged Defendant's 100% violation rate assumption, arguing that his complaint contained no information as to the number of times Plaintiff, or any other class member, clocked-out for a meal period and continued working. *Id.* at *14-15. The Court found it reasonable to assume a 100% violation rate of the meal period provisions based on the allegations in Plaintiff's complaint, but did not find it reasonable to assume such a rate with respect to rest periods, as Plaintiff failed to offer specific evidence as to rest periods in his complaint. *Id.* at *15. Therefore, the Court found that Plaintiff placed $1,584,864.75 in controversy with respect to Plaintiff's meal period claim, but denied Defendant's contention that Plaintiff has placed the same $1,584,864.75 in controversy with respect to Plaintiff's rest period claim. *Id.* at *16. The Court also considered the sufficiency of Defendant's calculations regarding the amounts placed in controversy by Plaintiff's overtime and minimum wage claims. Defendant assumed that Plaintiff placed in controversy one hour of wages for off-the-clock work per shift at California's applicable minimum wage per day and five hours of unpaid overtime per week. *Id.* at *17. The Court found the assumptions were not warranted because Plaintiff did not allege that he and other putative class members were entitled both to one hour of additional minimum wage payments and to one hour of overtime pay each and every day. Accordingly, the Court determined that figures of $312,539.07 and $1,188,648.56 for Plaintiff's overtime and minimum wage claims were appropriately based on the allegations in the complaint. *Id.* at *19-20. Plaintiff did not challenge Defendant's calculation of the amount-in-controversy on his claim for waiting time penalties. Therefore, the Court accepted Defendant's estimate of an amount-in-controversy of $124,886 based on the waiting time claim. Finally, Defendant argued that it was entitled to include the anticipated amount of reasonable attorneys' fees spent to litigate this action in the calculation of the amount-in-controversy. *Id.* at *20. The Court determined that the better view is that attorneys' fees incurred after the date of

removal are not properly included because the amount-in-controversy is to be determined as of the date of removal. The Court further stated that Defendant had not provided evidence regarding its anticipated overall fees and the Court would not consider reasonable attorneys' fees in its calculation of the amount-in-controversy. Therefore, the Court concluded that Defendant failed to demonstrate by a preponderance of the evidence that the amount-in-controversy exceeded $5 million and therefore remanded the case.

***Black, et al. v. T-Mobile USA, Inc.*, 2017 U.S. Dist. LEXIS 182109 (N.D. Cal. Nov. 2, 2017).** Plaintiff, a senior field technician, filed an action in state court alleging that Defendant denied Plaintiff adequate overtime compensation as well as meal and rest periods in violation of the California Labor Code. Defendant removed the matter, asserting that the amount-in-controversy exceeded the $5 million minimum threshold set out in the CAFA. Plaintiff filed a motion to remand, which the Court denied. Plaintiff contended that Defendant failed to satisfy its burden of demonstrating that the amount-in-controversy exceeded $5 million. Defendant calculated that Plaintiff sought over $6 million in unpaid overtime for technicians' on-call time alone. *Id.* at *10. In reaching this figure, Defendant assumed that, while on-call, technicians were compensated for an average of 10.68 hours responding to on-call work and 15 hours of overtime per week. Defendant included this compensation in its calculations for the class members' regular rate of pay. *Id.* at *11. Plaintiff argued that Defendant erroneously extrapolated from information about the named Plaintiff to the class as a whole because Defendant based its assumption that technicians were compensated for 10.68 on-call hours on Plaintiff's own payroll records and based its assumption that class members worked 15 hours of overtime per week on the allegation that the named Plaintiff "typically" worked 40 to 55 hours per week and that his claims were typical of the other putative class members. *Id.* at *12. The Court concluded that Defendant's extrapolation from Plaintiff's average work schedule was reasonable in light of the other evidence in the record that indicated that Plaintiff and the putative class worked similar schedules. The Court noted that putative class members were all scheduled to work 8 hours per day, 5 days per week, and had the same on-call schedule from Monday at 5:00 p.m. to the following Monday at 7:59 a.m. *Id.* The Court further found that putative class members were all current or former field technicians, and there were no allegations from which Defendant or the Court should assume that they performed substantially different work. The Court stated that, even if it agreed that Defendant's assumptions about average work time and average overtime hours were flawed, Plaintiff's claim for unpaid overtime still exceeded the $5 million amount-in-controversy requirement. The Court explained that, assuming that Plaintiff was not compensated for any on-call or overtime hours, Plaintiff's regular rate of pay would decrease from $20.01 – in Defendant's calculations – to $16.07. Using this revised figure in Defendant's calculations, Plaintiff was still conservatively seeking over $5 million in unpaid overtime for putative class members' on-call time alone. *Id.* at *13. The Court also noted that Defendant's conservative calculations assumed a minimum wage of $8.00 and did not account for the increase in minimum wage in 2014 ($9.00), 2016 ($10.00), and 2017 ($10.50). *Id.* at *14. The Court, therefore, held that Defendant established by a preponderance of the evidence that the amount-in-controversy exceeded $5 million and it denied Plaintiff's motion to remand.

***Brinkley, et al. v. Wqh Wvg Monterey Financial Services,* 2017 U.S. App. LEXIS 20668 (9th Cir. Oct. 20, 2017).** Plaintiff brought an action in state court against Defendant, alleging: (i) invasion of privacy in violation of California and Washington state law; (ii) unlawful recording of telephone calls under California law; and (iii) violation of § 17200 of the California Business and Professions Code. Defendant removed the action. Plaintiff moved to remand pursuant to the CAFA's home-state controversy exception. The District Court delayed ruling on Plaintiff's motion, and ordered jurisdictional discovery. The Magistrate Judge subsequently ordered Defendant to produce a list of all putative California and Washington class members. Defendant produced a list of over 152,000 individuals who had recorded calls with Defendant between October 15, 2009, and May 6, 2016, and had a California or Washington mailing address. *Id.* at *4. Plaintiff hired a statistician who analyzed the list and found that a random sampling of the individuals contained no evidence of individuals who were physically located in, but were not residents of, California or Washington when they made or received a phone call with Defendant. *Id.* at *5. The District Court therefore granted Plaintiff's motion to remand, finding that at least two-thirds of class members were California citizens. *Id.* On appeal, the Ninth Circuit vacated the ruling and remanded. The Ninth Circuit noted that in order to determine whether two-thirds of class members were California citizens, it must first determine the size of the class as a whole. *Id.* at *7. Plaintiff's proposed class consisted of all individuals who made or received a telephone call with Defendant "while physically located or residing in California and Washington." *Id.* Accordingly, the Ninth Circuit reasoned that the class included

individuals who were physically located in, but were not residents of, California or Washington when they made or received a call with Defendant (the “located in” sub-group). *Id.* at *7-8. Moreover, the Ninth Circuit stated that Plaintiff’s expert report relied on the data Defendant produced, which contained a list of Defendant’s accounts listing California and Washington street addresses with respect to which accounts telephone calls were recorded between October 15, 2009 and May 6, 2016. However, the list addressed only a portion of the class, *i.e.*, those who were "residing in California and Washington" when they made or received a call with Defendant. The Ninth Circuit observed that the data produced did not address, or contain information about, the size of the "located in" sub-group. *Id.* at *8. The Ninth Circuit found that Plaintiff did not submit any evidence regarding the "located in" sub-group, and without knowing the size of the sub-group, the size of the entire class was unknown. *Id.* at *9. Accordingly, the Ninth Circuit held that it could not determine whether two-thirds of all class members were California citizens. The Ninth Circuit concluded that a Plaintiff could not remand an otherwise valid case under the CAFA when only a portion of the class met the two-thirds citizenship requirement. The Ninth Circuit thereby vacated the ruling and remanded for further proceedings.

***Chalian, et al. v. CVS Pharmacy, Inc.*, 2017 U.S. Dist. LEXIS 55485 (C.D. Cal. April 11, 2017).** Plaintiff, a pharmacist, filed a class action in state court for unpaid wages, failure to pay overtime, failure to provide accurate itemized wage statements, waiting time penalties, and unfair business practices. *Id.* at *2. Defendants removed the action pursuant to the CAFA, asserting that the parties were diverse and that the amount-in-controversy exceeded $5 million. Plaintiff filed a motion to remand, which the Court denied. Plaintiff argued that the removal was untimely because Defendants removed the case more than 30 days after they received the complaint. However, the Court determined that Defendants had to conduct their own investigation to calculate that the amount-in-controversy exceeded $5 million. The Court found that Defendants removed in the applicable one year period, and therefore the removal was timely. Defendants argued that there was jurisdiction under the CAFA because the amount-in-controversy exceeded $5 million and neither Defendant CVS nor Defendant RX Services were California citizens. *Id.* at *5. In response, Plaintiff insisted that removal was improper under the CAFA because Defendants' calculations of the amount-in-controversy were speculative and Defendant Garfield Beach CVS, LLC, ("Garfield Beach") was a citizen of California. *Id.* at *6. Defendants offered sufficient evidence that the amount-in-controversy exceeded $15,607,980, and while Defendants’ calculations might not be exact, the Court found them to be reasonable estimates; further, Defendants established by a preponderance of the evidence that the amount-in-controversy exceeded $5 million. Plaintiff contended the home-state exception to the CAFA’s jurisdiction was met because: (i) more than two-thirds of the proposed class were citizens of California; and (ii) Garfield Beach, a primary Defendant, was a citizen of California. *Id.* at *7-8. In response, Defendants argued that the primary Defendants included all Defendants and since CVS and RX Services were domiciled in Rhode Island and New York and were not citizens of California, the home exception did not apply. *Id.* at *8. The Court agreed and reasoned that Defendants CVS and RX Services were primary Defendants because they were the real targets of the suit. The Court held that because CVS was domiciled in Rhode Island and RX Services was domiciled in New York, the primary Defendants were not California citizens and the home-state exception did not apply. *Id.* at *9. Plaintiff also argued that the local controversy exception applied because: (i) CVS, RX Services and Garfield Beach CVS, LLC, were citizens of California; (iii) Garfield Beach's conduct formed a significant basis of the class members’ claims; (iii) the principle injuries occurred in California; and (iv) no other class actions with similar legal claims had been filed against Defendants. However, the Court found that similar lawsuits had been filed against Defendants within the last three years, 12 times in California, and once each in Massachusetts and New York. The Court further stated that some of the suits involved claims of unpaid wages and overtime for pharmacist training, unfair business practices, conversion, and wage statement claims for pharmacist employees, which were similar or the same as the claims Plaintiff alleged. *Id.* Therefore, the Court ruled that the local controversy exception did not apply. Accordingly, the Court found that removal was proper and denied Plaintiff’s motion to remand.

***Chan Healthcare Group v. Liberty Mutual Fire Insurance Co.*, 844 F.3d 1133 (9th Cir. 2017).** Plaintiff filed an action alleging that Defendant’s improper use of a database to set reimbursement amounts violated various Washington statutes. Plaintiff sought a declaratory judgment that the settlement of a related Illinois case was unenforceable in Washington. Plaintiff argued that the Illinois settlement agreement could not be applied to bar Plaintiff’s Washington claim against Defendant consistent with Plaintiff’s due process rights. *Id.* at 1136. Defendant then removed the case on the ground that Plaintiff had raised a federal due process claim, thereby

creating federal question jurisdiction under the CAFA. Plaintiff challenged the timeliness of Defendant's removal and argued that there was no federal question jurisdiction because he did not raise his federal due process claim as an affirmative claim, but instead raised the issue in response to Defendant's assertion of the Illinois settlement as a defense. *Id.* The District Court granted Plaintiff's motion to remand based solely on the ground that removal was untimely. The District Court explicitly declined to decide whether federal question jurisdiction was present. The District Court also awarded Plaintiff $18,330 in attorneys' fees after finding that Defendant "had no objectively reasonable basis for removal." *Id.* On appeal, the Ninth Circuit dismissed Defendant's petition for permission to appeal the District Court's remand order and vacated the order granting attorneys' fees. The Ninth Circuit stated that the default rule on remand orders is that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *Id.* at 1137. The Ninth Circuit considered whether it had jurisdiction to review the District Court's order remanding the action when the asserted basis for jurisdiction was a federal question rather than traditional diversity or the CAFA's minimal diversity jurisdiction. The Ninth Circuit noted that 28 U.S.C. § 1453(b) governs the general procedure for removal, and § 1453(c) provides a limited means for appellate review of remand orders in cases removed under § 1453(b). *Id.* at 1138. Plaintiff argued that § 1453(c)(1) was limited to diversity actions under the CAFA. Defendant asserted that no CAFA-based limitation applied and that all class actions were covered by this grant of jurisdiction. The Ninth Circuit concluded that CAFA's legislative history supported the conclusion that the limited grant of appellate review was tied to the CAFA's minimal diversity provisions. The Ninth Circuit noted that § 1453(b) included two references linked exclusively to diversity that failed to include provisions specific to federal question jurisdiction, including: (i) sub-section (b) excepts the 1-year limitation under section 1446(c)(1), which applies to diversity cases alone; and (ii) sub-section (b) permits removal without regard to whether any Defendant is a citizen of the state in which the action is brought. *Id.* at 1139. The Ninth Circuit opined that § 1453(b)'s general focus on diversity cases and failure to carve out exceptions applicable only to federal question cases underscored that it was directed to diversity cases. *Id.* Finally, the Ninth Circuit noted that § 1453(d) states that it "shall not apply to any class action that solely involves" three enumerated classes of state and federal law claims involving securities and corporate governance. The Ninth Circuit found that § 1453(d) mirrors § 1332(d)(9) of the CAFA, which places those same three categories of claims outside of the CAFA's minimal diversity provision. *Id.* The overlapping scope of those two provisions assisted the Ninth Circuit in concluding that both statutes operate in the CAFA diversity sphere. The Ninth Circuit further found that the Fifth, Sixth, and Eighth Circuits had ruled that the review provisions of § 1453(c) were limited to class actions brought under the CAFA. *Id.* at 1140. The Ninth Circuit agreed with those circuits that the focus of § 1453(c)(1) was limited to appeal of remand orders in diversity class actions brought and removed under the CAFA. *Id.* at *1141. The Ninth Circuit therefore concluded that it lacked jurisdiction to review the District Court's remand order and dismissed Defendant's petition for permission to appeal.

***Chen, et al. v. United Talent Agency,* 2017 U.S. Dist. LEXIS 34960 (C.D. Cal. Mar. 10, 2017).** Plaintiff, a former employee, brought a class action alleging that Defendant violated several provisions of the California Labor Code. Defendant removed the action pursuant to the CAFA's amount-in-controversy requirement. Defendant alleged that based on the causes of action Plaintiffs asserted, the amount-in-controversy exceeded $5,500,000. *Id.* at *4. Defendant's estimate included $8,400 in allegedly unpaid minimum wages and associated liquidated damages, $819,000 in allegedly unpaid overtime, $2,185,000 in allegedly improper rest breaks and associated penalties, $85,000 in allegedly improperly itemized wage statements and associated penalties, $720,000 in penalties for alleged waiting time pay, $635,000 in separate civil penalties under the Private Attorney General Act ("PAGA"), and $1,113,000 representing attorneys' fees. *Id.* at *5. The Court stated that as an initial matter, the estimated $635,000 in civil penalties under the PAGA could not be used to reach the CAFA's amount-in-controversy requirement. *Id.* The Court further found that although attorneys' fees may properly be considered as part of the amount-in-controversy, decisions from within the Ninth Circuit recognized a split in authority "as to whether only attorneys' fees that have accrued at the time of removal should be considered in calculating the amount-in-controversy, or whether the calculation should take into account fees likely to accrue over the life of the case." *Id.* at *6. The Court therefore concluded that Defendant's reliance on anticipated attorneys' fees was insufficient to satisfy its burden to show that the amount-in-controversy exceeded the jurisdictional minimum. Moreover, the Court held that because Defendant offered no evidence of any pre-removal attorneys' fees accrued by Plaintiffs, the Court had no basis to consider any portion of the asserted $1,113,000 in attorneys' fees to determine the amount-in-controversy. *Id.* Accordingly, the Court held

that Defendant improperly relied on the PAGA's penalties and anticipated but unaccrued attorneys' fees in asserting that this action satisfied CAFA's jurisdictional amount-in-controversy requirement. Therefore, the Court remanded the action for lack of federal subject matter jurisdiction.

Christmas, et al. v. Union Pacific Railroad Co., **2017 U.S. App. LEXIS 11724 (9th Cir. June 30, 2017).** Plaintiff filed a class action in state court alleging that Defendant required employees to work 12-hour shifts in violation of the California Labor Code. Plaintiff then amended his complaint to include four individual Defendants ("Local Defendants"). Defendant removed the action to the District Court pursuant to the CAFA. The District Court denied Plaintiff's motion to remand based on the CAFA's local controversy exception, and granted judgment on the pleadings, with prejudice, to Defendant on preemption grounds. On appeal, the Ninth Circuit reversed and remanded with instructions to remand to state court. The parties disputed two factors, including: (i) whether "significant relief" was sought from at least one of the Local Defendants; and (ii) whether the conduct of at least one of the Local Defendants formed a "significant basis" for the claims asserted. *Id.* at *2-3. The Ninth Circuit held that the District Court erred in finding that "significant relief" "cannot be derived from" the Local Defendants. *Id.* at *3. The Ninth Circuit explained that to determine if Plaintiff claimed "significant relief" from a Defendant, it must look to the remedies requested by Plaintiffs. *Id.* Plaintiff's complaint alleged that that under § 606, the Local Defendants were liable for statutory penalties of $100 to $1,000 per violation. *Id.* Defendant, by contrast, was liable for penalties of $500 to $5,000 per violation. *Id.* The Ninth Circuit noted that there were four Local Defendants, meaning that the amount sought against the collective group represented 80% of the total penalties for which Defendants could be liable. The Ninth Circuit found that Plaintiff's complaint also sought injunctive relief against Local Defendants, which weighed in favor of "significant relief." *Id.* The Ninth Circuit therefore held that the relief requested against the Local Defendants was "significant" both comparatively and absolutely. *Id.* The Ninth Circuit determined that the District Court further erred in finding that the Local Defendants' conduct did not form a "significant basis" for the claims asserted. *Id.* The Ninth Circuit noted that to determine if the basis for the claims against a Defendant was significant, it must compare the allegations against that Defendant to the allegations made against the other Defendants, looking specifically at that Defendant's "basis" in the context of the overall "claims asserted." *Id.* at *4. The Ninth Circuit found that the complaint alleged that Local Defendants were "responsible for scheduling hours and days of work." *Id.* The Ninth Circuit reasoned that this was precisely the conduct that Plaintiffs claimed was illegal. *Id.* Therefore, the Ninth Circuit explained that even if the conduct of the Local Defendants was controlled by Defendant, and even if they acted solely pursuant to Defendant's policies, the conduct of the Local Defendants "nonetheless remains the conduct of [the Local Defendants], for which [they] may be held liable." *Id.* Therefore, the Ninth Circuit found that the conduct of the Local Defendants provided a "significant basis" for the claims set forth in Plaintiff's complaint. *Id.* The Ninth Circuit explained that although District Courts may consider other evidence to make jurisdictional decisions with respect to the CAFA's other provisions, for the purposes of the local controversy exception "the District Court is to look to the complaint rather than to extrinsic evidence." *Id.* at *4-5. The Ninth Circuit therefore determined that there was no other way to measure the Local Defendants' "significance" without further fact-finding, speculation, or a deep and current knowledge of Defendant's operations, which would ultimately be result in a prohibited mini-trial of the merits. *Id.* at *5. Accordingly, because the claims against the Local Defendants were "significant" for the purposes of the CAFA's local controversy exception, the Ninth Circuit held that the District Court was required to remand the case to the state court. The Ninth Circuit therefore vacated the order granting Defendant's motion for judgment on the pleadings and reversed and remanded.

Crummie, et al. v. Certifiedsafety, Inc.**, Case No. 17-CV-3892 (N.D. Cal. Oct. 11, 2017).** Plaintiff filed a class action in state court against Defendant asserting violations of various wage & hour laws on behalf of hourly, non-exempt employees. Defendant removed the action pursuant to the CAFA, contending that the amount-in-controversy exceeded $5 million. Plaintiff filed a motion to remand, arguing that Defendant failed to meet its burden to establish that the amount-in-controversy was sufficient. The Court denied Plaintiff's motion, finding that Defendant submitted reasonable estimates of the amount-in-controversy, which Plaintiff failed to rebut. *Id.* at 1. In support of its notice of removal, Defendant submitted the declaration of its Vice President of Human Resources, who used figures to calculate that the amount-in-controversy was not less than $5,004,030 for waiting time penalties based on the estimate of 684 putative class members. *Id.* at 4. Defendant further submitted a supplemental declaration stating that additional items of recovery increased the amount to $6,743,912.50 for total unpaid wages, missed meal breaks, missed rest breaks, wage statement claim penalties,

and failure to pay minimum wage penalties. *Id.* Plaintiff argued that Defendant presented no direct evidence to ground its assumptions of a weekly half hour in unpaid overtime and a 50% violation for meal and rest breaks on empirical data. *Id.* at 5. However, the Court noted that Plaintiff's alternate proposal to assume a 25% violation rate was likewise unattached to any factual evidence. *Id.* at 6. The Court ruled that Defendant was entitled to make assumptions on the violation rate so long as the assumptions were assumptions, which the Court found was the case here. *Id.* The Court thereby found that the total amount-in-controversy exceeded the jurisdictional threshold and denied Plaintiff's motion to remand.

***Doe, et al. v. First Financial Security Inc.,* 2017 U.S. App. LEXIS 9152 (9th Cir. May 25, 2017).** Plaintiffs, a group of sales contractors, filed a class action alleging that Defendant failed to pay them sales commissions in violation of the California Labor Code. The District Court dismissed Plaintiffs' complaint with prejudice for failure to establish subject-matter jurisdiction under the CAFA. On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded for further proceedings with instructions to grant Plaintiffs leave to amend their complaint. *Id.* at *1-2. The Ninth Circuit found that the District Court did not err by dismissing the complaint for failure to satisfy the CAFA's amount-in-controversy requirement. The Ninth Circuit noted that Plaintiffs' complaint made no allegations connecting the withheld commissions for the named Plaintiffs' sales network to the claims of the individual class members. *Id.* at *2. However, the Ninth Circuit found that the District Court abused its discretion by denying Plaintiffs leave to amend for three reasons. First, Ninth Circuit stated that amendment was not futile because the record suggested that, if given leave to amend, Plaintiffs could plausibly allege that: (i) there were approximately 360 sales contractors within the sales network who were eligible to receive commissions; (ii) the withheld commissions to these 360 sales contractors exceed $12 million; (iii) the 360 sales contractors are the same sales contractors as the approximately 360 individual class members in this case; and (iv) therefore, the withheld commissions for the individual class members exceeded $12 million. *Id.* at *3. Second, the Ninth Circuit found that the District Court dismissed the complaint *sua sponte* on two grounds not raised by Defendant, including: (i) Plaintiffs' amount-in-controversy allegations were facially deficient; and (ii) Plaintiffs' class action allegations failed to satisfy Local Rule 23-2.2's class definition pleading requirements. *Id.* Because neither ground was raised by Defendant, the Ninth Circuit held that the District Court should have provided Plaintiffs with leave to amend to correct the alleged deficiencies in their amount-in-controversy and class action allegations. *Id.* Third, the Ninth Circuit opined that the District Court erred in holding that Plaintiffs' class action allegations failed to satisfy Local Rule 23-2.2's class definition pleading requirements. Local Rule 23-2.2 requires that Plaintiffs in a class action allege "the definition of the proposed class" and "the size (or approximate size) of the proposed class." *Id.* at *4. Plaintiffs alleged that their class action consisted of former sales contractors who resigned from the company on and after May 10, 2014, including one sub-class consisting of approximately 260 sales contractors who entered into and performed their employment contracts within California, and a second sub-class consisting of approximately 100 sales contractors who entered into and performed their employment contracts outside California. *Id.* The Ninth Circuit determined that Plaintiffs' allegations appeared sufficient to satisfy Local Rule 23-2.2's class definition pleading requirements. *Id.* The Ninth Circuit also rejected Defendant's argument that Plaintiffs "repeatedly" failed to allege subject-matter jurisdiction. *Id.* The Ninth Circuit noted that Plaintiffs filed only two complaints attempting to allege subject-matter jurisdiction under the CAFA, and, the District Court dismissed the second of these two complaints *sua sponte* on grounds not raised by Defendant. *Id.* at *4-5. The Ninth Circuit found that Plaintiffs appeared able to cure the deficiencies identified in one of these grounds, and the other ground was legally erroneous. Accordingly, the Ninth Circuit affirmed in part, reversed in part, and remanded for further proceedings.

***Dunson, et al. v. Cordis Corp.,* 2017 U.S. App. LEXIS 6446 (9th Cir. April 14, 2017).** Plaintiff filed a putative class action seeking damages for injuries caused by Defendant's allegedly defective medical device. Plaintiff originally filed the action in state court. Defendant removed the action and seven other lawsuits to District Court, invoking the CAFA's mass action provision as the basis for removal. Each of the eight actions had fewer than 100 Plaintiffs, but together involved more than 100 named Plaintiffs. The parties agreed that the jurisdictional requirements for removal under the CAFA's mass action provision were met, except they disputed whether Plaintiffs' claims had been "proposed to be tried jointly." *Id.* at *2-3. Defendant argued that Plaintiffs proposed to try their claims jointly when they moved in state court to consolidate the eight actions. In the motion, Plaintiffs requested consolidation of the actions "for all pretrial purposes, including discovery and other proceedings, and the institution of a bellwether-trial process." *Id.* at *3. Plaintiffs stated that consolidation of the actions "for

purposes of pretrial discovery and proceedings, along with the formation of a bellwether-trial process, will avoid unnecessary duplication of evidence and procedures in all of the actions, avoid the risk of inconsistent adjudications, and avoid many of the same witnesses testifying on common issues in all actions, as well as promote judicial economy and convenience." *Id.* The District Court held that Plaintiffs' consolidation motion did not propose a joint trial of their claims, and therefore the cases could not be removed under the CAFA's mass action provision. *Id.* at *3-4. Because Defendant asserted no other basis for federal jurisdiction, the District Court granted Plaintiffs' motion to remand. On appeal, the Ninth Circuit affirmed the District Court's ruling. The Ninth Circuit stated that the question before it was whether Plaintiffs' proposal for a bellwether-trial process amounted to a proposal to try their claims jointly. The Ninth Circuit explained that two types of bellwether-trials can be held when a large number of Plaintiffs assert the same or similar claims against a common Defendant. In the first type, the claims of a representative Plaintiff are tried, and the parties in the other cases agree that they will be bound by the outcome of that trial. *Id.* at *6. The Ninth Circuit noted that in the second (and far more common) type of bellwether-trial, the claims of a representative Plaintiff are tried, but the outcome of the trial is binding only as to the parties involved in the trial itself. *Id.* The results of the trial are used in the other cases purely for informational purposes as an aid to settlement. The Ninth Circuit ultimately determined that despite Defendant's contentions, Plaintiffs' references to the avoidance of inconsistent adjudications did not necessarily shed light on which type of bellwether-trial they were proposing. Since Defendant bore the burden of showing that Plaintiffs proposed a joint trial of their claims, the inconclusive nature of Plaintiffs' statements did not meet that burden. *Id.* at *10. The Ninth Circuit found that Plaintiffs requested consolidation for pre-trial purposes, and because their references to the avoidance of inconsistent adjudications could have been tied to that aspect of their request alone, those references did not necessarily say anything about whether they were proposing a joint trial. The Ninth Circuit determined that Plaintiffs requested consolidation for purposes of pre-trial proceedings, which standing alone, would not trigger removal jurisdiction under the CAFA's mass action provision. Finally, the Ninth Circuit found that Plaintiffs' request for consolidation for purposes of establishing a bellwether-trial process said nothing regarding whether they were referring to a bellwether-trial whose results would have preclusive effect on Plaintiffs in the other cases. The Ninth Circuit therefore held that the District Court correctly concluded that removal jurisdiction did not exist under the CAFA's mass action provision, and the remand order was proper.

***Duran, et al. v. Sephora USA,* 2017 U.S. Dist. LEXIS 128189 (N.D. Cal. Aug. 11, 2017).** Plaintiff brought an action in state court and Defendant moved to dismiss Plaintiff's second amended complaint under Rule 12(b)(1), asserting that the Court lacked jurisdiction under the CAFA. In response, Plaintiff filed a motion for leave to amend seeking to add FLSA claims to her complaint. Plaintiff asserted that Defendant's motion to dismiss should be denied because her proposed FLSA claims would give the Court federal question jurisdiction. Plaintiff also argued that she satisfied the CAFA's minimum diversity requirement and that Defendant waived its right to challenge Plaintiff's class claims under the CAFA's local controversy and home-state exceptions. *Id.* at *2. The Court granted Defendant's motion, finding that the CAFA's home-state controversy exemption applied. The Court also granted Plaintiff's motion for leave to amend her complaint to add the FLSA claims. Defendant contended that Plaintiff's claims failed to meet the CAFA's minimum diversity requirements or fall under one of the CAFA exceptions because more than two thirds of the class had last known residential addresses in California. *Id.* at *3. Plaintiff argued that the minimum diversity requirement was met, but did not challenge the merits of Defendant's assertion that her claims fell under the local controversy and home-state exceptions to the CAFA, instead arguing that Defendant waived the right to raise these exceptions through delay. At the outset, the Court noted that the home-state controversy exception provides that it "shall decline to exercise jurisdiction under [§ 1332(d)(2) where] two-thirds or more of the members of all proposed Plaintiff classes in the aggregate, and the primary Defendants, are citizens of the State in which the action was originally filed." *Id.* at *8-9. The Court stated that this exception cleared applied, as Defendant's records demonstrated that over 98% of the putative class members were residents of California. Further, the Court noted that Plaintiff's claims were asserted only against Defendant, a corporation headquartered in California, making Defendant a California citizen because it has its principal place of business in California. *Id.* at *9. Plaintiff argued that Defendant's home-state controversy exception argument, raised in its motion to dismiss more than 100 days after the initial complaint was filed, was untimely and Defendant thereby waived its right to raise the issue. *Id.* at *10. The Court noted that typically the Ninth Circuit suggests that motions to remand based on an exception to jurisdiction under the CAFA must be brought in a "reasonable time." *Id.* at *10-11. Assuming that the "reasonable time" requirement applicable to motions to remand would also apply to a motion to dismiss, the Court found that

Defendant complied with this standard. *Id.* at *11. Accordingly, the Court granted Defendant's motion to dismiss. As to Plaintiff's motion for leave to file an amended complaint, Defendant argued that Plaintiff unduly delayed in seeking leave to add a FLSA claim. The Court reasoned that because the case was in its early stages, discovery had not yet begun, the FLSA claims may be meritorious, and the prejudice to Defendant was minimal or non-existent, there was insufficient justification to deny leave to amend. Therefore, the Court granted Plaintiff's motion for leave to add a FLSA claim to her complaint.

***Franke, et al. v. Anderson Merchandisers,* 2017 U.S. Dist. LEXIS 119087 (C.D. Cal. July 28, 2017).** Plaintiff filed an action in state court alleging that Defendant violated various provisions of the California Labor Code. Defendant removed the action pursuant to the CAFA. Plaintiff filed a motion to remand. Defendant contended that the amount-in-controversy was $7,048,712.10. *Id.* at *3. As to Plaintiff's meal break claims, Defendant calculated the amount-in-controversy by counting the number of days in which an employee's average hours worked per day for a given pay period was five hours or more and then multiplying that number by an assumed 50% rate of violation and the average hourly rate of the putative class members. *Id.* at *4. For the rest break premium amount, Defendant applied the same methodology, except that it counted the number of days in which an employee's average hours worked per day for a pay period was three-and-a-half hours or more. *Id.* Plaintiff argued that it was unreasonable for Defendant to assume a 50% violation rate. The Court found that Plaintiff's allegations explicitly described a uniform practice, and failed to include any modifying language to suggest less than uniform violations. *Id.* at *5. Accordingly, given Plaintiff's broad allegations and failure to provide any rebutting evidence, the Court found that Defendant would be justified in using a 100% violation rate. The Court held that Defendant proved the meal and rest break premium amounts by a preponderance of the evidence. As to Plaintiff's waiting time penalties, the Court noted that an employer's failure to timely pay wages owed pursuant to §§ 201 or 202 results in a penalty of the employee's wages for every day that is late, up to a maximum of 30 days' wages, which Defendant adopted for its damages calculation. *Id.* at *6. Plaintiff alleged that Defendant failed to pay wages owed to Plaintiff and the putative class members "upon discharge or resignation . . . within any time permissible under California law." *Id.* at *7. Given the broad and vague allegations, the lack of any allegation that Defendant paid overdue wages to employees within 30 days after they ended employment, and Plaintiff's failure to submit any alternative evidence, the Court found Defendant's estimate appropriate. *Id.* at *9. As to Plaintiff's minimum wage claims, the Court noted that an employer must pay a penalty of $100 for the first failure to pay an employee minimum wages and $250 for each subsequent failure. *Id.* at *10. Defendant assumed employees were not paid minimum wages for each pay period, and used a one-year statute of limitations, applying a $100 penalty for 267 initial pay periods and a $250 penalty for 4,479 subsequent pay periods for California-based employees within the one-year limitations period, putting $1,146,450 in controversy. *Id.* The Court observed that Plaintiff failed to offer any evidence contradicting Defendant's calculations and found Defendant's estimate of minimum wage penalties sufficient in light of Plaintiff's allegations of a uniform policy and systematic scheme of wage abuse, failure to pay minimum wages at all material times, and policies and practices of failing to pay minimum wages. *Id.* at *11. Defendant also argued that California-based employees received inaccurate pay stubs for all applicable pay periods and that it calculated the amount- in-controversy by applying penalties. Defendant applied a $50 penalty for 267 initial pay periods and a $100 penalty for 4,479 subsequent pay periods for California-based employees within the one-year limitations period, putting $461,250 in controversy. *Id.* at *12. Plaintiff argued that Defendant did not support its use of a 100% wage statement violation rate with any evidence. The Court determined that Plaintiff failed to submit evidence showing a lower violation rate. The Court opined that coupled with Plaintiff's allegation that "at all material times set forth herein, Defendant failed to provide complete or accurate wage statements to Plaintiff and the other class members," and the lack of alternative evidence, the Court found that Defendant was justified in its use of a 100% violation rate. *Id.* at *13. Finally, Defendant estimated daily unpaid overtime by determining the number of pay periods in which an employee worked on average 7.9 hours or more per day, assuming one hour of overtime went unpaid for each day in those periods, and multiplying these hours by the overtime rate, which is 1.5 times the average hourly rate of putative class members. The Court found that a reasonable amount of attorneys' fees based on the damages amounts calculated by Defendant brought the amount-in-controversy over the CAFA's requirement for jurisdiction. Accordingly, the Court denied Plaintiff's motion to remand.

***Hamid, et al. v. Nike Retail Services,* 2017 U.S. Dist. LEXIS 90953 (C.D. Cal. June 13, 2017).** Plaintiff filed an action in state court asserting that Defendant violated various provisions of the California Labor Code. Defendant removed the case pursuant to the CAFA. Plaintiff filed a motion to remand, asserting that the Court must decline to exercise jurisdiction because either the local controversy exception or the home-state controversy exception applied. *Id.* at *6. Plaintiff initially argued that Defendant failed to prove that the CAFA amount-in-controversy requirement was met. However, the Court found that even if Defendants used a conservative violation rate estimate of 30%, the amount-in-controversy requirement would be met, and that was only taking into account only two of Plaintiff's 14 claims. *Id.* at *8-9. Accordingly, the Court held that Defendants plausibly alleged that the amount-in-controversy requirement was met. Therefore, the Court concluded that Defendants carried their burden of establishing that the CAFA granted it jurisdiction. The Court also analyzed Plaintiff's arguments that the statutory exceptions to the CAFA applied. As to the local controversy exemption, the Court noted that it must decline to exercise jurisdiction over a class action in which: (i) 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; (ii) at least one Defendant is a Defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the proposed Plaintiff class; and who is a citizen of the State in which the action was originally filed; (iii) principal injuries resulting from the alleged conduct or any related conduct of each Defendant were incurred in the state in which the action was originally filed; and (iv) during the 3-year period preceding the filing of that class action, no other class action was filed asserting the same or similar factual allegations against any Defendants on behalf of the same or other persons. *Id.* at *9-10. The Court noted that Plaintiff offered evidence that more than two-thirds of the class members were California citizens. Additionally, it did not appear there are any other class actions arising out these circumstances that have been filed against Defendants in the last three years. *Id.* at *11. Further, Plaintiff offered evidence that Defendant Lopez, a district director, was a California citizen and therefore a local Defendant. Defendants argued that Plaintiff failed to allege facts to support the argument that class members sought "significant relief" against Lopez or that Lopez's alleged conduct formed a significant basis for the claims asserted by the proposed Plaintiff class. The Court determined that Plaintiff challenged a state-wide policy, which strongly indicated that the state-wide management of Defendant's operations formed the basis of the allegations, and not the actions of any individual district director alone. *Id.* at *14. Accordingly, the Court found that Plaintiff failed to carry his burden of proving that Lopez's conduct formed a significant basis for the claims asserted. Further, the Court noted that Plaintiff failed to provide the Court with any evidence of how many class members were employed in Lopez's district, and therefore only a very small sub-section of the class might be able to seek recovery from her. Accordingly, the Court opined that Plaintiff had borne his burden of showing that significant relief was sought from Lopez. *Id.* at *18. Accordingly, the Court determined that the local controversy exception did not apply. Plaintiff further argued that the home-state exception applied. However, the Court ruled that there was no dispute that Defendant Nike, an Oregon corporation, was the primary Defendant, and the home-state exception applies only when all of the primary Defendants are citizens of the forum state. Accordingly, the Court found that the home-state exception did not apply. The Court thereby denied Plaintiff's motion to remand.

***Henry, et al. v. Century Freight Lines, Inc.,* 2017 U.S. App. LEXIS 10995 (9th Cir. June 21, 2017).** Plaintiff, a truck driver, filed a class action in state court alleging that Defendant misclassified drivers as independent contractors and thereby failed to pay overtime compensation in violation of the California Labor Code. Defendant removed the action to the District Court. Plaintiff filed a motion to remand, which the District Court granted pursuant to the CAFA. On appeal, the Ninth Circuit reversed the District Court's ruling. Plaintiff sought to represent a class of all those: (i) who worked in California for Defendant; (ii) as a truck driver; (iii) during the four years preceding the complaint's filing; and (iv) who were classified as an independent contractor. *Id.* at *2. Plaintiff sought reimbursement for all costs and expenses of owning and/or leasing, repairing, maintaining, and fueling the trucks and vehicles driven while conducting work for Defendant in violation of § 2802 of the California Labor Code. *Id.* In opposing Plaintiff's motion to remand, Defendant provided evidence of the amount that California-resident truck drivers paid in "lease-related payments." *Id.* In support of remand, Plaintiff argued that lease payments could not be considered for purposes of the amount-in-controversy because they were not recoverable as a matter of law. The Ninth Circuit, however, ruled that in determining the amount-in-controversy, a District Court must accept the allegations contained in the complaint as true and thereby assume the jury will return a verdict in Plaintiff's favor on every claim. *Id.* The complaint stated multiple times that Plaintiff sought

reimbursement for "all costs and expenses of leasing" the trucks. *Id.* at *4. As such, the Ninth Circuit explained that lease-related payments had been placed into controversy and were properly considered for purposes of the CAFA's jurisdiction. *Id.* The Ninth Circuit therefore concluded that Defendant produced sufficient evidence to establish by a preponderance of the evidence that the amount-in-controversy exceeded $5 million. *Id.* Defendant provided a declaration from Todd Militzer, its Vice President and Chief Financial Officer, who attested that during the class period, independently-owner truck drivers who provided a California address as his or her primary residence and worked in California paid more than $2,250,000 in lease-related payments and more than $7,450,000 in deductions for fuel. *Id.* The Ninth Circuit held that Militzer's declaration was sufficient to carry Defendant's burden. The Ninth Circuit thereby reversed and remanded with the instruction to the District Court that Defendant established the CAFA's jurisdictional requirements. *Id.* at *5.

***Hernandez, et al. v. Starbucks Corp.,* 2017 U.S. Dist. LEXIS 108081 (C.D. Cal. July 12, 2017).** Plaintiff filed an action in state court alleging claims against Defendants for violation of the California Labor Code, including failure to provide meal breaks and rest breaks, failure to provide minimum wages and overtime wages, failure to timely pay final wages, and failure to provide accurate wage statements. Defendant removed the action pursuant to the CAFA. Plaintiff filed a motion to remand, alleging that Defendant failed to meet the burden of proof that the amount-in-controversy exceeded $5 million. Defendant calculated the amount-in-controversy to be at least $5,118,960, including: (i) $1,152,989 for failure to provide meal breaks; (ii) $1,152,989 for failure to provide rest breaks; (iii) $1,387,170 in unpaid wages and liquidated damages; (iv) $460,480 in waiting time penalties; (v) $323,700 in wage statement penalties; (vi) $98,803 for failure to reimburse business expenses; and (vii) $542,838 in attorneys' fees. *Id.* at *3-4. Defendant estimated that the amount-in-controversy for Plaintiff's meal break claim was $1,152,989. The Court noted that this calculation was based on the assumption that each class member incurred one meal break violation per shift during the class period. *Id.* at *5-6. Defendant contended that this assumption was warranted in light of Plaintiff's allegation that pursuant to a "pattern and practice," Defendants "regularly failed to provide meal breaks due to the "uniform administration of corporate policy." *Id.* at *6. In contrast, Plaintiff presented evidence that she was unable to take an off-duty meal period approximately 70% of the time, or 3 to 4 times per workweek "because of the way the company required store managers to schedule employees." *Id.* Extrapolating this 70% violation rate for the class, and relying on the data Defendants provided, Plaintiff calculated the amount-in-controversy for her meal break claim to be $807,092 ($1,152,989 x 0.7), which reduced the amount-in-controversy below $5 million. *Id.* at *7. Plaintiff also contended that Defendants' minimum wage and overtime wage estimates should be reduced because they were derived from Defendants' 100% meal break violation rate. *Id.* The Court concluded that Defendants failed to demonstrate, by a preponderance of the evidence, that the amount-in-controversy exceeded $5 million. The Court found that Plaintiff's complaint referred to a "uniform administration of corporate policy," and that the most reasonable reading of Plaintiff's allegations was not that Defendants failed to provide an off-duty meal period on each and every shift, but rather that Defendants had a uniform policy which resulted in class members' inability to take an off-duty meal period on a regular basis. *Id.* at *8. Accordingly, the Court ruled that Defendants' assumption of a 100% violation rate was unreasonable. *Id.* The Court reasoned that it had no choice but to conclude that Defendants failed to meet its burden of demonstrating by a preponderance of the evidence that the amount-in-controversy exceeded $5 million. Accordingly, the Court granted Plaintiff's motion to remand.

***Hernandez, et al. v. Sysco Corp.,* 2017 U.S. Dist. LEXIS 10538 (N.D. Cal. Jan. 25, 2017).** Plaintiff, a former employee, brought a class action alleging that Defendants violated several provisions of the California Labor Code. Defendants removed the action pursuant to the CAFA. Plaintiff moved to remand the action under the local controversy exception of the CAFA, and the Court denied the motion. Defendants alleged that removal was proper under the CAFA because the case had more than 100 putative class members, the amount-in-controversy exceeded $5,000,000, and Plaintiff was a citizen of California whereas Defendants were citizens of Delaware and Texas. *Id.* at *2-3. Plaintiff did not dispute that Defendants made a *prima facie* case of removal under the CAFA and instead he contended that remand was appropriate under the local controversy exception. The Court stated that in establishing that the local controversy provision applied, a party must prove that during the 3-year period preceding the filing of that class action, no other class action was filed asserting the same or similar factual allegations against any Defendants on behalf of the same or other persons. *Id.* at *3-4. The Court found Defendants offered evidence that a similar class action complaint was filed in San Diego Superior Court in April 2014. *Id.* at *5. The Court therefore concluded that Plaintiff did not meet his burden of showing that the

local controversy exception applied because he did not establish that during the three years preceding the filing of this action no other class action was filed asserting the same or similar claims against the same Defendants, as required by the exception. *Id.* The Court held that since Plaintiff did not demonstrate that each required element of the local controversy exception was satisfied, it must deny Plaintiff's motion for remand. *Id.* Plaintiff argued that the Court should nonetheless apply the local controversy exception and decline jurisdiction because Defendants did not identify the previous class action in its removal notice. *Id.* The Court, however, opined that it was Plaintiff's burden to show the local controversy requirement applied, not Defendants' burden to show that it does not. *Id.* at *6. The Court, accordingly, denied Plaintiff's motion for remand.

***In Re Pfizer,* 2017 U.S. Dist. LEXIS 79714 (N.D. Cal. May 23, 2017).** Thousands of women in over 100 cases filed in California state court alleged that the use of Lipitor caused them to suffer from Type II diabetes. Defendant removed the matters pursuant to the CAFA's mass action provision, and the cases were consolidated under a master case number for administrative purposes. Plaintiffs then filed a consolidated motion to remand on the grounds that 100 or more Plaintiffs had not proposed that their cases be tried jointly. *Id.* at *416. The Court granted Plaintiffs' motion to remand. Three Plaintiffs filed a petition with the California Judicial Council to have their individual cases coordinated in a Joint Council Coordinated Proceeding ("JCCP"). A group of 21 additional Plaintiffs from eight other state court cases then filed an amended coordination petition, and stated that other cases would be filed, and requested that Plaintiffs from those cases could be added via add-on petitions. *Id.* at *417. Plaintiffs argued that jurisdiction pursuant to the CAFA's mass action provision did not apply, because only 65 Plaintiffs at most proposed that their cases be jointly tried, as that was the maximum number of Plaintiffs that ever attempted to join the JCCP. *Id.* at *431. Plaintiffs stated that all other remaining Plaintiffs did nothing more than file actions in state court, and the JCCP could not bind them to Plaintiffs who had not yet been added through an add-on petition or other means. *Id.* Defendant argued that the JCCP proposed joining other Plaintiffs to the coordinated action by "stating that they would seek to add all subsequent Lipitor claims." *Id.* at *432. However, the Court found that the JCCP's statements were insufficient to trigger the CAFA's mass action jurisdiction. The Court stated that suggestions or predications were not voluntary affirmations proposing a joint trial on behalf of the remaining Plaintiffs. *Id.* The Court determined that absent add-on petitions or similar affirmative actions or definitive commitments by the remaining Plaintiffs, they had not proposed a joint trial. *Id.* The Court reasoned that Plaintiffs are free to structure actions to avoid the CAFA's jurisdiction. *Id.* at *436. The Court also stated that it would not speculate on whether 35 or more Plaintiffs would ever take action in the future to be part of and bound by a proposal for a joint trial. *Id.* Accordingly, the Court granted Plaintiffs' motion to remand.

***Liberty Mutual Fire Insurance Co., et al. v. EZ FLO International, Inc.*, 2017 U.S. App. LEXIS 25306 (9th Cir. Dec. 14, 2017).** Plaintiffs, a group of 26 insurance companies in their capacity as subrogees of 145 insured homeowners, alleged that Defendant, a manufacturer of supply lines that connects water pipes to plumbing fixtures, produced defective products that allowed water to leak out of the supply lines. Plaintiffs filed their lawsuit in state court, but after they amended their complaint to seek over $5 million in damages allegedly suffered by their 145 insureds, Defendant filed a notice of removal pursuant to the CAFA. Plaintiffs then moved to remand. The District Court granted the motion to remand, holding that it lacked jurisdiction under the CAFA because the amended complaint did not include more than 100 named Plaintiffs. Defendant thereafter appealed to the Ninth Circuit. On appeal, the Ninth Circuit affirmed the District Court's remand order. The Ninth Circuit explained that at issue in the appeal was whether a lawsuit filed by 26 insurance companies, acting as subrogees of their 145 insureds, involved "claims of 100 or more persons" within the meaning of the CAFA. *Id.* at *4. Citing the U.S. Supreme Court's analysis in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), the Ninth Circuit opined that the U.S. Supreme Court's conclusion that the word "persons" in the phrase "100 or more persons" was synonymous with named Plaintiffs. *Id.* at *6. Defendant argued that *Hood* was distinguishable because Plaintiffs in *Hood* were unnamed, while the insureds here were identified in the case caption by reference to an attached exhibit. The Ninth Circuit rejected this argument, holding that even if the insureds were named in the amended complaint, they were still not named Plaintiffs, as required by *Hood*. *Id.* at *8-9. The Ninth Circuit thus concluded that the insureds were not Plaintiffs since they did not file the lawsuit, nor had they filed, served, or been served with any papers in the case. Accordingly, the Ninth Circuit affirmed the District Court's remand order, holding that the CAFA's numerosity requirement was not satisfied. *Id.* at *12.

***Lopez, et al. v. Bank Of America,* Case No. 17-CV-2383 (N.D. Cal. July 25, 2017).** Plaintiff, a banker, filed a state court class action alleging that Defendant under-paid bankers in violation of the California Labor Code. Defendant removed the matter pursuant to the CAFA. Plaintiff moved to remand, arguing that Defendant could not show that the matter met the amount-in-controversy threshold of $5 million. Defendant asserted that Plaintiff put $8,014,405.49 in controversy with her overtime claims and the portion of the estimated attorneys' fees for the claims. *Id.* at 1. Additionally, Defendant asserted that Plaintiff's remaining claims put an additional $3,270,367.59 in controversy. The Court found that the limited evidence provided by the parties suggested that the assumptions regarding the overtime claims were unreasonable. *Id.* at 2. Defendant submitted the declaration of Joseph Bush, a vice president, in support of its notice of removal. The Court held that Bush's declaration did not include any information supporting Defendant's assumption about the alleged number of overtime hours worked. *Id.* The Court noted that Plaintiff provided some evidence that she did not work as many overtime hours as Defendant assumed because she did not work some weeks and she had vacations. *Id.* at *2-3. The Court determined that although Plaintiff's declaration was limited to her own experience, it was the only evidence on the alleged violation rate for the overtime claims. Accordingly, the Court found that there was some evidence that the assumption rate used by Defendant was unreasonable. The Court further held that there was a similar lack of evidence supporting Defendant's assumptions about the other claims. *Id.* at 3. Accordingly, the Court found that Defendant failed to demonstrate by a preponderance of the evidence that there was more than $5 million in controversy, and granted Plaintiff's motion to remand.

***Morgan, et al. v. Childtime Childcare, Inc.*, 2017 U.S. Dist. LEXIS 186537 (C.D. Cal. Nov. 10, 2017).** Plaintiff filed a putative class action in state court against Defendants. Defendants removed Plaintiff's case, and Plaintiff moved to remand. The Court denied Plaintiff's motion. The parties disputed whether the $5 million threshold for jurisdiction under the CAFA had been met. Defendants claimed that Plaintiff's unpaid overtime claim alone placed $2,226,577.32 in controversy based on an average hourly rate of $12.12 per hour for the 1,615 putative class members who worked a total of 122,474 weeks during the relevant time period. *Id.* at *7-8. Using the overtime wage of $18.18 times 122,474 workweeks resulted in $2,226,577.32. *Id.* at *8. Plaintiff argued that it was unreasonable for Defendants to assume that all 1,615 employees worked one hour of unpaid overtime per week. The Court, however, stated that the amount-in-controversy requirement generally is satisfied where Defendants assume a 100% violation rate based on allegations of a uniform illegal practice and where Plaintiff offers no evidence rebutting this violation rate. *Id.* at *9. The Court concluded that Plaintiff's complaint was broad, did not specify how often the alleged violations occurred, and only alleged that the violations were part of a "uniform policy and systematic scheme of wage abuse" without further qualification. *Id.* The Court therefore held that, considering the weight of authority supporting use of Defendants' assumed violation rate under these circumstances, it would not require Defendants to use a lower rate. *Id.* Defendants further contended that Plaintiff's meal period claim and rest period claim each placed $1,484,384.88 at stake using the same calculations. *Id.* at *9-10. The Court determined that Plaintiff's complaint included little limitation on how often those violations occurred and alleged a "uniform and systematic" scheme of violating employees' right to meal and rest periods. *Id.* at *10. Therefore, considering the pervasiveness and the daily requirement of meal and rest breaks, the Court held that Defendants were not unreasonable in assuming one meal period and one rest period violation per week per employee. *Id.* Defendants also placed $2,118,600 in controversy for waiting time claims and $1,773,800 in controversy for wage statement claims. The Court therefore found that Defendants demonstrated that more than $5 million was at stake in this case. *Id.* at *13. Accordingly, the Court ruled that Defendants had sufficiently established the requisite amount-in-controversy under the CAFA and it denied Plaintiff's motion to remand.

***Rachner, et al. v. Network Funding, L.P*., 2017 U.S. Dist. LEXIS 190081 (C.D. Cal. Nov. 16, 2017).** Plaintiffs, a group of employees, filed a class action in state court alleging that Defendant violated various provisions of the California Labor Code and the California Unfair Competition Law. Defendant removed the action, asserting that the amount-in-controversy for at least one named Plaintiff exceeded the jurisdictional minimum. Defendant based its determination on communications between the parties in preparation for a mediation during which Plaintiffs' counsel stated that he had incurred attorneys' fees of approximately $150,000 "without any lodestar multiplier" and that fees through trial "could be up to $500,000." *Id.* at *3. Plaintiffs' counsel further contended that Plaintiff Rachner's compensatory damages included: (i) unpaid overtime wages of $35,969.853; (ii) unreimbursed business expenses of $1,040; (iii) waiting time penalties of $22,168.39; and (iv) wage statement

penalties of $1,600. Defendant calculated that Rachner would be entitled to additional liquidated damages in the amount of $8,460 for unpaid minimum wages based on his alleged 864 hours of unpaid overtime. Defendant, therefore, calculated Rachner's total damages, exclusive of attorneys' fees, at $69,238.24. *Id.* at *4. The Court noted that the statutes on which Plaintiffs based their claims provided for the recovery of attorneys' fees and Plaintiffs sought an award of reasonable attorneys' fees. Thus, the Court found that it was clear that attorneys' fees could be included toward the amount-in-controversy. *Id.* at *9. Defendant produced evidence that Plaintiff Rachner's compensatory claims reasonably could total $69,238.24 and that, at the time of removal, his attorneys' fees exceeded $5,761.76. *Id.* Accordingly, the Court concluded that Defendant demonstrated by a preponderance of the evidence that the amount-in-controversy for Plaintiff Rachner's claims was likely to exceed $75,000. *Id.* at *9-10. The Court therefore denied Plaintiffs' motion to remand.

***Ramirez-Duenas, et al. v. TF Outdoor LLC,* 2017 U.S. Dist. LEXIS 61986 (E.D. Cal. April 24, 2017).** Plaintiff, an employee, filed a putative class action on behalf of himself and fellow employees alleging various violations of the California Labor Code by Defendant. Plaintiff originally filed the action in state court. Defendant removed the action, contending that it had jurisdiction pursuant to the CAFA because: (i) the matter involved 100 or more putative class members; (ii) minimal diversity existed between the parties; and (iii) the amount-in-controversy exceeded $5 million. *Id.* at *1. Plaintiff filed a motion to remand, arguing that the amount-in-controversy did not exceed $5 million. *Id.* at *2. Plaintiff and the putative class were non-exempt employees who worked in Defendant's warehouse from December 7, 2012 to the present. Defendant estimated Plaintiff's claimed five causes of action resulted in an amount-in-controversy of $5.8 million. One of Plaintiff's claims was that "for at least a portion of the liability period," warehouse employees were paid a "meal period premium payments in increments of one-half one hour" rather than one additional hour of pay as required by the California Labor Code . *Id.* at *3. Defendant calculated the amount-in-controversy for the meal period claim by assuming that each putative class member was not provided with a compliant meal period at least three times per week. *Id.* at *3-4. By using that number multiplied by half of hourly minimum wage by the 217 class period, Defendant determined an amount-in-controversy for this claim of $1,852,420. *Id.* at *4. Plaintiff asserted that the calculation was erroneous because: (i) Defendant assumed a violation rate without any evidence to support its assumption; (ii) Defendant's amount-in-controversy calculation was premised on the total number of possible meal period violations (based on the assumed violation rate) rather than the number of unpaid meal period premiums owed; and (iii) Defendant based its calculation on the present minimum wage, not the then-applicable minimum wage. *Id.* at *5-6. The Court addressed the first concern only and found that Plaintiff's complaint was devoid of any indication of how frequently Defendant failed to provide him or the class members with a meal break. *Id.* at *6-7. Defendant contended that it "could reasonably have assumed," based on the allegations of the complaint, "up to two defective meal breaks per day, or ten per five-day workweek." *Id.* at *8. The Court determined, however, that as no part of Plaintiff's complaint spoke to the frequency of the alleged meal period denials, no reasonable inference could be drawn from the complaint regarding the frequency of meal period denials. *Id.* The Court stated that applying an assumed 100% violation rate where no underlying facts existed to the support that conclusion – relying exclusively on the reasoning that the complaint did not restrict the violation rate to a rate that is discernably smaller than 100% – improperly shifted the burden of establishing subject-matter jurisdiction to Plaintiff. The Court therefore declined to assume a 100% meal period violation rate based on the allegations of the complaint. The Court ruled that an assumption that meal period violations took place every day was unreasonable as a matter of law. *Id.* at *12. As Defendant submitted no evidence to establish the frequency of meal period violations, the Court held that it could not accept a 100% violation rate based on the allegations of the complaint and evidence submitted, but no alternative rate was clear. *Id.* at *13. The Court therefore permitted Defendant to submit supplemental briefing and evidence in support of its assumed three-violations-per-week rate of meal period denial. *Id.* at *15.

***Reyes, et al. v. Carehouse Health,* 2017 U.S. Dist. LEXIS 103764 (C.D. Cal. July 5, 2017).** Plaintiff filed a class action in state court alleging that Defendant violated several violations of the California Labor Code. Defendant removed the action and one year later, Plaintiff filed a motion to remand. The Court denied Plaintiff's motion. Defendant alleged that the amount-in-controversy exceeded the CAFA's minimum requirement for federal jurisdiction. Defendants offered calculations for Plaintiff's claims for unpaid meal and rest period premiums, unpaid overtime compensation, waiting time penalties, and attorneys' fees in order to reach the jurisdictional threshold. Plaintiff contended that Defendants had not met their burden of establishing the amount-

in-controversy under the CAFA because their calculations were based on "unreasonable assumptions" about her claims. *Id.* at *6. To calculate the amount-in-controversy for Defendants' alleged meal and rest period violations, Defendants assigned a violation rate of one meal break violation and one rest break violation per week per class member. *Id.* at *6-7. Defendants offered the declaration of Christina Young, the Senior Director of Business Applications for Genesis Curative Services LLC (which provided contracted payroll services to Defendant Southwest), who attested that the putative class members worked a total of 43,829 workweeks during the relevant four-year statutory period at an average hourly rate of pay of $21.27. *Id.* at *8. Accordingly, Defendants calculated the total amount of missed meal and rest break premiums as $1,864,485.66. Based on the same average hourly pay rate of $21.27, Defendants calculated the average overtime rate for the putative class members as $31.91 per hour. *Id.* at *10. Assuming one hour of unpaid overtime wages for each putative class member for each workweek during the four-year statutory period, the total amount of unpaid overtime wages amounted to $1,398,583.39. *Id.* Defendants calculated the total amount of potential waiting time penalties as $1,776,470.40. *Id.* Finally, for Plaintiff's desired attorneys' fees, Defendants maintained that 25% of recovery was a reasonable amount of fees in a class action such as this one. *Id.* at *11. Defendants contended that Plaintiff was not entitled to attorneys' fees for her meal and rest break or her waiting time claims, so 25% of her unpaid overtime claims would total $349,645.85 (*i.e.*, 25% of $1,398,583.39 unpaid overtime wage liability). *Id.* at *11-12. Accordingly, Defendants asserted the total amount-in-controversy was at least $5,389,185.30. Plaintiff countered that Defendants assumed "every single class member suffered a violation under each claim during every single week of their employment." *Id.* at *12. The Court disagreed and found that Defendants employed reasonable estimates of one violation per week per employee for the meal and rest break and overtime claims. Further, the Court opined that Defendants presented evidence that their calculations were conservative. *Id.* at *13. At her deposition, Plaintiff estimated that Defendants did not allow her to take rest breaks three or four days per week and did not provide her with meal breaks six days per week. For that reason, the Court found significant that Defendants' estimates were lower than the rates Plaintiff herself previously suggested. The Court therefore determined that Defendants demonstrated that the amount-in-controversy was met by a preponderance of the evidence, and it denied Plaintiff's motion to remand.

***Scott, et al. v. Credico (USA) LLC,* 2017 U.S. Dist. LEXIS 155600 (N.D. Cal. Sept. 22, 2017).** Plaintiffs filed an action in state court alleging that Defendants violated the California Labor Code and California Business and Professions Code. Defendants removed the action. Plaintiffs later clarified that the proposed class was limited to those employees jointly employed by Defendants Credico, Sprint/UMC, and Latitude, rather than including those employed by any Defendants. In support of their notice of removal, Defendants estimated the amount-in-controversy for the wage claims (including base pay and overtime) as $1,607,953.70. Defendants also calculated damages $240,600 for § 558 penalties, $593,350 for unpaid wages penalties, $242,710 for meal and rest break premiums, $949,627 for waiting time penalties, and 25% of the total recovery for attorneys' fees. *Id.* at *5. Defendants thereby estimated the total amount-in-controversy was $7,427,741.87. The Court stated that Defendants had not met their burden to demonstrate that the amount-in-controversy exceeded $5 million. Defendants presented a calculation of "gross wages" based on the total number of hours worked per week by putative class members, the number of workweeks, and the applicable wage rate (including variations of the minimum wage over time, and overtime versus regular time rates). *Id.* at *6-7. Defendants acknowledged that they have already paid class members approximately $950,000 as compensation for their work. *Id.* at *7. The Court noted that the amount in dispute and the wages were for unpaid overtime wages. Accordingly, the amount of unpaid overtime wages in dispute was $657,953.70, not 1,607,953.70. *Id.* at *8. The Court found that Defendants' uncontested evidence established wages were paid and that Plaintiffs were only seeking to recover unpaid wages, not total gross wages. The Court determined that the revised damages came to $3,801,594. Defendants sought to add attorneys' fees of 25% of recovery. The Court held that because contingency fees based on a common fund recovery are not damages, they should not be counted as part of the amount-in-controversy. *Id.* at *10. Accordingly, the Court held that Defendants have not demonstrated, by a preponderance of the evidence, that the amount-in-controversy exceeded $5 million. The Court therefore granted Plaintiffs' motion to remand.

***Vikram, et al. v. First Student Management, LLC*, 2017 U.S. Dist. LEXIS 166396 (N.D. Cal. Oct. 6, 2017).** Plaintiff, a bus driver, filed a state court action alleging that Defendant failed to accurately calculate and pay for all time worked in violation of the California Labor Code. Defendant removed the action to the District Court

pursuant to the CAFA, asserting that the amount-in-controversy exceeded $5 million. Plaintiff filed a motion to remand, arguing that Defendant failed to substantiate its claims that there was diversity of citizenship, more than 100 class members, and that the amount-in-controversy was over $5 million. *Id.* at *5. Plaintiff challenged Defendant's assertions of diversity of citizenship and the number of class members on the ground that Defendant's removal notice lacked information and evidence. In response, Defendant provided a declaration by its corporate officer which stated that Defendant is a corporation incorporated under Delaware law and headquartered in Ohio. Defendant also provided a declaration stating that per Defendant's time-keeping data and employment/payroll records, there were 5,750 non-exempt employees working as bus drivers in California during the class period. *Id.* at *7. The Court concluded that based on the declarations, Defendant established by a preponderance of the evidence that the case met the CAFA's diversity and numerosity requirements. *Id.* at *7-8. As to the amount-in-controversy, Defendant estimated Plaintiff's waiting time penalties claim as $6,160,126.83, wage statement claims as $7,346,550, minimum wage claims as $2,280,685.09, and attorneys' fees as $5,209,829.43. *Id.* at *8. In support, Defendant relied primarily on a declaration stating that Defendant's "payroll records show that from July 6, 2016 to July 21, 2017, First Student issued 75,301 wage statements to 3,671 non-exempt California bus drivers." *Id.* at *9-10. Based on these numbers, Defendant calculated the $50 penalty as $183,550 (3,671 initial pay period violations x $50), and the subsequent pay period violations as $7,163,000 (71,630 subsequent pay period violations x $100), for a total of $7,346,550. *Id.* at *10. Plaintiff argued that Defendant could not assume a 100% violation rate because Plaintiff's complaint alleged that Defendant only issued inaccurate wage statements "from time to time." *Id.* at *11. The Court stated that while Plaintiff may have pled that the inaccurate wage statements were only issued "from time to time," Plaintiff's wage statement claim stated that "Defendant failed to list the total hours worked by Plaintiff and other California Labor Sub-Class Members each pay period because of Defendant's policy that required California Labor Sub-Class Members to work off-the-clock." *Id.* at *11-12. The Court determined that this claim then turned to the "mandatory" practice of requiring workers to arrive at a pre-designated time, where they would have to wait in line to retrieve their route assignments and bus keys. *Id.* at *12. Thus, based on Plaintiff's own allegations, the Court found it was reasonable to assume that every wage statement would be in violation, based on Defendant's "mandatory" practice of requiring workers to arrive at pre-designated times, which resulted in off-the-clock work that would not be reflected in "each" pay period. *Id.* The Court thereby concluded that Defendant demonstrated by a preponderance of the evidence that the wage statement penalty claim was worth $7,346,550, more than the CAFA's $5 million requirement. Accordingly, the Court denied Plaintiff's motion to remand.

Vilitchai, et al. v. Ametek Programmable Power, Inc., **2017 U.S. Dist. LEXIS 31623 (S.D. Cal. Mar. 6, 2017).** Plaintiff filed a complaint in state court asserting unlawful business practices in violation § 17200 of the California Business and Professions Code. Plaintiff alleged that Defendants failed to pay minimum wage, overtime, and wages to cover missed meal and rest breaks. Defendants removed the action based on diversity jurisdiction under the CAFA. Plaintiff filed a motion to remand and argued that Defendants did not sufficiently support the $5 million minimum jurisdictional requirement under the CAFA. The Court granted Plaintiff's motion. Plaintiff argued that Defendants' allegations were erroneous because they rested on the assumption that the class included over 110,000 non-exempt or hourly-paid employees employed in California. Plaintiff offered to amend the complaint to clarify the scope of the putative class to include only those of Defendants' non-exempt or hourly-paid California employees who worked for Defendant Ametek. The Court noted that when the class allegations were read in the context of the complaint as a whole, it was apparent that the putative class included only employees who were placed with Ametek in California. *Id.* at *4. The Court found that Defendants' assumption that the putative class comprised more than 110,000 members and that the amount-in-controversy therefore exceeded $5 million was unsupported, and thus insufficient to meet Defendants' burden in opposing Plaintiff's motion to remand. Defendants also filed a separate opposition to Plaintiff's motion, arguing that if only its own non-exempt or hourly-paid employees were included in the putative class, the amount-in-controversy still exceeded $5 million. *Id.* at *6. However, the Court determined that Defendants' calculation was based on the assumption of a 100% violation rate for the meal and rest break violations and a one-hour per week violation rate for the overtime violations. *Id.* Defendants argued the assumption was based on the allegations in the complaint. As to the meal and rest break violations, Defendants interpreted the complaint to allege a 100% violation rate, *i.e.*, that in every instance of a class member working more than a five-hour shift, Defendants failed to provide for a meal and rest break. *Id.* at *7-8. The Court opined that although Plaintiff alleged

Defendants had a "uniform policy and systematic scheme of wage abuse," such allegations did not support a 100% violation rate. *Id.* at *8. The Court reasoned that the complaint did not allege class members missed all meal and rest breaks, or even that Defendants failed to compensate them for every meal or rest break which was missed, and therefore the complaint did not support a 100% or any other specific violation rate. *Id.* The Court therefore found that Defendants failed to provide evidence in support of their assumption that the meal and rest break violations occurred on every shift of five or more hours. *Id.* at *9. As to overtime, Defendants contended that the complaint alleged that Ametek "failed to pay for any overtime . . . ." *Id.* However, the Court concluded that the complaint alleged that Defendants failed to pay overtime for "all the hours worked." *Id.* The Court found the difference between "any" and "all" to be material because whereas the allegation that Defendants did not pay for any overtime would support a 100% violation rate, the allegation that they did not pay for all overtime allowed for a conclusion that Defendants paid for some of the overtime worked. *Id.* at *10. Accordingly, the Court granted Plaintiff's motion to remand.

***Young, et al. v. Novartis Pharmaceutical Corp*., 2017 U.S. Dist. LEXIS 170961 (N.D. Cal. Oct. 16, 2017).** Plaintiff, an employee, filed a putative class action in state court alleging several violations under the California Labor Code and the California Business and Professions Code. Defendant removed the case pursuant to the CAFA. Plaintiff filed a motion to remand, and the Court granted the motion, finding that the amount-in-controversy did not meet the CAFA's threshold of $5 million. Defendant calculated the amount-in-controversy at more than $8 million, including: (i) unpaid overtime wages of $744,242.88; (ii) missed meal and rest break premiums of $4,961,046; (iii) waiting time penalties of $595,929.60; (vi) wage statement penalties of $145,150.00; and (v) attorneys' fees of $1,611,592.12. *Id.* at *3. The Court stated that even assuming that all the assumptions made for unpaid overtime wages, waiting time penalties, and wage statement penalties were reasonable, the amount-in-controversy for those three counts was only $1,485,322.48. *Id.* at *6. Therefore, the Court noted that the key issue was the amount-of-controversy attributed to the meal and rest break premiums. The Court opined that in calculating the meal and rest break premiums, Defendant assumed a 100% violation rate. Defendant argued that the assumption was reasonable because Plaintiff alleged that class members were denied meal and rest breaks "at all material times," based on a "uniform policy/practice of wage abuse that involved failing to pay them for . . . missed meal periods and rest breaks," and policies and practices "requiring employees . . . to work through their meal and rest periods without paying them proper compensation." *Id.* at *7. The Court disagreed and found that Plaintiff's allegations that Defendant engaged in a uniform policy and practice of meal/rest break violations could not support the assumption that the violations happened 100% of the time. The Court held that even if one could infer from such allegations that each time a meal break or rest break was missed, Defendant failed to pay for the meal/rest break premium, the allegations did not show how often an employee missed a meal break or rest break. *Id.* The Court determined that if it were to assume a more reasonable violation rate of two days a week, the damages for missed meal and rest breaks would amount to $1,984,418.40. *Id.* at *10. Adding the claims for unpaid overtime wages, waiting time penalties, and wage statement penalties, total damages would equal $3,469,740.88. *Id.* at *11. Further, the Court found that attorneys' fees may be counted toward the amount-in-controversy only if "an underlying statute authorizes an award of attorneys' fees, either with mandatory or discretionary language." *Id.* In this case, the Court stated that the only fee-shifting statute was for the wage-statement-penalty claim. The Court reasoned that Defendant failed to present any evidence to support an estimate of attorneys' fees that Plaintiff might recover based on a projected lodestar, nor did Defendant provided any basis for the Court to conclude that a 25% benchmark provided a reasonable proxy for the lodestar estimate. *Id.* at *12. Therefore, the Court held that Defendant failed to prove by a preponderance of evidence that attorneys' fees should be included in the amount-in-controversy. Further, even if a 25% award were included, the Court stated that the total amount-in-controversy would not reach $5 million. Accordingly, the Court granted Plaintiff's motion to remand.

(x) Tenth Circuit

***Speed, et al. v. JMA Energy Co., LLC*, 2017 U.S. App. LEXIS 18968 (10th Cir. Oct. 2, 2017).** Plaintiff brought a putative class action in state court alleging that Defendant, an oil and gas producer, violated Oklahoma law by failing to pay interest on delayed payments of revenue from oil and gas production to mineral-interest owners. Defendant removed the case based on the CAFA. *Id.* at *2. Plaintiff filed a motion to remand, arguing it could prove mandatory and discretionary exceptions to the CAFA. After conducting jurisdictional discovery, Plaintiff filed an amended motion to remand. The District Court granted the motion relying on an exception to the CAFA

that permits a District Court to decline to exercise jurisdiction over a class action meeting certain citizenship prerequisites "in the interests of justice and looking at the totality of the circumstances" and based on its consideration of six enumerated factors. *Id.* On appeal, the Tenth Circuit affirmed the District Court's remand order. After Plaintiff moved to remand following Defendant's removal, the District Court permitted the parties to conduct discovery on the jurisdictional issues. *Id.* at *6. The parties later stipulated that the aggregated claims totaled $5 million, and that more than one-third, but fewer than two-thirds, of the proposed class members were Oklahoma citizens. As a result of this discovery and the stipulation, Plaintiff filed an amended motion to remand, asserting the discretionary exception to jurisdiction under the CAFA, which allows a District Court to decline to exercise jurisdiction over a class action that is otherwise covered by the CAFA based on six enumerated factors, including: (i) whether the claims asserted involve matters of national or interstate interest; (ii) whether the claims asserted will be governed by laws of the state in which the action was originally filed; (iii) whether the class action had been pleaded in a manner that seeks to avoid federal jurisdiction; (iv) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or Defendants; (v) whether the number of citizens of the state in which the action was originally filed in all proposed Plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and (vi) whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed. *Id.* at *7-8. Addressing each of the six factors, the Tenth Circuit held that the District Court did not abuse its discretion in remanding the case. Regarding the first, second, and fifth elements, the Tenth Circuit opined that the claims primarily concerned Oklahoma state interests, Oklahoma laws, and Oklahoma citizens, and therefore the District Court did not abuse its discretion in remanding the case. *Id.* at *10-21, *30-32. In addressing the third element, the Tenth Circuit ruled that the class action was not pleaded in a manner that sought to avoid federal jurisdiction since Plaintiff proposed a "natural class" that "encompass[ed] all of the people and claims that one would expect to include in a class action." *Id.* at *21. Regarding the fourth element, the Tenth Circuit opined that there was an ample connection to the forum state, and therefore the District Court did not abuse its discretion on this point. *Id.* at *28-29. Finally, the Tenth Circuit analyzed the sixth element, which considers whether during the three year period preceding the filing of the class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons had been filed. Explaining that the District Court found that no other such actions had been filed during the previous three-year period, the Tenth Circuit reasoned that this factor favored remand. Accordingly, the Tenth Circuit concluded that the District Court did not abuse its discretion in ruling that each of the six enumerated factors relative to the discretionary exception to jurisdiction under the CAFA supported remand, and it affirmed the District Court's remand order.

(xi) Eleventh Circuit

***Adams, et al. v. International Paper Co*., 2017 U.S. Dist. LEXIS 71693 (S.D. Ala. May 5, 2017).** Plaintiffs, a group of 248 individuals who own or occupy residential property located in the Africatown Community in Mobile County, Alabama, filed a class action in state court alleging that Defendants released dioxins, furans and related chemicals, as well as other hazardous and harmful chemicals and pollutants, from Defendant's property into the air, soil, surface water, and/or groundwater of Plaintiffs' properties and/or residences. *Id.* at *6. Plaintiffs asserted 23 state law claims sounding in theories of negligence, wantonness, trespass, public nuisance, private nuisance, failure to warn, fraud, outrage, strict liability, battery, and assault. Plaintiffs sought compensatory damages for personal injuries and diminution in value of their real properties, as well as punitive damages and injunctive relief. *Id.* at *6-7. Defendant removed the matter on the basis of federal subject-matter jurisdiction and the diversity provisions of 28 U.S.C. § 1332, reasoning that there was complete diversity of citizenship between Plaintiffs and the only properly-joined Defendant, and that the amount-in-controversy exceeded the sum of $75,000. Plaintiffs then filed an amended complaint substituting a new Defendant, H.O. Weaver & Sons, Inc., and explaining that when Plaintiffs mistakenly named the wrong Defendant and that H.O. Weaver was the entity they had intended to name. H.O. Weaver is an Alabama corporation with its principal place of business in Alabama, and therefore it is an Alabama citizen for diversity purposes, and is non-diverse from Plaintiffs, all or substantially all of whom are likewise Alabama citizens. *Id.* at *9. Alternatively, Defendants also asserted that the matter should be removed pursuant to the CAFA because it was a mass action, the minimal diversity requirement was satisfied, and the amount-in-controversy exceeded $5 million. Plaintiffs asserted that the local controversy exception to the CAFA applied because Plaintiffs and the principal Defendant were premised in

Alabama. The Court noted that the CAFA excludes from the definition of "mass action" 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.* at *19. The Court explained that the core of the dispute was therefore whether there was an event or occurrence that would place the action outside the scope of the CAFA's mass action provision. Defendant argued that an "event or occurrence" is confined to mean "a truly singular happening," as opposed to "an action for continuing pollution over decades." *Id.* at *20. However, the Court disagreed, and reasoned that the exception should not be construed so narrowly relative to wrongs occurring at a singular moment in time. The Court also held that Plaintiffs met their burden of showing that declination of jurisdiction was appropriate under the "local controversy" exception to CAFA. Thus, even if this case fell within the statutory definition of a "mass action," remanding the action would remain appropriate under the CAFA pursuant to the "local controversy" exception for declining jurisdiction. *Id.* at *25. Accordingly, the Court granted Plaintiffs' motion to remand.

***Blevins, et al. v. Aksut,* 849 F.3d 1016 (11th Cir. 2017).** Plaintiffs, a group of patients, filed a state court class action alleging that Defendant falsely informed them that they required heart surgery, and then conducted the unnecessary heart operations on them in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs alleged that Defendants operated a racketeering enterprise through which they performed and billed for the unnecessary heart procedures. *Id.* at 1018. Defendant removed the matter based on federal-question jurisdiction. Plaintiffs moved to remand and argued that the CAFA's local controversy provision prohibited the District Court from exercising jurisdiction. The Magistrate Judge assigned to the case reported and recommended that the District Court deny Plaintiffs' motion to remand because the CAFA was inapplicable. The District Court adopted the Magistrate Judge's recommendation. On appeal, the Eleventh Circuit affirmed the District Court's ruling. The Eleventh Circuit found that it was undisputed that Plaintiffs' complaint alleged that Defendants violated the federal RICO statute and that Defendant removed based on federal-question jurisdiction under 28 U.S.C. § 1331. *Id.* at 1019. However, Plaintiffs contended that the CAFA's local controversy provision precluded federal jurisdiction because it requires District Courts to abstain from exercising jurisdiction over all "local" class actions. *Id.* Plaintiffs further argued that the CAFA assigns jurisdiction over local class actions exclusively to the state courts. The Eleventh Circuit disagreed, and held that § 1332(d)(4) does not affect a District Court's ability to exercise jurisdiction under § 1331. *Id.* at 1020. The Eleventh Circuit stated that § 1332(d)(4)'s language makes clear that it has no bearing on jurisdiction asserted under § 1331, as it provides that District Courts "shall decline to exercise jurisdiction under paragraph (2)" of § 1332(d). *Id.* However, it does not preclude the exercise of any other jurisdictional power. The Eleventh Circuit therefore reasoned that when the requirements of federal question jurisdiction are met, a District Court may exercise jurisdiction over class actions, even if they involve only local parties. The Eleventh Circuit opined that nothing in the language of § 1332(d)(4) indicates that Congress intended to divest District Courts of jurisdiction under § 1331. Rather, § 1332(d)(4) prevents District Courts from exercising the jurisdiction that they otherwise possess under that statute, but does not restrict their ability to exercise other forms of jurisdiction. *Id.* Accordingly, the Eleventh Circuit held that the CAFA's local controversy provision does not require District Courts to abstain from exercising federal-question jurisdiction over local class actions, and nothing in that provision indicates that Congress intended to divest District Courts of federal-question jurisdiction. *Id.* The Eleventh Circuit thereby affirmed the District Court's denial of Plaintiffs' motion to remand.

***Garvin, et al. v. RCI Hospitality Holdings, Inc.*, Case No. 16-CV-25221 (S.D. Fla. Oct. 23, 2017).** Plaintiffs, a group of exotic dancers, filed a collective action alleging that Defendant misclassified them as independent contractors and thereby failed to pay overtime and minimum wages in violation of the FLSA and Florida wage & hour law. Defendant moved to dismiss Plaintiffs' claims, or in the alternative, to compel arbitration. *Id.* at 2. Plaintiffs voluntarily dismissed their FLSA claims, leaving only the state law claims. The Court analyzed whether it still had original jurisdiction over Plaintiffs' state law claim under the CAFA. Plaintiffs asserted in their complaint that: (i) the class was between 100 and 500 members; (ii) the amount-in-controversy exceeded $5,000,000; and (iii) there was diversity between at least one Plaintiff and/or members of the class and Defendant. *Id.* at 3. The Court found that based on the allegations in the complaint, it was unable to determine if there was diversity of citizenship. Accordingly, the Court granted Defendant's motion to dismiss for lack of subject matter jurisdiction.

***Hunter, et al. v. City Of Montgomery*, 859 F.3d 1329 (11th Cir. 2017).** Plaintiffs filed a putative class action contending that Defendants' use of red light traffic violation cameras deprived class members of rights protected by state law and 42 U.S.C. § 1983. Plaintiffs sought a declaration that the red light camera program was unlawful, a judgment requiring Defendants to refund all red light violation fines they had collected as a result of the program, an injunction directing Defendants to stop issuing tickets based on the program, and an award of attorneys' fees. *Id.* at *1331. Defendants removed the lawsuit to the District Court citing the § 1983 claim, the request for attorneys' fees under § 1988, and diversity jurisdiction under the CAFA. Plaintiffs then amended their complaint to drop the § 1983 claim and eliminated their reliance on § 1988 for attorneys' fees. The District Court ordered supplemental briefing on whether it had subject-matter jurisdiction. Plaintiffs contended that both the CAFA's local controversy exception and its home state exception to the exercise of federal jurisdiction applied. The District Court agreed, finding that both exceptions applied. On appeal, the Eleventh Circuit affirmed. First, the Eleventh Circuit found that it had jurisdiction to hear the appeal because a remand order based on the CAFA's local controversy exception or home state exception did not fall within either of § 1447(d)'s categories requiring it to decline to exercise jurisdiction. *Id.* at *1334. Further, the Eleventh Circuit considered whether the home state exception applied. The parties agreed that two-thirds or more of the members of the putative classes were citizens of Alabama, that the City of Montgomery was a citizen of Alabama, and that Defendant Traffic Solutions was not a citizen of Alabama. *Id.* The Eleventh Circuit therefore determined that the question was whether Traffic Solutions was a "primary Defendant" under the CAFA. *Id.* at *1335. The Senate Judiciary Committee's report on the CAFA described the meaning of "primary Defendant" as "those Defendants who are the real targets of the lawsuit" – *i.e.*, Defendants that would be expected to incur most of the loss if liability was found. *Id.* Plaintiffs' only request for monetary relief was a request for refund of all traffic fines collected in connection with the red light camera program. *Id.* at *1336. The Eleventh Circuit concluded that Plaintiffs sought the monetary relief from the City alone and not from Traffic Solutions, and therefore Traffic Solutions could not be a primary Defendant. *Id.* Accordingly, because the only primary Defendant was a "citizen of the State in which this action was originally filed," the home state exception to the CAFA's jurisdiction applied. *Id.* The Eleventh Circuit therefore affirmed the District Court's ruling remanding the matter.

(xii) District Of Columbia Circuit

***ALDF, et al. v. Hormel Foods Corp.*, 2017 U.S. Dist. LEXIS 51629 (D.D.C April 5, 2017).** Plaintiff filed suit against Defendant in the Superior Court of the District of Columbia, alleging that Defendant violated the District of Columbia Consumer Protection Procedures Act ("DCCPPA") and mislead consumers with its "Natural Choice" advertising campaign. Plaintiff's Complaint claimed that Defendant's meat products were not natural as the advertising campaign implied. Defendant removed the case, invoking the Court's federal question, diversity, and CAFA jurisdiction. Plaintiff moved to remand the case, asserting that the Court lacked subject-matter jurisdiction. The Court granted Plaintiffs' motion. Defendant maintained that the Court had subject-matter jurisdiction based upon federal question, diversity, and CAFA jurisdiction. *Id.* at *5. The Court rejected each of Defendant's arguments and remanded the case. *Id.* First, the Court rejected Defendant's argument that the case raised federal issues and ruled that here was no real conflict between the false advertising claims in this case and the federal laws that Defendant cited, as the laws Defendant cited to related to meat labelling and packaging. *Id.* at *6. The Court opined that this case was not about the labels or packages on meat products, but instead a national advertising campaign, including magazine advertisements, newspaper inserts, and webpages. *Id.* at *8. As such, the Court ruled that it lacked federal question jurisdiction because Plaintiff asserted only a single cause of action under District of Columbia law. Second, the Court found that it lacked diversity jurisdiction because Defendant failed to demonstrate that there was $75,000 in controversy in this case. *Id.* at *12. Defendant asserted that the purported cost of complying with the injunctive relief satisfied the jurisdictional amount. *Id.* The Court rejected this argument and ruled that the cost of compliance was not a proper measure of the jurisdictional minimum, and as it also was not convinced that Defendant's speculation as to possible attorneys' fees was sufficient to establish jurisdiction. Finally, the Court determined that it lacked jurisdiction under the CAFA because this case was not a proper class action. *Id.* at *25. Accordingly, the Court granted Plaintiff's motion and remanded the case to state court. *Id.* at *66.

***Bradford, et al. v. George Washington University*, 2017 U.S. Dist. LEXIS 58590 (D.D.C. April 18, 2017).** Plaintiff filed a class action in state court against Defendant asserting violations of the District of Columbia Consumer Protection Procedures Act (the "Consumer Protection Act"), and claims for unjust enrichment,

fraudulent misrepresentation, and negligent misrepresentation. Defendant removed the action pursuant to the CAFA, asserting that the action met the CAFA's amount-in-controversy threshold and that the class contained more than 300 individuals. Plaintiff filed a motion to remand, which the Court denied. *Id.* at *1. Plaintiffs alleged that they each paid over $28,000 in tuition to participate in what they believed would be a specialized on-line education program provided by Defendant. *Id.* at *2. Plaintiffs contended that the on-line education program, Security and Safety Leadership ("SSL"), was marketed "as substantially identical" to the classroom version, but was not equivalent to the classroom version in actuality. *Id.* at *3. Plaintiffs argued that Defendant failed to establish both the numerosity and the amount-in-controversy requirements of the CAFA. In support of its notice of removal, Defendant provided the declaration of one of its directors stating that since 2010, at least 248 students paid some tuition for the on-line SSL course, and that the aggregate tuition and fee charges for these 248 students totaled $5,911,464.02. *Id.* at *10. Of that sum, the 248 students actually paid $4,390,805.99. Plaintiffs challenged this evidence as inadmissible under the Federal Rules of Evidence, arguing that statements in the declaration did not satisfy the business records exception to the prohibition on hearsay and that the statements violated the best evidence rule. *Id.* The Court disagreed, finding that the declaration provided reliable evidence regarding the number of putative class members and the amount-in-controversy, which were jurisdictional elements the Court need only determine by a preponderance of the evidence standard. *Id.* at *11. The Court found that while the declaration did not recite the precise language of an exception to the hearsay rule, the Court was persuaded that the information regarding the University's enrollment, tuition, payment, and attendance records would be admissible at trial. *Id.* at *12. The Court thereby determined that based on the record before it, Defendant established by a preponderance of the evidence that the putative class contained at least 248 Plaintiffs, and therefore the CAFA's numerosity requirement was satisfied. *Id.* at *14. In addition, given that these students paid over $4 million for the on-line SSL course, and in light of Plaintiffs' request for treble and punitive damages and reasonable attorneys' fees, the Court concluded that Defendant also established by a preponderance of the evidence that the amount-in-controversy exceeded the CAFA's $5 million threshold. Accordingly, the Court denied Plaintiffs' motion to remand.

IX. Other Federal Rulings Affecting The Defense Of Workplace Class Action Litigation

Throughout 2017, 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 ADA class actions; Alien Tort Statute and trafficking victims class actions; Anti-Injunction Act issues in class actions; appeals in class action litigation; application of tolling principles in class actions; appointment, selection, and removal of lead counsel in class actions; ascertainability under Rule 23; attorneys' fee awards in class actions; bankruptcy issues in class actions; breach of contract class actions; civil rights class actions; class actions involving unions; class definition issues; class-wide proof and class-wide damages in class actions; collateral estoppel, *res judicata*, and settlement bar concepts under Rule 23; commercial free speech issues in class actions; consolidation issues in class actions; consumer fraud class actions; COBRA class actions; data breach class actions; decertification under Rule 23; default judgments in class actions; discovery issues in class actions; disqualification of counsel in class actions; employee testing issues in class actions; experts in class action litigation; FACTA and FDCPA class actions; Family & Medical Leave Act class actions; FCRA class actions; Federal Tort Claims Act class actions; foreign worker and labor issues class actions; government enforcement litigation; immigration class actions; industrial injury class actions; injunctions in class actions; intervention issues in class actions; issue certification under Rule 23; issues with the Judicial Panel On Multi-District Litigation in class actions; jurisdiction issues in class action litigation; litigation over class action settlement agreements and consent decrees; medical monitoring class actions; mootness issues in class action litigation; multi-party litigation over modification of employee/retirement benefits; non-workplace class action arbitration issues; notice issues in class actions; objectors and opt-out issues in class actions; OFCCP enforcement actions; preemption issues in class actions; preemptive motions to strike or dismiss class allegations; privacy class actions; procedural issues and proof requirements in Rule 23 class actions; public employee class actions; sanctions, contempt, and unethical misconduct in class action litigation; service awards and costs in class actions; settlement administration issues in class actions; settlement approval issues in class actions; settlement enforcement issues in class actions; special masters in class actions; standing issues in class actions; statute of limitations issues in class actions; stays in class action litigation; TCPA class actions; the adequacy of representation requirement for class certification; the *cy pres* doctrine in class actions; the numerosity requirement for class certification; the predominance requirement for class certification; the typicality requirement for class certification; trial and post-trial issues in class action litigation; venue issues in class actions; WARN class actions; workplace antitrust class actions; and workplace class action arbitration issues.

These rulings of 2017 added to the evolving case law interpreting Rule 23, and significantly impact the defense of workplace class actions.

(i) ADA Class Actions

***Brodie, et al. v. Speedway LLC,* 2017 U.S. Dist. LEXIS 54544 (W.D. Pa. April 7, 2017).** Plaintiffs, a group of disabled customers, brought a class action alleging violations of Title III of the Americans With Disabilities Act ("ADA"). Specifically, Plaintiffs challenged Defendant's corporate policies and practices, which they contended result in accessibility barriers at its parking facilities in violation of the ADA. Plaintiffs alleged that "Defendant's centralized design, construction, alteration, maintenance and operational policies and practices have systematically and routinely violated the ADA by designing, constructing and altering facilities so that they are not readily accessible and usable, by failing to remove architectural barriers, and by failing to maintain and operate facilities so that the accessible features of Defendant's facilities are maintained" in violation of § 12183(a)(1) and applicable regulations. *Id.* at *4-5. Plaintiffs further asserted these violations would deter them and similarly-situated individuals from returning to Defendant's facilities and that absent injunctive relief they would be unable to fully access Defendant's facilities in violation of their rights under the ADA. *Id.* at *5. Defendant filed a motion to dismiss, which the Court denied. Defendant argued that Plaintiffs lacked standing as to Defendant's locations they have not visited. Defendant further argued that Plaintiffs failed to meet Rule 23's commonality, adequacy of representation, and typicality requirements. *Id.* at *8. In addition, Defendant asserted that because Plaintiffs lacked individual standing as to the locations they had not visited, Plaintiff Access Now likewise had no standing. Defendant requested that all class allegations be dismissed. The Court noted that as Plaintiff had not filed a motion for class certification, little if any class discovery had been conducted and in the Court's estimation, there had not been the necessary record development as to this issue. *Id.* at *8-9. Further,

the Court found that Plaintiffs alleged sufficient facts to state a claim to relief that was plausible on its face: *i.e.,* that Defendant's centralized ADA accessibility policies were ineffective, and that these policies have allowed, and will allow, architectural barriers to develop and persist at its stores, and deter others similarly-situated from returning. *Id.* at *10. The Court also determined that Plaintiffs had adequately established standing as to the locations they visited, and Rule 23 would come into play thereafter. The Court opined that Plaintiffs were entitled to proceed to conduct discovery and to develop a record. *Id.* Further, the Court stated that as pled, whether Defendant's alleged centralized policies were ineffective and discriminatory would be common to all class members. *Id.* Similarly, the Court noted that Plaintiffs' challenge to this policy and the policy's effect on accessibility at all of Defendant's stores was typical of, and to, all class members. *Id.* at *11. Finally, the Court held that Defendant's application of its centralized policies and its failure to implement effective accessibility policies was generally applicable to all class members, since a single injunction against Defendant's policy would remediate barriers the policy already had caused and prevent barriers from recurring as a result of the policy's current ineffectiveness. Accordingly, the Court found that the pleadings did not demonstrate that Plaintiffs could not meet the requirements of Rule 23, but rather showed class certification may be appropriate if discovery confirms Plaintiffs' class allegations. Accordingly, the Court denied Defendant's motion to dismiss.

***Equal Rights Center, et al. v. Kohl's Corp.,* 2017 U.S. Dist. LEXIS 66390 (N.D. Ill. May 2, 2017).** Plaintiffs, a group of disabled customers, brought a class action alleging violations of Title III of the Americans With Disabilities Act ("ADA"). Plaintiffs contended that Defendant systematically denied customers who use wheelchairs and scooters full and equal enjoyment of their stores across the country. According to Plaintiffs, while Defendant's internal documents relating to store layouts – its "Shopability Standards" – set forth the minimum spacing distance for merchandise racks in its stores and directed employees to enforce those standards, Defendant regularly failed to ensure that the standards were followed. *Id.* at *2. Plaintiffs filed a motion for class certification, which the Court denied. Plaintiffs sought to certify a class of all people with mobility disabilities who relied on wheeled mobility devices for mobility who, during the 12 months immediately prior to the filing of the complaint, were denied access to the goods, services, facilities, privileges, advantages, or accommodations of any Defendant's stores in the United States on the basis of disability because of the existence of aisles that were too narrow. *Id.* at *4. Plaintiffs acknowledged that Defendant's written Shopability Standards, "if enforced, would most likely have avoided this lawsuit altogether." *Id.* at *5. Plaintiffs therefore challenged the daily individual decisions by relevant employees of Defendant in each particular store as to how wide aisles would be and where merchandise racks would be placed. *Id.* The Court explained that discretionary decisions can be the source of a common claim if they are, for example, the outcome of employment practices or policies controlled by higher-level directors, if all decision-makers exercise discretion in a common way because of a company policy or practice, or if all decision-makers act together as one unit. The Court found that Plaintiffs failed to make this showing, as they did not point to evidence of systemic policies or procedures. *Id.* at *6. The Court noted that Plaintiffs had not directed the Court to any evidence that Defendant, as a matter of practice or policy, routinely required employees to ignore complaints or disregard its Shopability Standards. *Id.* at *7. Thus, the Court found that Plaintiffs failed to establish commonality. The Court also ruled that Plaintiffs failed to meet numerosity. Plaintiffs asserted that even assuming that only one half of 1% of the estimated 3.6 million wheelchair users, or 1,800 individuals, have visited Defendant's stores in the United States and experienced difficulties maneuvering the aisles, the numerosity requirement would be satisfied. The Court opined that while Plaintiffs' reliance on statistics regarding the number of wheelchair-using individuals nationwide could be useful if every store were laid out according to a common plan, this was not the case. Plaintiffs specifically asserted that 12 individuals using mobility devices had trouble accessing items in 17 different Kohl's stores based on the narrowness of the aisles. *Id.* at *10. The Court held that simply because a store may have one or more aisles that are less than 36 inches does not necessarily lead to the conclusion that it was inaccessible to a person using a wheeled mobility device. *Id.* at *10-11. The Court also found that Plaintiffs failed to meet the predominance requirement of Rule 23(b)(2), because Plaintiffs had not shown that Defendant refused to act on grounds that applied generally to the class. Moreover, the Court found that Plaintiff's proposed injunction to "bring its policies, practices and procedures into compliance with the ADA" was overbroad. *Id.* at *12. The Court stated that such injunctive relief would simply require Defendant to obey the law, and should be viewed with caution given the possibility for overbreadth and vagueness. *Id.* at *12-13. The Court concluded that Plaintiffs also did not indicate how an injunction containing such broad and non-specific

language could be enforced given that the layout of over 1,100 stores varied on a daily basis. *Id.* at *13. The Court therefore denied Plaintiffs' motion for class certification.

***Glover, et al. v. City Of Laguna Beach,* Case No. 15-CV-1332 (C.D. Cal. June 25, 2017).** Plaintiffs, on behalf of themselves and others similarly-situated, brought a class action alleging that Defendant's Alternative Sleeping Location ("ASL"), a homeless shelter, violated the Americans With Disabilities Act ("ADA"), § 5 of the Rehabilitation Act ("RA"), the Eighth Amendment, the Fourteenth Amendment, and §§ 7 and 17 of Article I of the California Constitution. *Id.* at 1. The parties cross-moved for summary judgement. Plaintiffs moved for summary judgment to establish Defendant's violations of: (i) the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments and the California Constitution; and (ii) Title II of the ADA and § 504 of the RA. *Id.* Defendant moved for summary judgement on all of Plaintiffs' claims. The Court denied Plaintiffs' motion and granted Defendant's motion as to the cruel and unusual punishment claims. *Id.* at 2. The Court found that there were genuine issues of material facts about whether Plaintiffs were excluded from, discriminated against, or denied benefits from the ASL on the basis of disability. *Id.* Therefore the Court declined to grant summary judgment on those claims. The Court granted Plaintiffs' motion with regard to their claim that Defendant transported individuals to and from the ASL using a van that was not equipped with ramps or lifts. *Id.* Finally, the Court granted Plaintiffs' motion for summary judgment on Plaintiffs' substantive due process claims. Accordingly, the Court granted in part and denied in part the parties' cross-motions for summary judgment.

***Hizer, et al. v. Pulaski County*, 2017 U.S. Dist. LEXIS 146138 (N.D. Ind. Sept. 11, 2017).** Plaintiff filed a class action alleging violation of both the Americans With Disabilities Act ("ADA") and the Rehabilitation Act. Plaintiff filed a motion for class certification, which the Court granted. The Pulaski County Courthouse is a three-story building with the floors being connected by a stairway as well as an elevator. The Courthouse's public restrooms are located on the first floor. *Id.* at *2. Plaintiff alleged that the entrances to the restrooms were not wide enough for a person in a wheelchair to be able to enter them, nor were the stalls in the restrooms large enough for a person with a physical disability to maneuver within them. The Court found that Plaintiff sufficiently alleged standing as Plaintiff suffered from a physical disability and her legal assistant and her involvement on the County's ADA Board required her to visit the Courthouse frequently, and she was therefore repeatedly subjected to embarrassment and an enhanced burden when having to manage the Courthouse's allegedly inaccessible features. The Court then reviewed Plaintiff's motion for class certification pursuant to Rule 23. Plaintiff stated that many people with physical disabilities lived in Pulaski County, and the statistics provided to the Court indicated that the number might very well be in excess of 1,000 individuals. *Id.* at *16. The Court therefore determined that the number of potential class members, as well as the judicial inefficiency of attempting to try a case with so many individual Plaintiffs and future class members, made joinder impracticable. The Court also found that Plaintiff's allegation that the conditions at the Courthouse violated the ADA and Rehabilitation Act "poses a question of law that is common to the class, the determination of which would resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at *18. The Court also held that all putative class members were affected by the accessibility problems at the Courthouse and therefore Plaintiff's claims were typical of the proposed class, insofar as each of those claims were based on the same legal theory that the Courthouse's alleged inaccessibility constituted a violation of the ADA and the Rehabilitation Act. *Id.* The Court also found that Plaintiff was adequate to represent the interests of the proposed class, as Plaintiff's claims were identical to those of the other members of the class and there was no evidence of any unique defense or circumstance that would cause conflict. The Court further noted that Plaintiff's counsel was skilled and experienced in this type of litigation, and had appeared before the Court in similar circumstances. *Id.* at *20. As to Rule 23(b), the Court explained that Rule 23(b)(2) covers cases where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.* at *21. The Court reasoned that Plaintiff was attempting to obtain declaratory and injunctive relief designed to benefit the whole class. Thus, Plaintiff met the Rule 23(b)(2) requirement as to the proposed class. Accordingly, the Court granted class certification to a class comprised of all persons with mobility impairments or other physical disabilities who accessed or attempted to access, or who will access or will attempt to access the Pulaski County Courthouse.

***Kurlander, et al. v. Kroenke Arena Co*., 2017 U.S. Dist. LEXIS 195438 (D. Colo. Aug. 31, 2017).** Plaintiff, a deaf individual, filed a class action against Defendant on behalf of herself and all others similarly-situated for

violation of Title III of the Americans With Disabilities Act ("ADA"). Plaintiff alleged that Defendant, the owner and operator of the Pepsi Center – an indoor arena in Denver, Colorado – discriminated against patrons who are deaf or hard of hearing by failing to offer open captioning on the center hung display or ribbon board displays ("displays") during events when the Displays are used ("display events"). *Id.* at *1-2. Plaintiff sought injunctive relief and reasonable attorneys' fees and costs. Plaintiff filed a motion for class certification, which the Court granted. Plaintiff sought to certify a class of all Pepsi Center patrons who are deaf or hard of hearing and unable to hear using assistive listening devices, who have been, since November 10, 2014, or in the future will be, denied full and equal enjoyment of the goods, services, facilities, advantages, or accommodations of the Pepsi Center based on Defendant's failure to provide open captioning of aural content during non-concert events for which the center-hung display was used. *Id.* at *3. Plaintiff alleged that, because the "full and equal enjoyment" of the Pepsi Center included all of the aural information provided over the public address system during display events, effective communication for those who cannot hear that information required open captioning. *Id.* at *5. The Court found that Plaintiff had standing because her injury was the lack of open captioning of aural content at display events, and if she prevailed in this case and Defendant was required to provide open captioning of aural content at display events, her injury would be redressed. *Id.* at *9. The Court determined that Plaintiff's proposed class definition adequately defined the class and that individual inquiries of each of the class members were not required. Accordingly, the class was sufficiently ascertainable. *Id.* at *10. As to the Rule 23 requirements, the Court noted that the Pepsi Center seated between 17,000 and 21,000 people and hosts over 200 events per year, with attendance for the 2015-2016 season totaling over 1.276 million. *Id.* at *14. The Court reasoned that while these figures suggested that the class was numerous and hard to identify, it was more than enough to meet the numerosity requirement. *Id.* at *15. Further, the Court found that the common question of whether Defendant was required to provide open captioning at display events to those who are deaf and hard of hearing and require open captioning of aural content was a question of fact and law common to the members of the class. *Id.* at *16. The Court also stated that Plaintiff's claim was typical of the claims of the class, as she also claimed that Defendant violated Title III by failing to provide open captioning of display events. *Id.* The Court further determined that the named Plaintiff, like the members of the proposed class, sought remedies for the lack of open captioning that posed a barrier to their full and equal enjoyment of events at the Pepsi Center. The Court found that there were no unique facts or defenses relevant to the named Plaintiff's claim that would put her in conflict with the proposed class. The Court also opined that Plaintiff's counsel was experienced in class actions and would adequately represent the interests of Plaintiff and the class. *Id.* at *17. As to the Rule 23(b) requirements, the Court held that this matter clearly fell within the paradigm for class certification under Rule 23(b)(2) because "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.* at *18. The Court concluded that, based on the record before it and taking into account the class definition, it was appropriate to certify the class under Rule 23(b)(2) because injunctive relief was being requested that would be appropriate respecting the class as a whole. *Id.* at *19. Accordingly, the Court granted Plaintiff's motion for class certification.

***Markett, et al. v. Five Guys Enterprises, Inc.,* 2017 U.S. Dist. LEXIS 115212 (S.D.N.Y. July 21, 2017).**
Plaintiff, a blind individual, filed an action on behalf of herself and a nationwide class of similarly-situated individuals, asserting that she could not make a purchase on Defendant's website due to various access barriers. Plaintiff alleged that these access barriers denied her full and equal access to, and enjoyment of, the goods, benefits, and services of Defendant, in violation of Title III of the Americans With Disabilities Act ("ADA"), the New York State Human Rights Law, the New York State Civil Rights Law, and the New York City Human Rights Law. *Id.* at *2. Plaintiff sought declaratory and injunctive relief as well as compensatory damages. Defendant filed a motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) and 12(b)(1). Defendant argued that the ADA only governs access to the goods and services available at physical facilities, and because Plaintiff only alleged that she was denied access to a non-physical space, *i.e.,* Defendant's website, her complaint failed to state an essential element of her Title III claim. *Id.* Defendant further stated that it was currently in the process of completing a large-scale website renovation effort that would result in its website being accessible to Plaintiff and other blind and visually impaired individuals. *Id.* at *3. Defendant thus claimed that Plaintiff's action was moot and must be dismissed for lack of subject-matter jurisdiction. The Court noted that to state a claim under Title III, a Plaintiff must allege: (i) that she is disabled within the meaning of the ADA; (ii) that Defendant owns, leases, or operates a place of public accommodation; and (iii) that Defendant

discriminated against her by denying her a full and equal opportunity to enjoy the services Defendant provides. *Id.* at *4. Based on these factors, the Court concluded that Plaintiff has met these three requirements and therefore stated a valid claim under Title III of the ADA. First, Defendant did not dispute that Plaintiff has sufficiently plead that she was disabled within the meaning of the ADA. Second, the Court stated that the text and purposes of the ADA, suggested that Defendant's website was covered under the ADA, either as its own place of public accommodation or as a result of its close relationship as a service of Defendant's restaurants, which indisputably are public accommodations under the statute. *Id.* at *5. Third, accepting Plaintiff's factual allegations as true, the Court held that Defendant denied Plaintiff a full and equal opportunity to enjoy the services it provides through its website. The Court therefore rejected Defendant's argument that Plaintiff's claims were moot, and denied Defendant's motion to dismiss.

Mielo, et al. v. Steak 'N Shake Operations Inc., **2017 U.S. Dist. LEXIS 64051 (W.D. Pa. April 27, 2017).** Plaintiffs, a group of paraplegics, brought a putative class action alleging that Defendant's compliance policy violated Title III of the Americans With Disabilities Act ("ADA") by failing to ensure that their parking lots were fully accessible to and independently usable by individuals who use wheelchairs. *Id.* at *2. Plaintiffs had difficulty accessing several of Defendant's restaurants because of architectural barriers in the parking facilities, such as excessively sloped parking spaces. *Id.* at *3. Plaintiffs' investigators found architectural barriers at eight restaurants. *Id.* at *4. Plaintiffs alleged that Defendant disregarded its on-going statutory obligation to ensure its parking facilities remain accessible to individuals with disabilities by failing to conduct assessments to determine if barriers existed. *Id.* at *7-8. Defendant admitted that it had no written policy regarding accessibility of its parking lots and that it relied upon customers' complaints to ensure compliance with the ADA. *Id.* at *8. The Court rejected Defendant's contention that its maintenance obligations under the ADA were limited to temporary mechanical failures and easily movable obstructions, finding this ran contrary to the purposes of the ADA to ensure that facilities be accessible to and usable by individuals with mobility disabilities. *Id.* at *10. Plaintiffs moved for certification on behalf of a class consisting of individuals with "qualified mobility disabilities who were or will be denied the full and equal enjoyment of the goods, services, facilities…. of any Steak 'n Shake" because the individual encountered accessibility barriers. *Id.* at *2. The Court granted Plaintiffs' motion, finding all requirements of Rule 23 were met. The Court rejected Defendant's argument that numerosity was not satisfied, finding that the standard may be relaxed in cases where injunctive relief is sought. The Court reasoned that numerosity was satisfied based upon census statistical data concerning the numbers of persons with mobility disabilities. *Id.* at *14. The Court also rejected Defendant's arguments as to commonality, ruling that Plaintiffs established that Defendant applied the same ADA maintenance policies to all its restaurants and this would produce common questions. *Id.* at *17. The Court further found that Rule 23(b)(2) was satisfied because Plaintiffs presented evidence that Defendant's compliance policy was ineffective and if Plaintiffs prevailed, an injunction would provide relief to each member of the class. Accordingly, the Court granted Plaintiffs' motion for class certification.

Nevarez, et al. v. Forty Niners Football Co., LLC, **2017 U.S. Dist. LEXIS 121030 (N.D. Cal. Aug. 1, 2017).** Plaintiffs, two physically disabled individuals and a non-disabled spouse, filed a class action against Defendants alleging violations of disability discrimination because of architectural barriers in the football stadium under the American With Disabilities Act ("ADA") and California's Unruh Civil Rights Act ("Unruh Act"). Defendants moved to dismiss portions of Plaintiffs' claims pursuant to Rule 12(b)(6). *Id.* at *11. The Court granted in part and denied in part Defendants' motion. *Id.* at *32. Plaintiff DeFrancesco was a quadriplegic and required the use of a wheelchair and Plaintiff Priscilla Nevarez ("Mrs. Nevarez'") was the spouse of Plaintiff Abdul Navarez ("Mr. Nevarez"), a physically disabled individual who required the use of a wheelchair. First, Defendants argued that Mrs. Nevarez lacked Article III and statutory standing to bring claims for disability discrimination under the ADA and the Unruh Act. Second, Defendants move to dismiss portions of Plaintiffs' claims for damages under the Unruh Act on the basis that Plaintiffs failed to timely exhaust their state administrative remedies. Defendants moved to dismiss Mrs. Nevarez's claims against Defendants and asserted that Mrs. Nevarez could not allege discrimination claims under the ADA and the Unruh Act because she lacked Article III and statutory standing as she was non-disabled and her associational discrimination claims were inadequate. Defendants also asserted that Mrs. Nevarez was unable to bring an associational discrimination claim simply because she struggled to assist her husband as he navigated the stadium. The Court rejected Defendants' argument on the grounds that Ninth Circuit case law precedents had consistently rejected identical attempts to interpret the ADA's

associational discriminations in a narrow fashion. The Court ruled that Mrs. Nevarez had adequately alleged a specific, direct, and separate injury because of her association with Mr. Nevarez, and therefore it denied Defendants' motion to dismiss her ADA claims. Likewise, the Court denied Defendants' motion to dismiss Mrs. Nevarez's Unruh Act claim to the extent Defendants moved to dismiss this claim for failure to adequately allege an ADA claim. Defendants also moved to dismiss portions of the Nevarez's' claims for damages under the Unruh Act and Mr. DeFrancesco's claim under the Unruh Act on the basis that Plaintiffs failed to timely exhaust their state administrative remedies, as required by California law. *Id.* at *29. The California Tort Claims Act requires that any civil complaint for money damages first be presented to and rejected by the pertinent public entity not later than six months after the accrual of the cause of action. Accordingly, the Court dismissed the Nevarez's' claims for damages under the Unruh Act only as to the claims that were premised on events that were time-barred. Defendants asserted that Mr. DeFrancesco's claim for damages under the Unruh Act claim against Defendants should be dismissed in its entirety for failure to timely exhaust his state administrative remedies because the complaint contained no factual allegations regarding if or when Mr. DeFrancesco submitted a claim. Plaintiffs conceded that the complaint did not contain any factual allegations regarding Mr. DeFrancesco's claim submission and requested leave to amend the complaint in this regard. Accordingly, the Court granted Defendants' motion to dismiss without prejudice as to DeFrancesco's claim under the Unruh Act and granted him leave to amend to the complaint. In sum, the Court granted in part and denied in part Defendants' motion to dismiss Plaintiffs' claims. *Id.* at *33.

***Ochoa, et al. v. City Of Long Beach,* Case No. 14-CV-4307 (C.D. Cal. Oct. 17, 2017).** Plaintiffs, a group of individuals with mobility disabilities, filed a class action alleging that Defendant failed to maintain accessible sidewalks and pedestrian rights-of-way in violation of the Americans With Disabilities Act. The parties ultimately reached a settlement, which the Court preliminarily approved. The parties subsequently filed a joint motion for final settlement approval, which the Court granted. The Court found that the settlement class of "all persons (including without limitation residents of and visitors to the City) with any mobility disability, who, at any time from July 14, 2014 through the term, have used or will use the pedestrian facilities in the City of Long Beach," met Rule 23's requirements. *Id.* at 3. The Court further determined that the settlement agreement was fair, reasonable, adequate, and in the best interests of the settlement class as a whole. *Id.* The Court held that the expenditures the City set forth for improvements to the sidewalks and rights-of-way were proper and reasonably calculated to maintain and ensure accessibility of the pedestrian facilities. *Id.* The Court noted that in accordance with the settlement agreement, class members released all claims as set forth in the settlement agreement. The Court also determined that Plaintiffs' request for attorneys' fees of $3,364,904 was reasonable and well supported by evidence submitted in support of the motion for attorneys' fees. *Id.* at 5. Accordingly, the Court granted the parties' joint motion for final settlement approval.

***Updike, et al. v. Clackamas County,* 2017 U.S. Dist. LEXIS 19872 (D. Ore. Feb. 13, 2017).** Plaintiff, a deaf inmate, brought a putative class action against Defendant alleging violations of the Americans With Disabilities Act ("ADA") and § 504 of the Vocational Rehabilitation Act. Plaintiff asserted claims on behalf of himself and other deaf or hard of hearing individuals who have been, are, or will be incarcerated at the Clackamas County jail. *Id.* at *2. Plaintiff filed a motion for class certification, which the Court denied. Plaintiff asserted that Defendant failed to provide hearing-impaired inmates with adequate access to sign language interpreters, which inhibited the ability of inmates to effectively communicate with Clackamas County employees, particularly medical professionals. *Id.* at *4. Plaintiff alleged that Defendant discriminated against deaf and hard of hearing individuals through its policies and practices and that the discrimination was willful and deliberate. *Id.* Plaintiff sought both compensatory damages and equitable relief on behalf of the class. The Court noted that Plaintiff proposed to include in his certified class all deaf or hard of hearing people "who will become incarcerated" (or "future deaf or hard of hearing individuals incarcerated") at the Clackamas County Jail. *Id.* at *19. Future class members necessarily may seek only injunctive relief; they cannot recover money damages for "past injuries" that, by definition, have not yet occurred. *Id.* at *20. The Court, however, already had dismissed Plaintiff's claims for injunctive relief for lack of standing. The Court therefore modified Plaintiff's proposed class definitions to exclude injunctive relief, as it was unavailable to him. With respect to the revised class definitions, the Court considered Plaintiff's proposed broad class, which was defined as "all deaf or hard of hearing inmates who formerly were or currently are incarcerated in the Clackamas County Jail anytime during the period of April 29, 2013 to the present." *Id.* at *21. The Court also considered Plaintiff's proposed narrow class, which was defined

as "(i) all current [or former] deaf or hard of hearing individuals incarcerated by Clackamas (ii) who require [or required] accommodations, including interpreters or other auxiliary aids or services, to communicate effectively and/or to access programs or services available to individuals incarcerated by Clackamas (iii) anytime during the period of April 29, 2013 to the present." *Id.* The Court found that Plaintiff produced data indicating that Plaintiff's broad class contained approximately 900 deaf or hard of hearing individuals incarcerated at the Clackamas County jail annually. *Id.* at *24. Therefore, the Court determined that the broad class met the numerosity requirement. However, the Court determined that Plaintiff's narrow class failed to meet numerosity. Although 40 deaf or hard of hearing were incarcerated at the Clackamas County jail during the class period, Plaintiff had not alleged that each of these 40 individuals actually required any auxiliary aid or other accommodation while incarcerated, including but not limited to an ASL interpreter. *Id.* at *25. Without such evidence, the Court declined to find more than a handful of people who needed an accommodation that was not provided. *Id.* at *26. Because numerosity is a threshold requirement for class certification, the Court would not consider the other requirements of class certification as applied to Plaintiff's proposed narrow class definition. The Court determined that Plaintiff failed to show that his broad class definition demonstrated typicality and predominance. Without the ability to seek class-wide injunctive relief, the Court determined that each putative class member would be required to litigate the individualized nature of his or her alleged degree of hearing impairment and precisely what aid or assistance that inmate reasonably needed but was denied by Defendant, as well as whether Defendant acted with deliberate indifference toward each individual putative class member. *Id.* at *36-37. Accordingly, the Court denied Plaintiff's motion for class certification.

(ii) Alien Tort Statute And Trafficking Victims Class Actions

Adhikari, et al. v. Kellogg Brown & Root,* 845 F.3d 184 (5th Cir. 2017*). Plaintiffs were the family members of a group of Nepali men who were kidnapped and murdered as they traveled to a United States military base, Al Asad, to work for Daod & Partners, a Jordanian corporation that sub-contracted with Defendant, a U.S. military contractor. *Id.* at *3. Plaintiffs brought causes of action under the Alien Tort Statute ("ATS"), the Trafficking Victims Protection Reauthorization Act ("TVPRA"), and state tort law. *Id.* The District Court granted Defendant's motion for summary judgment on the ATS claims and dismissed the TVPRA claims. *Id.* at *4. The District Court dismissed the state tort claims as being barred by the statute of limitations and refused to equitably toll the claims. *Id.* at *46. On Plaintiffs' appeal, the Fifth Circuit affirmed. *Id.* at *4. The deceased were recruited by a Nepal-based company and promised jobs at a hotel in Jordan. *Id.* Once in Jordan, Plaintiffs' passports were confiscated and they were told that they were being sent to Iraq to work on Al Asad, and would only be paid three-quarters of what they were originally promised. *Id.* at *5. The Fifth Circuit held that the ATS did not apply extraterritorially, in light of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013). *Id.* at *41. The Fifth Circuit noted that Daod's recruitment, transportation, and alleged detention all occurred in Nepal, Jordan, and Iraq, and the deceased never arrived at Al Asad. *Id.* at *16. The Fifth Circuit determined that all relevant conduct occurred overseas, and it did not reach the issue of whether the conduct could even be imputed to Defendant. *Id.* Furthermore, the Fifth Circuit ruled that Plaintiffs failed to establish that the United States controlled Al Asad in 2004, such that it constituted a territory of the United States, noting that a U.S. military base does not constitute *de facto* territory unless the United States has demonstrated an intent to exercise sovereignty over that base permanently. *Id.* at *20. The Fifth Circuit also rejected Plaintiffs' argument that Defendant's conduct in the United States, such as domestic payments to Daod, rebutted the presumption against extraterritoriality (as the application of the ATS is determined by the location of the conduct relevant to the ATS' focus). *Id.* at *21. The Fifth Circuit further concluded that the District Court correctly dismissed the TVPRA claims because: (i) the TVPRA did not apply extraterritorially at the time of the alleged conduct in 2004; and (ii) applying a 2008 amendment to the TVPRA that had the effect of permitting Plaintiffs' extraterritorial claims would have an improper retroactive effect on Defendant. *Id.* at *4. Fifth Circuit ruled that nothing in the text of the pre-2008 TVPRA or in the text of § 1596 indicated that a Plaintiff could sue for extraterritorial violations of the TVPRA before 2008. *Id.* at *33. The Fifth Circuit concluded that the District Court was correct in finding that the presumption against retroactivity prevented applying § 1596 to Defendant's conduct; in so holding, it reasoned that the presumption against retroactivity is based on the "unfairness of imposing new burdens on Defendant's after the fact." *Id.* at *34. Furthermore, the Fifth Circuit held that the District Court did not abuse its discretion when it dismissed the common law tort claims because they were time-barred and it refused to equitably toll Plaintiffs' state law tort claims. *Id.* at *46. Accordingly, the Fifth Circuit affirmed the District Court's order.

(iii) Anti-Injunction Act Issues In Class Actions

***Abella Owners' Association, et al. v. MI Windows & Doors, Inc.*, 860 F.3d 218 (4th Cir. 2017).** Plaintiff, a California non-profit mutual benefit corporation, sought relief from the enforcement of a final class action judgment entered in this multi-district litigation. In 2012, the Judicial Panel on Multi-District Litigation transferred 18 class actions filed against Defendant in various districts to the U.S. District Court for the District of South Carolina (the "MDL") for consolidated pre-trial proceedings. Plaintiffs sought damages caused by Defendant's manufacture of allegedly defective windows. The parties to the MDL ultimately reached a settlement and the District Court preliminarily approved the settlement and certified a settlement class under Rule 23. The District Court directed the parties to notify class members: (i) of the settlement; (ii) of the option to withdraw from the action; and (iii) of the date of a hearing to determine the fairness, reasonableness, and adequacy of the settlement. *Id.* at 220. After the opt-out deadline passed, the District Court conducted the fairness hearing and entered a final judgment approving the settlement, enjoining the class members from pursuing other related claims against Defendant, and dismissing the transferred actions. *Id.* Plaintiff, although it did not opt-out of the settlement, continued to pursue its action against Defendant in California state court. Defendant filed a motion to enforce the class action settlement against Plaintiff and sought an injunction prohibiting it from continuing the California action. Plaintiff contended that the District Court lacked authority to enjoin its prosecution of the state action against Defendant by reason of the Anti-Injunction Act, and that Plaintiff should not be bound by the class action judgment because of the excusable neglect of its counsel in overlooking the opt-out deadline. *Id.* at 220-221. The District Court rejected Plaintiff's arguments and enjoined Plaintiff from proceeding with its claims. On appeal, the Fourth Circuit affirmed the District Court's ruling. The Fourth Circuit agreed with the District Court's determination that an injunction was justified by the "relitigation exception" of the Anti-Injunction Act. The Fourth Circuit explained that the relitigation exception "was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Id.* at 223. Thus, the exception is founded on concepts of *res judicata* and collateral estoppel, and it permits an injunction where either of these doctrines would preclude the state court action to which the injunction is directed. *Id.* The Fourth Circuit noted that under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving their parties or their privies based on the same cause of action. The Fourth Circuit found that all aspects of *res judicata* were satisfied in this case, and therefore it concluded that the District Court's final judgment approving the class action settlement was claim preclusive with respect to Plaintiff's California claims against Defendant. *Id.* at 224. The Fourth Circuit also determined that the District Court did not abuse its discretion in concluding that the neglect of Plaintiff's counsel was not excusable. *Id.* at 227. Accordingly, the Fourth Circuit affirmed the District Court's ruling.

(iv) Appeals In Class Action Litigation

***Brown, et al. v. Cinemark United States*, 2017 U.S. App. LEXIS 24749 (9th Cir. Dec. 7, 2017).** Plaintiff filed a class action alleging that Defendants violated various provisions of the California Labor Code. The matter was consolidated with similar pending actions by the District Court, including one filed by Plaintiff Mario De La Rosa. Defendants moved to dismiss this case for lack of appellate jurisdiction under 28 U.S.C. § 1291, in light of the U.S. Supreme Court decision in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), because Plaintiffs voluntarily settled some of their claims. *Id.* at *2. The District Court denied Defendants' motion, and on appeal, the Ninth Circuit affirmed the District Court's ruling. The District Court had previously dismissed Plaintiff Brown's direct wage statement claim and denied class certification of Plaintiffs' meal and rest break claims, reporting pay claims, off-the-clock work claims, derivative wage statement claims, and direct wage statement claims. *Id.* at *3. Plaintiffs' remaining individual claims were set for trial. Defendants filed a motion for summary judgment motion on the remaining claims. The District Court issued a tentative ruling, which proposed granting the motion in part and denying it in part. *Id.* Subsequently, the parties stipulated to the tentative order and settled all remaining individual claims. Plaintiffs reserved the right to challenge the District Court's judgment denying class certification of the direct wage claim and dismissing Brown's individual direct wage statement claim. *Id.* Plaintiffs appealed the issues reserved by the settlement. Defendants argued that the Ninth Circuit lacked jurisdiction under *Baker* to consider an appeal of the District Court's interlocutory judgment because Plaintiffs voluntarily settled the remaining claims. *Id.* The Ninth Circuit explained that in *Baker*, the District Court declined to certify Plaintiffs' proposed class, and on appeal discretionary interlocutory review under Rule 23(f) was declined. *Id.* Rather than pursue their individual claims on the merits, Plaintiffs in *Baker* voluntarily dismissed their own claims

with the express purpose of creating a final judgment for appeal. *Id.* at *4. Plaintiffs in *Baker* then appealed only the District Court's interlocutory order striking their class allegations. *Id.* The Supreme Court held that "the voluntary dismissal essayed by respondents does not qualify as a 'final decision' within the compass of § 1291." *Id.* at 1707. The Supreme Court explained that this "tactic would undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class action orders." *Id.* The Ninth Circuit found that the parties' mutual settlement for consideration here did not raise the same concerns, because Plaintiffs continued litigating their remaining individual claims after the District Court denied class certification. *Id.* The Ninth Circuit opined that no facts suggested that Plaintiffs engaged in sham tactics to achieve an appealable final judgment, as the resolution of the present case was not a unilateral dismissal of claims, but a mutual settlement for consideration reached by both parties, which expressly preserved certain claims for appeal. *Id.* at *4-5. The Ninth Circuit held that the situation here was unlike *Baker*, where Plaintiffs openly intended to sidestep Rule 23(f) when they voluntarily dismissed their claims. *Id.* at *5. The Ninth Circuit thereby concluded that it had jurisdiction under 28 U.S.C. § 1291 to consider the appeal on the merits.

***Bynum, et al. v. Maplebear Inc.*, 2017 U.S. App. LEXIS 19405 (2d Cir. Oct. 5, 2017).** Plaintiff, a former employee, filed an action asserting Defendant misclassified her as an independent contractor and thereby failed to pay overtime compensation in violation of the FLSA and the New York Labor Law ("NYLL"). The District Court had previously granted Defendant's motion to compel arbitration and then stayed the case pursuant to § 3 of the Federal Arbitration Act. *Id.* at *1. Plaintiff subsequently requested the District Court to end the stay and dismiss the action instead so that she could appeal the District Court's ruling. The District Court granted Plaintiff's motion. On appeal, the Second Circuit held that it lacked jurisdiction over the appeal. The Second Circuit stated that the Federal Arbitration Act bars interlocutory appeals from the grant of a motion to compel arbitration. *Id.* at *2. The Second Circuit determined that Plaintiffs could not circumvent that prohibition by agreeing to dismiss their claims rather than proceed to arbitration. The Second Circuit relied on U.S. Supreme Court precedent, and reasoned that "the voluntary dismissal essayed by respondents does not qualify as a 'final decision' within the compass of § 1291. The tactic would undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class action orders." *Id.* at *3. The Second Circuit reasoned that similarly, allowing an immediate appeal would violate the finality rule. Accordingly, the Second Circuit dismissed Plaintiff's appeal for lack of jurisdiction.

***Chen-Oster, et al. v. Goldman, Sachs & Co.*, 2017 U.S. Dist. LEXIS 106406 (S.D.N.Y. June 14, 2017).** Plaintiffs, a group of former female employees, brought a class action alleging that Defendants denied them equal compensation and opportunities for promotion in violation Title VII of the Civil Rights Act of 1964. Defendants moved to dismiss the claims of Plaintiffs Gamba and De Luis for injunctive and declaratory relief. The Court denied the motion, and Defendants moved to certify for interlocutory appeal two issues raised in the Court's order, including: (i) whether former employees lack standing to seek injunctive or declaratory relief against their former employer; and (ii) whether a former employee who has not alleged unlawful discharge can seek the remedy of reinstatement under Title VII. *Id.* at *4. In their motions to dismiss, Defendants argued that, pursuant to the Supreme Court's holding in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), Gamba and De Luis lacked standing to seek injunctive and declaratory relief for the class because they no longer worked for Defendant. The Court disagreed, holding that a former employee may have standing to sue where she is seeking reinstatement and would face the same allegedly discriminatory policy once reinstated. The Court also concluded that Gamba and De Luis plausibly could seek reinstatement even if they failed to allege unlawful discharge. *Id.* at *5. At the outset, the Court noted that, pursuant to the three-pronged test set forth in 28 U.S.C. § 1292(b), the Court only may certify an order for interlocutory appeal where: (i) the order involves a controlling question of law; (ii) there is substantial ground for difference of opinion; and (iii) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *Id.* The Court found that the first prong weighed in favor of an interlocutory appeal, because whether a former employee seeking reinstatement under Title VII had standing to seek injunctive or declaratory relief in a Title VII action was a threshold question that affected the scope of remedies sought in the lawsuit, which would significantly affect the conduct of the action. *Id.* at *6. Similarly, the Court stated that whether a former employee could seek reinstatement when the party had not alleged a wrongful discharge was a controlling question of law that could alter the conduct of the action. *Id.* As to the second prong, the Court opined that substantial ground for difference of opinion existed when: (i)

there was conflicting authority on the issue; or (ii) the issue was particularly difficult and was an issue of first impression. *Id.* at *6-7. The Court noted that there was a substantial ground for difference of opinion on the issue of whether *Wal-Mart* "categorically foreclosed former employees from seeking injunctive and declaratory relief." *Id.* at *7. Further, the Court determined that Defendants were correct that case law authorities from other circuits had held contrary to the Second Circuit. The Court also stated that there was substantial disagreement as to whether wrongful discharge was necessary for a claim of reinstatement. *Id.* Accordingly, the Court held that there was conflicting authority on these issues, which had not been squarely addressed by the Second Circuit since *Wal-Mart*. As to the third prong, the Court stated that, were the Second Circuit to reverse the order (finding that Plaintiffs lacked standing to bring the Rule 23(b)(2) action), the parties would be saved from the burden of having to go through an extensive discovery process. *Id.* at *9. Finally, the Court held that, although the parties also would have an opportunity pursuant to Rule 23(f) to seek appellate review following the Court's decision on class certification, immediate interlocutory appeal would remove a cloud of legal uncertainty over these proceedings and significantly affect the parties' bargaining positions, and hasten the termination of this litigation through a possible settlement. *Id.* Accordingly, the Court granted Defendant's motion to certify two questions for interlocutory appeal.

***Love, et al. v. Wal-Mart Stores, Inc.,* 2017 U.S. App. LEXIS 14261 (11th Cir. Aug. 3, 2017).** 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 of 1964. After the U.S. Supreme Court reversed the certification of a nationwide gender discrimination class in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), members of the putative class in that case filed new, regional class actions against Wal-Mart, including *Love v. Wal-Mart Stores, Inc. Id.* at *1-2. The putative class members were able to do so because *Wal-Mart* tolled the statute of limitations with respect to their filing claims with the EEOC, which is a prerequisite to filing a federal discrimination suit. *Id.* at *3. However, in the Eleventh Circuit such tolling is limited to individual claims and not class claims. *Id.* Accordingly, the District Court in *Love* allowed the individual claims of the named Plaintiffs to proceed, but dismissed the class claims as untimely. *Id.* Plaintiffs subsequently settled their individual claims with Defendant. *Id.* The named Plaintiffs and Defendant filed a stipulation of voluntary dismissal under Rule 41(a)(1)(A)(ii). *Id.* The District Court entered an order acknowledging the stipulated dismissal and dismissing all pending motions as moot. *Id.* On November 6, 2015, a group of putative class members moved to intervene in the District Court solely to appeal the District Court's dismissal of the class claims. *Id.* at *4. The District Court denied the motion to intervene on the grounds that the stipulated dismissal stripped the Court of jurisdiction to hear the motion. *Id.* That same day, 34 days after the filing of the stipulated dismissal, the putative class members appealed both the denial of their motion to intervene and the dismissal of the class claims. *Id.* On appeal, the Eleventh Circuit ruled that it did not have jurisdiction over the putative class members' appeal of the dismissal of the class claims because it was filed more than 30 days after the filing of the parties' stipulated dismissal. *Id.* In doing so, the Eleventh Circuit rejected the putative class members' argument that only named Plaintiffs' appeal deadline was triggered by the stipulated dismissal and that the putative class members' deadline was not triggered until the District Court's subsequent order on October 23, 2015. *Id.* at *4-6. The Eleventh Circuit explained that "the plain language of Rule 41(a)(1)(A)(ii) requires that a stipulation filed pursuant to that sub-section is self-executing and dismisses the case upon its becoming effective, *i.e.*, upon filing unless it explicitly conditions its effectiveness on a subsequent occurrence." *Id.* at *6-7. Without any condition in the stipulation here, the Eleventh Circuit found that the stipulated dismissal was effective upon filing and triggered the putative class members' 30-day deadline under Rule 4 to appeal dismissal of the class claims. *Id.* at *7. The putative class members' appeal, filed 34 days after the filing of the stipulated dismissal, was therefore untimely. *Id.* at *8-9. In turn, although the putative class members' appeal of the denial of their motion to intervene was timely filed, such an appeal was moot as the putative class members had intervened solely for the purpose of appealing the dismissal of the class claims. *Id.* at *9.

***Microsoft Corp. v. Baker, et al.*, 137 S. Ct. 1702 (2017).** Plaintiffs, 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. The District Court struck Plaintiffs' class allegations based on the denial of class certification in a previously-filed case of the same nature, finding that principles of comity mandated its decision. Plaintiffs petitioned the Ninth Circuit for appellate review of the interlocutory order under Rule 23(f), but the Ninth

Circuit declined to exercise jurisdiction. *Id.* at 1712-13. Rather than pursue their individual claims further, Plaintiffs moved to voluntarily dismiss their claims with prejudice and represented to the District Court that they would appeal the order striking their class allegations thereafter. *Id.* at 1711. Defendant stipulated to the voluntary dismissal with prejudice, but argued that Plaintiffs would have no right to appeal. The District Court granted the stipulated motion to dismiss. *Id.* Plaintiffs subsequently appealed the District Court's decision to strike their class allegations. *Id.* The Ninth Circuit held that it had jurisdiction to entertain the appeal under 28 U.S.C. § 1291, thereby rejecting Defendant's argument that Plaintiffs had impermissibly circumvented Rule 23(f). *Id.* The Ninth Circuit also reversed the District Court's decision to strike Plaintiffs' class allegations. *Id.* at 1712. The Ninth Circuit expressed no opinion as to the merits of class certification, but found that comity did not require denial on the pleadings. It held that such a decision would more properly be made on Plaintiffs' eventual motion for class certification. *Id.* On further appeal, the U.S. Supreme Court granted *certiorari* to address a circuit split over the question of whether federal courts of appeals "have jurisdiction under [28 U.S.C.] § 1291 and Article III of the Constitution to review an order denying class certification (or . . . an order striking class allegations) after the named Plaintiffs have voluntarily dismissed their claims with prejudice." *Id.* The Supreme Court unanimously found that the Ninth Circuit had improperly exercised discretion over Plaintiffs' appeal. The Supreme Court ruled that Plaintiffs' voluntary dismissal with prejudice did not transform the District Court's denial of class certification into a final order. Such a tactic, the Supreme Court concluded, impermissibly attempted to subvert the final judgment rule in § 1291 as well as the process that Congress implemented for refining that rule and providing for appeals of interlocutory orders. *Id.* at 1713. The Supreme Court explained that Plaintiffs' tactic encouraged "protracted litigation and piecemeal appeals" as well as indiscriminate review of interlocutory orders. *Id.* Indeed, as the Supreme Court pointed out, under Plaintiffs' theory, "the decision whether an immediate appeal will lie resides exclusively" with Plaintiffs because they "need only dismiss [their] claims with prejudice whereupon [they] may appeal the District Court's order denying class certification." *Id.* at 1713. Thus, if Plaintiffs subsequently had been denied class certification on remand from the Ninth Circuit, they again could have voluntarily dismissed the case and forced an appeal of that decision, thereby circumventing the purpose of Rule 23(f) and, in conjunction, the rule-making process that Congress had bestowed upon the Supreme Court. *Id.* at 1714-15. Accordingly, the Supreme Court reversed the Ninth Circuit's ruling.

(v) Application Of Tolling Principles In Class Actions

***California Public Employees' Retirement Systems, et al. v. ANZ Security, Inc.*, 137 S. Ct. 2042 (U.S. 2017).** Plaintiff, a public pension fund, purchased securities offerings from Lehman Brothers Holdings Inc., and alleged that Defendants, a group of financial firms, were liable under the Securities Act of 1933 ("SA") for their participation as underwriters in the transactions. In 2008, a putative class action was filed against Defendants alleging that the registration statements for certain of Lehman's 2007 and 2008 securities offerings included material misstatements or omissions in violation of § 11 of the SA. *Id.* at 2044. The complaint was filed on behalf of all persons who purchased the identified securities, and therefore Plaintiff was a member of the putative class. In February 2011, more than three years after the relevant securities offerings, Plaintiff filed a separate complaint against Defendants in the U.S. District Court for the Northern District of California, alleging violations identical to those in the class action on Plaintiff's own behalf. *Id.* The parties reached a proposed settlement in the putative class action, and Plaintiff opted-out of the class. Defendants then moved to dismiss Plaintiff's individual suit, alleging that the § 11 violations were untimely under the 3-year bar in the second sentence of § 13 of the SA. *Id.* at 2045. Plaintiff asserted that the 3-year period was tolled during the pendency of the class action filing on the basis of *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974). The District Court disagreed, and the Second Circuit affirmed, holding that *American Pipe's* tolling principle was inapplicable to the 3-year bar. *Id.* The U.S. Supreme Court granted *certiorari* and on review, it affirmed the Second Circuit's ruling dismissing Plaintiff's claims. The Supreme Court found that the question was whether § 13 permits the filing of an individual complaint more than three years after the relevant securities offering, when a class action complaint was timely filed, and a Plaintiff filing the individual complaint would have been a member of the class but for opting-out of it. *Id.* at 2048. The Supreme Court ruled that the answer turned on the nature and purpose of the 3-year bar and of the *American Pipe* tolling rule that Plaintiff sought to invoke. The Supreme Court found that the statute provides in clear terms that "[i]n no event" shall an action be brought more than three years after the securities offering on which it is based, and that view was confirmed by the two-sentence structure of § 13. *Id.* at 2049. In addition to the 3-year time bar, § 13 contains a 1-year statute of limitations which runs from the time when a Plaintiff discovers (or should have discovered) the securities law violation. The Supreme Court

reasoned that the pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits, and that the 3-year time bar in § 13 of the SA is a statute of repose, which was designed to protect Defendants against future liability. *Id.* at 2050. The Supreme Court concluded that the statute displaced the traditional power of the judiciary to modify statutory time limits in the name of equity. Because the *American Pipe* tolling rule was rooted in those equitable powers, the Supreme Court found that it did not extend the 3-year period. Accordingly, the Supreme Court ruled that Plaintiff's filing was untimely, *American Pipe* tolling did not apply, and therefore the claim was properly dismissed.

***Collins, et al. v. Village Of Palatine*, 2017 U.S. App. LEXIS 23012 (7th Cir. Nov. 16, 2017).** Plaintiff filed a class action alleging that Defendant's police department issued a parking ticket to him in 2007 that listed personal information in violation of the Driver's Privacy Protection Act ("DPPA"). Defendant filed a motion to dismiss, and the District Court granted the motion. On appeal, the Seventh Circuit affirmed the District Court's ruling. Since the DPPA's statute of limitations is four years, ordinarily Plaintiff's claims would be time-barred. However, a nearly identical class complaint – entitled *Senne v. Village of Palatine* – was filed against Defendant in 2010. Because the lawsuit was brought as a class action, the filing of the complaint tolled the DPPA's statute of limitations for everyone in the proposed class. In *Senne*, the District Court heard argument on Plaintiff's class certification motion but deferred ruling, instead inviting Defendant to file a motion for summary judgment. Defendant filed the motion, and the District Court entered summary judgment for the Defendant and "terminated" the motion for class certification as moot. *Id.* at *3. The Seventh Circuit affirmed and the U.S. Supreme Court denied *certiorari*. On the day the Supreme Court denied *certiorari*, Senne filed a successor class action on behalf of himself and a proposed class as a placeholder to preserve the claims of the class. *Id.* at *4. Senne's counsel subsequently filed the instant suit naming Plaintiff as the class representative, and dismissed the other complaint. Defendant moved to dismiss, arguing that Plaintiff's claim was time-barred because the statute of limitations resumed when the District Court dismissed *Senne*. Plaintiff alleged that dismissal on timeliness grounds was inappropriate at the pleadings stage, and even if procedurally proper, the suit was timely because the limitations period was tolled until the Supreme Court denied Senne's petition for *certiorari*. Plaintiff also moved for class certification. The District Court agreed with Defendant that Plaintiff's claim was time-barred and granted the motion to dismiss. The District Court summarily denied the motion for class certification. On appeal, the Seventh Circuit noted that when a Plaintiff files a complaint on behalf of a proposed class, the statute of limitations for the claim is tolled for each member of the class pursuant to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). However, the Seventh Circuit stated that *American Pipe* does not address whether tolling continues during the pendency of an appeal after the suit is dismissed or class certification is denied. *Id.* at *10. The Seventh Circuit reasoned that the question of class certification was never addressed because the District Court: (i) initially dismissed the case with prejudice; and (ii) later entered summary judgment. *Id.* at *11. The Seventh Circuit held that an uncertified class action is decidedly not a class action once all class claims have been dismissed, and the statute of limitations therefore immediately resumes. The Seventh Circuit accordingly found that the DPPA's four-year statute of limitations on Plaintiff's claim commenced on June 14, 2007, when he discovered that personal information was displayed on his parking ticket, the statute was tolled when Senne filed suit on behalf of a proposed class on August 27, 2010, and it began to run once again when the District Court dismissed the case on September 22, 2010. *Id.* at *11-12. The Seventh Circuit found that once the claim was dismissed, the tolling rule of *American Pipe* no longer controlled, and the statute of limitations for Plaintiff's claim immediately resumed. The Seventh Circuit therefore determined that the limitations period expired on July 10, 2011. Accordingly, the Seventh Circuit affirmed the District Court's ruling dismissing Plaintiff's claims.

(vi) Appointment, Selection, And Removal Of Lead Counsel In Class Actions

***Ollila, et al. v. Babcock & Wilcox Enterprises, Inc.*, 2017 U.S. Dist. LEXIS 85042 (W.D.N.C. May 24, 2017).** In a putative class action brought under the Private Securities Litigation Reform Act ("PSLRA"), the Arkansas Teacher Retirement System ("ATRS") and the City of Birmingham Retirement and Relief System ("CBRRS") both requested the Court to consolidate the case with a related matter, pursuant to Rule 42(a), and appoint each as lead Plaintiff in the consolidated action. The Court explained that given the complexity of securities class actions, the Court must analyze various factors when appointing a lead Plaintiff, including: (i) the appointment must be made within 90 days after the date on which is notice is published; and (ii) if more than one action on behalf of a class asserting substantially the same claim or claims has been filed, the Court will appoint the most

adequate Plaintiff as lead Plaintiff for the consolidated actions. *Id.* at *3. The Court found that both entities timely filed motions to be appointed lead Plaintiff. The Court noted that with regard to the financial stakes involved, CBRRS alleged a loss of $468,903 on its transactions with Defendant and ATRS alleged a loss of $5,470,011. *Id.* at *6. The Court stated that it was clear that ARTS had a larger financial stake during the relevant time period, and would therefore have the larger financial interest in the relief sought by the class. *Id.* at *7. The Court focused on whether the lead Plaintiff could fulfill the requirements of Rule 23 and explained that a presumptive lead Plaintiff need make only a *prima facie* showing that it could satisfy the typicality and adequacy requirements of Rule 23 to be appointed. *Id.* The Court determined that ATRS made the requisite showing of typicality and adequacy, since ATRS' claims were based on the same interests and same injuries alleged by other purported class members; *i.e.*, that Defendant's alleged misrepresentations and omissions of fact caused substantial loss to investors like ATRS. *Id.* With regard to the adequacy requirement, the Court opined that the class representative and the selected attorney were capable of pursuing this litigation and neither had a conflict of interest with other members of the purported class. *Id.* at *8. The Court held that the interests of ATRS were aligned with those of other investors who lost money in transactions involving this stock. Accordingly, the Court determined that ATRS satisfied the third prong of the lead Plaintiff test, and it should be appointed the lead Plaintiff. The Court also considered whether any rebuttal evidence existed under 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). The Court stated that no such evidence was before it so as to undermine the adequacy of ATRS as lead Plaintiff or to suggest that it was subject to unique defenses that would render ATRS incapable of pursuing the interests of the putative class. *Id.* Accordingly, the Court granted ATRS' motion and denied CBRRS' motion.

(vii) Ascertainability Under Rule 23

***Briseno, et al. v. ConAgra Foods, Inc.,* 844 F.3d 1121 (9th Cir. 2017).** Plaintiff brought a class action alleging that Defendant's "100% Natural" label on Wesson oils was false or misleading because oils are made from bioengineered ingredients that Plaintiffs contended were "not natural." *Id.* at 1123. Plaintiffs filed a putative class action asserting state law claims against Defendant in eleven states, and those cases were consolidated in this action. Plaintiffs subsequently moved to certify 11 classes defined as all persons who reside in the states of California, Colorado, Florida, Illinois, Indiana, Nebraska, New York, Ohio, Oregon, South Dakota, or Texas who have purchased Wesson oils within the applicable statute of limitations periods established by the laws of their state of residence through the final disposition of this and any and all related actions. *Id.* at 1124. The District Court granted class certification, holding that, at the certification stage, it was sufficient that the class was defined by an objective criterion; *i.e.*, whether class members purchased Wesson oils during the class period. *Id.* Defendant appealed the District Court's ruling, asserting that Plaintiffs could not prove that an administratively feasible method to identify class members because consumers do not generally save grocery receipts and are unlikely to remember details about individual purchases of a low-cost product like cooking oil. *Id.* at 1125. At the outset, the Ninth Circuit stated that the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite for class certification. It noted that the Third Circuit has imposed this condition, holding that imposing an administrative feasibility requirement mitigates the administrative burdens of trying a Rule 23(b)(3) class action. The Ninth Circuit opined that Rule 23(b)(3) already contained the manageability criterion of the superiority requirement, which had the same purpose, and that adopting a freestanding administrative feasibility requirement instead of assessing manageability as one component of the superiority inquiry would have practical consequences inconsistent with the policies embodied in Rule 23. *Id.* at 1128. The Third Circuit had also justified its administrative feasibility requirement as necessary to protect absent class members and to shield *bona fide* claimants from fraudulent claims. *Id.* The Ninth Circuit noted that an administrative feasibility requirement like that imposed by the Third Circuit would likely bar such actions because consumers generally do not keep receipts or other records of low-cost purchases. Practically speaking, a separate administrative feasibility requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members, in precisely those cases that depend most on the class mechanism. *Id.* at 1129. Finally, the Ninth Circuit reasoned the Third Circuit characterized its administrative feasibility requirement as necessary to protect the due process rights of Defendants "to raise individual challenges and defenses to claims." *Id.* at 1130. However, the Ninth Circuit found that if the case proceeded past the certification stage, Plaintiffs would carry the burden of proving every element of its claims to prevail on the merits. *Id.* at 1131. Defendants can oppose the class representatives' showings at every stage. Given these existing opportunities to challenge Plaintiffs' case, it was not clear, the Ninth Circuit stated, why requiring an

administratively feasible way to identify all class members at the certification stage was necessary to protect Defendant's due process rights. *Id.* at 1132. The Ninth Circuit opined that the policy concerns that have motivated the Third Circuit to adopt a separately articulated administrative feasibility requirement are already addressed by Rule 23. The Ninth Circuit therefore joined the case law precedents of the Sixth, Seventh, and Eighth Circuits and declined to adopt an administrative feasibility requirement for class certification. Accordingly, the Ninth Circuit upheld the District Court's ruling granting class certification.

***Hernandez, et al. v. Midland Credit Management,* 2017 U.S. Dist. LEXIS 114735 (N.D. Ill. July 24, 2017).** Plaintiff brought a class action alleging that Defendant, a debt collector, violated the Fair Debt Collection Practices ("FDCPA") by sending him a false and misleading dunning letter. Defendant had previously moved to dismiss on the basis of lack of subject-matter jurisdiction, arguing that the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), made plain that Plaintiff has not suffered sufficient injury to establish standing in this case. *Id.* at *1. The Court denied Defendant's motion, finding that Plaintiff's alleged injury was both particularized and concrete. Plaintiff subsequently moved for class certification pursuant to Rule 23, which the Court denied. Defendant contended that Plaintiff's claims were not ascertainable. Defendant's ascertainability challenge focused on the language limiting the class to persons to whom Defendant "sent one or more letters or other communications similarly in the form of the October 5th letter" in the proposed class definition. *Id.* at *7. Defendant argued that the "other communications" language swept broadly enough to encompass telephone communications with potential class members. *Id.* The Court agreed and found that as formulated, Plaintiff's class definition included an amorphous group of people who received communications "similarly in the form of the October 5th letter," including potentially phone communications. *Id.* at *8. The Court determined that the proposed class definition supplied no objective way to decide whether a communication was substantially similar to the October 5th letter. The Court noted that Plaintiff did not propose an alternative class definition or suggest that the Court should attempt to repair his proposed class definition. *Id.* at *9. Accordingly, the Court denied Plaintiff's motion for class certification, but permitted Plaintiff leave to redefine the class in an ascertainable fashion.

***Jarzyna, et al. v. Home Properties,* 2017 U.S. Dist. LEXIS 73296 (E.D. Pa. May 15, 2017).** Plaintiff brought an action on behalf of himself and other similarly-situated former tenants against a residential management company, Defendant Home Properties L.P. ("Home"), and a debt collection agency, Defendant Fair Collections and Outsourcing, Inc. ("FCO"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA") and state consumer protection laws. *Id.* at *1-2. Plaintiff filed a motion for class certification, which the Court denied on the basis that Plaintiff failed to prove that the class was ascertainable. Plaintiff moved to certify a class of all persons residing in Pennsylvania, New York, New Jersey, Massachusetts, Maryland, Maine, Florida, Illinois, and Washington, D.C. who, during the period January 1, 2008, through April 8, 2013: (i) had been identified and/or readily identifiable by Home to have been assessed a 30-day notice fee with the balance placed with FCO for collection; and (ii) who had been subject to FCO's standard, common, and uniform policy not to identify itself as a debt collector when leaving messages on cellular or personal phones. *Id.* at *2. The Court held that Plaintiff failed to identify any methodology for ascertaining the members of the proposed class. In support of his motion, Plaintiff pointed only to Home's verified response identifying 3,274 tenants in Pennsylvania who paid lease breakage fees; however, FCO denied that it was possible to determine exactly who or how many of these 3,274 were charged the 30-day notice fee, let alone how many were provided to FCO for collection. *Id.* at *15-16. Further, the Court determined that Plaintiff failed to propose a methodology for identifying tenants "who have been subject of FCO's standard, common, and uniform policy not to identify themselves as a debt collector when leaving messages on cellular/personal phones." *Id.* at *16. The Court stated that, even assuming that there was some method by which Plaintiff could utilize computer software to identify which former tenants were charged the 30-day notice fee, Plaintiff still failed to demonstrate that he could ascertain which of those had their fees sent to FCO for collection and which received non-identifying messages from FCO regarding the collection of those fees. Plaintiff also failed to offer any evidence or testimony indicating that FCO maintained records showing which fees it called for any particular debtor to collect. *Id.* at *17. Given that Plaintiff failed to meet the threshold requirement for class certification by showing that his proposed class was ascertainable, the Court declined to analyze the other class certification requirements under Rule 23. Accordingly, the Court denied Plaintiff's motion for class certification.

***Leyse, et al. v. Lifetime Entertainment Services*, 2017 U.S. App. LEXIS 2607 (2d Cir. Feb. 15, 2017).** Plaintiff brought a putative class action alleging violations of the Telephone Consumer Protection Act ("TCPA"). The District Court denied Plaintiff's motion for class certification. Plaintiff appealed that order, as well as the District Court's order entering judgment on his individual TCPA claim after Defendant tendered complete relief to him. Defendant appealed the District Court's holding that Plaintiff had standing to bring his claim. *Id.* at *2. The Second Circuit upheld all of the District Court's decisions. The Second Circuit found that the record established that Defendant left a pre-recorded voice-mail message on an answering device at Plaintiff's home. *Id.* at *3. The Second Circuit concluded that Plaintiff's receipt of the pre-recorded call constituted more than a bare violation of the TCPA and satisfied the concrete injury requirement for standing. *Id.* Plaintiff argued that the District Court abused its discretion in denying his motion to certify a class comprised of "all persons to whose residential telephone lines [Defendant] or a third-party acting on its behalf" initiated the challenged pre-recorded message on ascertainability grounds. *Id.* Plaintiff proposed identifying class members by soliciting individual affidavits certifying receipt of the pre-recorded call accompanied by telephone bills showing subscription to New York City residential telephone service in August 2009. *Id.* at *4. The Second Circuit held that Plaintiff failed to produce evidence that this method employed objective criteria, was administratively feasible, or permitted ready identification of class members. *Id.* The Second Circuit found that the District Court correctly concluded that the proposed class was unascertainable because: (i) no list of the called numbers existed; (ii) no such list was likely to emerge; and (iii) proposed class members could not "realistically be expected to recall a brief phone call received six years ago or to retain any concrete documentation" of such receipt. *Id.* at *4-5. Plaintiff also appealed contending that the District Court erred in entering judgment on his individual claim upon Defendant's depositing with the clerk of court the full amount of damages and costs recoverable under the TCPA, even though Plaintiff had not accepted Defendant's Rule 68 offer of judgment in that amount. *Id.* at *6. The Second Circuit held that, although a Rule 68 offer for complete relief does not moot a case, it nonetheless may permit a Court to enter a judgment in Plaintiff's favor. *Id.* The Second Circuit therefore affirmed the District Court's entry of judgment on Plaintiff's individual claim. Accordingly, the Second Circuit upheld the District Court's decisions.

***Melgar, et al. v. CSK Auto, Inc.*, 681 Fed. Appx. 605 (9th Cir. 2017).** Plaintiffs, a group of retail store managers and assistant managers, filed a class action alleging that Defendant's reimbursement policy violated the California Labor Code. Plaintiffs filed a motion for class certification, which the District Court granted. On appeal, the Ninth Circuit affirmed the District Court's ruling. *Id.* at 607. The Ninth Circuit found that the District Court properly examined whether the lawfulness of Defendant's reimbursement policy would serve to "generate common answers apt to drive the resolution of the litigation." *Id.* at 606-07. The Ninth Circuit further concluded that the District Court did not abuse its discretion by certifying a purported fail-safe class. The Ninth Circuit explained that a fail-safe class is commonly defined as limiting membership to Plaintiffs described by their theory of liability in the class definition such that the definition presupposes success on the merits. *Id.* at 607. The Ninth Circuit stated that here, the class definition did not presuppose its success, because the liability standard applied by the District Court required class members to prove more facts to establish liability than were referenced in the class definition. *Id.* The Ninth Circuit further determined that the District Court did not abuse its discretion by certifying a class with a self-certification process for absent class members. *Id.* The Ninth Circuit rejected Defendant's contention that the class failed for lack of ascertainability. *Id.* at *3. The Ninth Circuit noted that it had previously rejected arguments that a self-identifying class was not "administratively feasible" at the certification stage or that a Defendant's due process rights were somehow impaired because a claimant need only "offer a self-serving affidavit as proof of class membership." *Id.* Accordingly, the Ninth Circuit affirmed the District Court's ruling granting class certification on the grounds that the class was clearly ascertainable.

***Sandusky Wellness Center, LLC, et al. v. ASD Specialty Healthcare, Inc*., 863 F.3d 460 (6th Cir. 2017).** Plaintiff filed a class action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") by sending an unsolicited fax with a non-compliant opt-out notice. Plaintiff moved for certification of a putative class comprising all 40,343 persons who allegedly received the fax. The fax advertising a drug was sent to 53,502 physicians, but only 40,343, or 75%, of these faxes were successfully transmitted; however, there were no logs to verify who received the faxes. The District Court denied class certification of claims under the TCPA based upon Plaintiff's failure to meet the predominance requirement of Rule 23(b)(3). It reasoned that there were two individualized issues central to the lawsuit, including: (i) class member identity; and (ii) consent to receiving the faxes. The Federal Communications Commission ("FCC") had granted Defendant a retroactive waiver from

complying with the Solicited Fax Rule ("SFR"). Accordingly, the District Court determined that common questions of law or fact did not predominate. On Plaintiff's appeal, the Sixth Circuit ruled that the District Court was correct to conclude that individualized questions of consent prevented common questions from predominating under Rule 23(b)(3). Although the District Court credited the FCC's retroactive waiver for the need to distinguish between solicited and unsolicited faxes, the D.C.'s Circuit's intervening decision in *Bais Yaakov of Spring Valley v. FCC,* 852 F.3d 1078, 1083 (D.C. Cir. 2017), which invalidated the SFR, provided alternative grounds for this differentiation. The Sixth Circuit opined that the District Court's recognition of the difficulty in identifying class members without fax logs and with sole reliance on individual affidavits was equally sufficient to preclude certification, regardless of whether this concern was properly articulated as part of the ascertainability requirement, Rule 23(b)(3) predominance, or Rule 23(b)(3) superiority. Accordingly, the Sixth Circuit affirmed the District Court's decision.

***St. Louis Heart Center, et al. v. Vein Centers For Excellence,* 2017 U.S. Dist. LEXIS 103142 (E.D. Mo. July 5, 2017).** Plaintiff brought an action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") by sending "junk faxes" to it and thousands of others. *Id.* at *1. The Court had previously certified a class of over 35,000 fax recipients. Defendant now sought summary judgment, or in the alternative, decertification of the class. Defendant hired fax broadcaster Westfax to send out form fax advertisements to thousands of fax numbers belonging to doctors and medical centers. Westfax charged Defendant for the 35,212 successful fax transmissions, but not the many attempted transmissions that did not go through, and did not provide a list of the fax numbers which were successfully sent an advertisement. *Id.* at *2. Plaintiff alleged that it received multiple fax advertisements from Defendant, including one that was part of a Westfax fax broadcast that went to more than 5,000 cardiologists. *Id.* at *2-3. Defendant argued that the proposed class could not be ascertained. It asserted that because no class member could prove that they were sent one of the junk faxes, if class members came forward with individual testimony or submitted their own evidence of fax receipt, the Court would be required to hold mini-hearings on the evidence. *Id.* at *3. Plaintiff contended that the facts demonstrated that Defendant did violate the TCPA, and any issues with identifying the victims of that violation would not equate to inadequate proof of liability. *Id.* at *5. The Court agreed and found that although the evidence before it did not identify the fax numbers which were successfully sent a junk fax by Defendant, the undisputed evidence showed that Defendant violated the TCPA by sending unsolicited fax advertisements. *Id.* at *6. The Court stated therefore that granting summary judgment in Defendant's favor could foreclose valid claims brought later by individuals who were sent the junk faxes at issue in this case. *Id.* Defendant further asserted that the inability to identify potential class members violated Rule 23's class requirements of commonality, predominance, and ascertainability. Plaintiff contended that precise identification of class members was not required at this stage of the litigation and that members should be able to identify themselves in response to notice. *Id.* at *7. The Court disagreed with Plaintiff and found that the class was not ascertainable. The Court stated that although Plaintiff provided evidence of the number of successfully transmitted junk faxes by Defendant, there was no evidence of exactly which fax numbers were successfully sent a junk fax. *Id.* at *10. Without fax logs of successful transmissions or other such evidence, the Court determined that the only way potential class members could prove they were "sent" junk faxes, as required by the class definition, was through individual testimony. *Id.* The Court held that without any generalized class-wide proof of liability, it would be required to conduct "mini-hearings on the merits of each case" in order to identify class members. *Id.* at *11. The Court therefore found that the class was not ascertainable, and granted Defendant's motion to decertify the class.

(viii) Attorneys' Fee Awards In Class Actions

***Aranda, et al. v. Caribbean Cruise Line, Inc.*, 2017 U.S. Dist. LEXIS 52645 (N.D. Ill. April 18, 2016).** Plaintiffs filed suit against Defendants Caribbean Cruise Line, Inc., Vacation Ownership Marketing Tours, Inc., the Berkley Group, Inc., and the Economic Strategy Group and its affiliates ("ESG") for violation of the Telephone Consumer Protection Act ("TCPA"). Over a million people across the United States received pre-recorded phone calls from ESG or Political Opinions of America requesting participation in various short political surveys. *Id.* at *2. After roughly four years of litigation, the parties settled on the eve of trial, and the settlement called for Defendants to establish a common fund in an amount no lower than $56 million and no higher than $75 million, from which class members would be paid. *Id.* *3. Following final approval of the class-wide settlement, Plaintiffs' counsel petitioned for an award of attorneys' fees in an amount equal to one third of the final common fund. The Court

granted in part the fee request. The Court held that, although the circumstances of the case warranted a higher fee award than those granted in other TCPA class actions, the award should not be as high as requested. The Court declined to depart from the "sliding-scale structure" used in the Seventh Circuit to award attorneys' fees in class actions. *Id.* The main question addressed by the Court was whether the fee request should be granted based on the "flat-percentage" approach proposed by Plaintiffs' counsel or the "sliding scale" model often used to award attorneys' fees for class action settlements as outlined in *In Re Synthroid Marketing Litigation*, 264 F.3d 712, 721 (7th Cir. 2001). *Id.* *4. The "sliding scale" model consists of breaking class action settlement funds into tiers or bands and awarding class counsel a decreasing percentage of each band. The rationale behind this approach is that "awarding class counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin yet still preserving some incentive for lawyers to strive for these higher awards." *Id.* at *11. Plaintiffs' counsel argued that an award amounting to one third of the net common fund accurately reflected the result of a hypothetical negotiation between Plaintiffs and their attorneys under a "market based approach." In support, they cited their typical contingency fees in TCPA cases and an expert who opined that the request was less than a standard rate for individual TCPA cases. Plaintiffs' counsel argued that they had generated better-than-average value for the class and should be paid accordingly. *Id.* *6-7. The Court agreed that the circumstances of the case warranted a higher fee than those granted in other TCPA class actions that had resulted in settlement. *Id.* *14. However, the Court did not agree that the case was one in which "declining marginal percentages are [not] always best" and, therefore, found that this concern did not provide a reason for class members to deviate from the sliding-scale structure in an *ex ante* negotiation. *Id.* *12. Specifically, the Court noted that Plaintiffs' counsel would have had the same or virtually the same incentive to fight for a high award whether they were receiving a flat rate or a sliding-scale rate because, up until the very end, class counsel were fighting to get any recovery for the class. *Id.* *16. The Court also disagreed that class members would accept a flat rate because of its low inherent value or because of the possibility that counsel could generate a high recovery through aggressive litigation because it was "not clear that the hypothetical class members in this case would be faced with the binary choice between a high-percentage fee with a large recovery, on the one hand, and a sliding-scale fee for a small recovery, on the other." *Id.* *17. Despite this, the Court was "persuaded that Plaintiffs and their counsel faced materially greater risks in this case than those faced in the other recent TCPA class actions" and, therefore, added at least a 6% premium to the first "band" of recovery on the sliding scale. *Id.* *25. Ultimately, the Court awarded class counsel 36% of the first $10 million ($3.5 million), 30% of the second $10 million ($3.5 million), 24% of the band from $20 million to $56 million ($8.64 million), and 18% of the remainder. The Court concluded that, if the common fund reached its $76 million ceiling, the Court would increase the fee award, in which case the award would amount to roughly 25.6% of the common fund, *i.e.*, slightly higher than the mean and median recoveries for TCPA cases of similar value. *Id.* *30-31. Accordingly, the Court granted the motion for attorneys' fees in part.

***Cashman, et al. v. Delta-Sonic Car Wash Systems,* 2017 U.S. Dist. LEXIS 14394 (W.D.N.Y. Jan. 31, 2017).** Plaintiffs, a group of former employees, filed an action alleging that Defendant violated various provisions of the FLSA and the New York Labor Law ("NYLL"). The parties subsequently settled the matter, and the Court granted preliminary approval of the settlement. *Id.* at *7. Defendants agreed to create a settlement fund of $800,000 to resolve Plaintiffs' claims. Plaintiffs' counsel filed an application for attorneys' fees in the amount of $320,000, which constituted 40% of the settlement fund. *Id.* at *19. The Court stated that, although the case involved a relatively large class, the litigation was fairly straightforward, involved a relatively discrete but unsettled legal issue, and generated limited motion practice. Additionally, Plaintiffs' counsel only deposed one individual, and Defendant deposed only two named Plaintiffs. *Id.* at *20. Plaintiffs' counsel submitted time records in support of their motion for attorneys' fees. Plaintiffs' counsel sought a rate of $350 per hour for attorney time of 691.55 hours and $150 per hour for paralegal time of 32.05 hours. Based on the time records, the total sought for attorney time and paralegal time was $246,593.72 or 30.82% of the total settlement. *Id.* at *23. Plaintiffs' counsel further requested an enhancement of approximately 30% based on "excellent results as well as the substantial risks incurred by taking this case on a contingency basis." *Id.* Application of the 1.30 multiplier resulted in the requested fee of $320,000. Plaintiffs argued that the lodestar cross-check justified the requested fee of 40% of the settlement fund. *Id.* The Court found that hourly rates generally allowed for a case such as this were in the range of $225 to $250 for partner time or senior associate time, $150 to $175 for junior associate time, and $75 for paralegal time. *Id.* at *24. The Court determined that these hourly rates ($225 to

$250 for partner time and $75 for paralegal time) were appropriate rates to be applied in this case. *Id.* at *25. The Court concluded that these rates were both fair and reasonable given the attorneys' years in practice and the hourly rate employed by comparable attorneys in the locale. *Id.* at *26. The Court held that, when applying these rates, the new total was $175,291.25. The Court therefore found that the lodestar calculation did not support a percentage of the fund fee of 40% but, would support a cross-checked percentage of 33% of the total settlement, or $264,000. *Id.* Therefore, the Court granted the request for attorneys' fees and awarded fees in the amount of $264,000.

***City Of Antonio, et al. v. Hotels.com, L.P.,* 2017 U.S. Dist. LEXIS 58385 (W.D. Tex. April 17, 2017).** Plaintiffs filed a class action for collection of hotel-occupancy taxes pursuant to Chapter 351 of the Texas Tax Code and similar Texas municipal tax codes. *Id.* at *9. Plaintiffs alleged that Defendants were statutorily obligated to pay hotel occupancy taxes on the difference between the retail price of the hotel rooms, which consumers paid, and the wholesale price that Defendants paid the hotels for the contractual right to book the rooms. After extensive discovery and motion practice, Plaintiffs obtained a jury verdict in their favor at trial. *Id.* at *13. Plaintiffs subsequently filed a fee application seeking $43,199,878 in attorneys' fees. *Id.* at *18. Plaintiffs argued that the Court should calculate the lodestar at $10,799,970 and apply a multiplier of four times the lodestar to account for the remarkable nature of the case. In the alternative, Plaintiffs argued that the Court should award the difference out of the class recovery. Plaintiffs also requested that the Court award them reasonable attorneys' fees for the prospective appeal of the case, and they sought $1,765,195.55 in expenses out of the common fund because such expenses were not recoverable by statute and typically would be billed to paying clients. Defendants opposed the amount of attorneys' fees requested. *Id.* at *18. Defendants stipulated to the amount of hours expended by Plaintiffs' counsel in the litigation as reasonable; however, Defendants asserted that the requested lodestar should be reduced because a large portion of the paralegal time was non-compensable in that it was clerical and administrative in nature, and the requested hourly rates far exceeded the prevailing rates in the community. *Id.* Defendants further argued that no enhancement was applicable because any factors that might otherwise justify an enhancement were subsumed within the Court's lodestar analysis. *Id.* at *19. Finally, Defendants argued that the Court should deny Plaintiffs' request for contingent appellate fees. The Magistrate Judge found that the number of attorney hours spent on the case – that totaled 19,516.83 – was reasonable considering the complex nature of the litigation. However, the Magistrate Judge recommended reducing the paralegal time by 15% to account for clerical, vague, duplicative, and excessive time entries. *Id.* at *22, *27. The Magistrate Judge also recommended that the Court award Plaintiffs attorneys' fees, to be paid by Defendants, in the amount of $25,014,476.25, an enhancement of 2.5 times the base lodestar. The Magistrate found that a 2.5 multiplier was appropriate due to the extraordinary results obtained and the contingent nature of the case. *Id.* at *50. Because the enhanced lodestar of $25,014,476.25 represented a reasonable award of attorneys' fees, the Magistrate Judge recommended that the Court deny Plaintiffs' request for further enhancement of the lodestar from the common fund. Finally, the Magistrate Judge recommended that the Court deny Plaintiffs' request for contingent appellate fees without prejudice because Plaintiffs failed to provide any evidence as to the number of hours that their counsel was likely to spend on the appeal or any basis on which to determine the reasonableness of the amounts requested. *Id.* at *53. The Magistrate Judge further recommended that the Court award Plaintiffs' counsel $1,750,858.57 in expenses out of the common fund. *Id.* at *55.

***Cobell, et al. v. Jewell*, 2017 U.S. Dist. LEXIS 54281 (D.D.C. April 10, 2017).** Plaintiffs, a group of Native Americans, filed a class action against Defendant, the Secretary of the Interior, alleging that Defendant had mismanaged accounts and land held in trust to benefit certain Native Americans. Plaintiffs sought damages and an order compelling Defendant to reform its trust practices. After many years of litigation, Plaintiffs obtained a settlement in 2009 that brought about trust reform and a significant recovery for Plaintiffs that required congressional approval. After settlement, Plaintiffs' counsel moved for an award of attorneys' fees and costs. Plaintiffs' counsel was awarded $99 million in attorneys' fees. Mark Brown, an attorney who worked on the case from 2000 until 2006, was not included in the motion. Brown petitioned the District Court for his share of the fee award. In his original petition, Brown sought compensation for approximately 11,500 hours, totaling $5.5 million. The Court conducted a five-day hearing and granted Brown the sum of $2,878,612.52. Brown subsequently filed a motion seeking pre-judgment interest on his fee award. The Court found that Brown was entitled to pre-judgment interest of $736,293.88, an amount calculated based on the simple, annual interest rate of 6%. *Id.* at *6-7. Brown requested pre-judgment interest on his fee award pursuant to § 15-108 and § 15-109 of the D.C.

Code, at an interest rate of 6%, compounded annually, for a total amount of $819,656.21. *Id.* at *9. Plaintiffs responded to Brown's motion by denying that he was entitled to any pre-judgment interest under the law of the District of Columbia. The Court held that an award of pre-judgment interest pursuant to § 15-109 was appropriate to fully compensate Brown. The Court stated that Brown waited over four years to be paid for his work on this case, during which time he was deprived of the use of a substantial sum of money that he was owed. When he was excluded from his co-counsels' motion for a fee award, he timely commenced suit to collect his fee. The Court opined that District of Columbia law is clear that pre-judgment interest is an equitable remedy used to make a judgment creditor whole, and there was no question that Brown would not be made whole if his fee award did not include pre-judgment interest on the substantial sum that was withheld from him for more than four years. *Id.* at *11. The Court determined that there was a consensus in District of Columbia case law authority that the rate applicable to pre-judgment interest awarded under § 15-109 in breach of contract actions where the contract specifies no interest rate is that defined in § 28-3302(a). *Id.* at *18. Plaintiffs contended that Brown should receive no more than the interest actually accrued over the past four years in the settlement account on the fees he was awarded. *Id.* at *20-21. The Court disagreed and stated that it would not ignore District of Columbia law concerning the proper rate of pre-judgment interest in this matter. Accordingly, the Court awarded Brown pre-judgment interest at the rate of 6% per annum pursuant to § 28-3302. Finally, Brown requested that pre-judgment interest on his fee award be compounded annually, rather than on a simple annual basis. The Court noted that § 28-3302 is silent as to whether interest should be calculated on a simple or compounded basis. *Id.* at *22. The Court stated that, even assuming that District of Columbia law permitted it the discretion to calculate pre-judgment interest on a compounded basis in an appropriate case, it would not do so because it would result in an award that would make Brown more than whole. *Id.* at *23. Because the purpose of pre-judgment interest is to make the creditor whole, and no more, the Court held that the award of pre-judgment interest would not be compounded. Accordingly, the Court granted in part and denied in part Brown's motion for pre-judgment interest.

***Cobell, et al. v. Jewell*, 2017 U.S. Dist. LEXIS 12814 (D.D.C. Jan. 31, 2017).** Plaintiffs, a group of Native Americans, filed a class action against the Defendant, alleging that the Department of the Interior had mismanaged accounts and the land it held in trust to benefit certain Native Americans. Plaintiffs sought damages and an order compelling the government to reform its trust practices. After many years of litigation, Plaintiffs obtained a settlement in 2009 that brought about trust reform and a significant recovery for the Plaintiffs, that required Congressional approval. After settlement, Plaintiffs' counsel moved for an award of attorneys' fees and costs. Plaintiffs' counsel was awarded $99 million in attorneys' fees. Mark Brown, an attorney who worked on the case from 2000 until 2006, was not included in the motion. Brown petitioned the District Court for his share of the fee award. In his original petition, Brown sought compensation for approximately 11,500 hours of time totaling $5.5 million. The District Court conducted a five-day hearing and granted Brown $2,878,612.52 in fees. Brown joined the Plaintiffs' legal team in January 2000 when he moved to Washington, D.C. to work on the case full-time until he left to return to California in 2006. Brown signed two letters indicating an agreement with the named Plaintiff. The letters stated that Brown's customary billing rate was $350 per hour. The engagement letters also contained a provision regarding the withdrawal of any attorney, which stated that if any counsel withdrew they would be entitled to the portion of their fee to which they would otherwise be entitled, taking into account the value of the services rendered and the total fees payable to counsel. *Id.* at *16 Plaintiffs' counsel allege that, beginning in 2001, Brown's performance deteriorated as well as his relationship with the other members of the legal team. Plaintiffs' counsel argued that Brown was either fired for just cause in 2007 or he withdrew in 2006 without cause, and in either scenario Brown was not entitled to fees. Brown disagreed and asserted that he adequately performed all duties assigned to him. The District Court ruled in favor of Brown and found that he was entitled to an award of reasonable fees. The District Court noted that when an attorney withdraws from representing his client for good cause, he retains a right to compensation for services rendered. The District Court rejected Defendant's assertion that Brown was terminated and instead found that he withdrew for just cause in January 2006. The District Court determined that Brown was entitled to fees pursuant to the engagement letter for the value of his legal services provided. The District Court noted that Brown's withdrawal did not result in any prejudice to his clients who were represented by a capable team of attorneys at the time of his departure. The District Court also found that Brown did not violate any ethical duty owed to Plaintiffs, and was therefore entitled to an award of reasonable fees. The District Court determined Brown's fees by employing the lodestar method, multiplying the total number of hours worked by the attorney's

reasonable rate, *i.e.*, the rate in the agreement of $350 per hour. The District Court found that Brown improperly included time in his fee petition for which he had previously been compensated for through interim fee awards and time that was he previously denied compensation for as part of interim fee petitions because the hours were deemed unnecessary, unreasonable, or unsupported. The District Court deducted these hours from his fee award. Furthermore, the District Court reduced the amount of fees that Brown requested by 20% due to Brown's failure to exercise billing judgment for reasonableness and imposing upon the Court the "grunt work" of reviewing 481 pages of records to determine compensable time. *Id.* at *125 Accordingly, the District Court awarded Brown a total of $2,878,612.52.

***Cook, et al. v. Rockwell International Corp.,* Case No. 90-CV-181 (D. Colo. April 28, 2017).** Plaintiffs, a class of property owners, brought an action alleging that Rocky Flats, a former nuclear weapons facility formerly operated by Dow Chemical Co. and Rockwell International Corp., dispersed plutonium that contaminated 30 square miles of property around the facility. Plaintiffs pursued claims of trespass and nuisance claims under Colorado state law and the federal Price-Anderson Act, passed in 1997, relating to nuclear power and the hazards of radioactive materials. The parties ultimately settled the matter after almost 27 years of litigation. Class counsel then filed a motion pursuant to Rule 23(h) and 54(d) for award of attorneys' fees. *Id.* at 1. The Court granted the motion. The Court found that the percentage-of-recovery method was appropriate for awarding fees in this matter. Class counsel requested 40% of the settlement fund, or $150 million. *Id.* at 2. The Court noted that other case law authorities have acknowledged that a 40% fee falls within the acceptable range of fee awards, and none of the other cases in which this was the case even approached the considerable risk, length, and complexity of Plaintiffs' class action. *Id.* at 3. The Court further determined that a 40% award fee would result in a lodestar multiplier of 2.41, which was also within the range of fees awarded in common fund cases. *Id.* The Court noted that class counsel filed this case 27 years ago on a completely contingent basis, and given the considerable risk, the legal team should be compensated for their efforts in securing excellent results for the class. *Id.* at 4. Accordingly, the Court awarded class counsel attorneys' fees of $150 million plus a proportionate shore of the interest on the settlement fund as it accrued.

***Dungee, et al. v. Davidson Design & Development, Inc.,* 674 Fed. App'x 153 (3d Cir. 2017).** Plaintiff, an investor, brought a class action alleging violations of the Americans Inventors Protection Act of 1999 ("AIPA") and breach of contract. A fee-shifting provision within the AIPA allowed Plaintiff to recover reasonable costs and attorneys' fees as a prevailing party. After the District Court denied Defendant's motion to dismiss Plaintiff's complaint, the parties mediated the case and reached a settlement agreement. Plaintiff filed a motion for an award of $2 million in attorneys' fees under a percentage-of-recovery calculation. Defendant argued that the lodestar calculation method was more appropriate under the circumstances and the parties agreed that the base lodestar calculation amounted to $257,226.76. The District Court subsequently issued an order granting $1,118,936.40 in attorneys' fees to Plaintiff's counsel. *Id.* at 155. The District Court reached this figure by applying a 4.35 multiplier to enhance the base lodestar calculation. The District Court explained that it applied the multiplier because case law precedent of the Third Circuit typically applied multipliers up to 15.6 with an average of 4.35. The District Court thereby accepted Plaintiff's assertion, adopted the multiplier of 4.35, and awarded a fee of $1,118,936.40. On appeal, the Third Circuit vacated and remanded the District Court's ruling. At the outset, the Third Circuit found that that the nature of the settlement made it difficult to fashion a precise calculation using the percentage-of-recovery method and, accordingly, it found no error in the District Court's application of the lodestar method. *Id.* at 156. However, the Third Circuit determined that the lodestar multiplier selected did not represent a reasonable fee for the work of Plaintiff's counsel. *Id.* The Third Circuit found that, if presented with a "rare" and "exceptional" case, a District Court could tailor the method of enhancing the lodestar to that specific case. *Id.* However, the party requesting an enhancement to the lodestar carries the burden to show that a multiplier is necessary to reach a fair and reasonable fee award. *Id.* The Third Circuit opined that the District Court offered no viable explanation for why the simple lodestar calculation would not adequately compensate class counsel, or why this case presented "rare" and "exceptional" circumstances needed to enhance the lodestar. *Id.* at 157. The Third Circuit determined that the District Court had simply adopted Plaintiff's recommended 4.35 multiplier, understanding it to be the "average" multiplier used in the Third Circuit. *Id.* The Third Circuit concluded that there was no basis justifying the use of any lodestar multiplier, let alone a multiplier of 4.35. Accordingly, the Third Circuit vacated the District Court's fee order and remanded the action for further proceeding.

***Huyer, et al. v. Buckley,* 849 F.3d 395 (8th Cir. 2017).** Plaintiffs filed a class action challenging Defendant's practice of automatically ordering and charging fees for property inspections when customers fell behind on their mortgage payments. In 2015, the parties participated in mediation and reached a settlement. The settlement agreement provided that Defendant would pay $25,750,000 in full settlement of all class claims including $3,250,000 to cover the costs of providing notice and administering the settlement. *Id.* at 397. Class counsel also requested attorneys' fees in the amount of one-third of the total settlement fund. The District Court preliminarily approved the settlement agreement, and more than 2.7 million notices were sent to class members. Three objectors filed objections to the amount of attorneys' fees, arguing that the notice and administration costs did not represent a benefit to the class members, and therefore the Court should calculate attorneys' fees based only on the net settlement fund rather than the total settlement fund. *Id.* The District Court granted final approval of the class action settlement and awarded $8,583,332.48 to class counsel in attorneys' fees, representing one-third of the total settlement fund. *Id.* at 397-98. On appeal, the Eighth Circuit affirmed the fee award. The Eighth Circuit found that objectors failed to show that the administrative costs were unjustifiable. Further, the Eighth Circuit noted that, under the terms of the settlement, if the costs of notice and administration did not reach $3,250,000, any remaining funds would be available for distribution to class members. Thus, the Eighth Circuit held that the District Court did not abuse its discretion by basing its fee award on the total settlement fund, which included administrative costs. *Id.* at 398. The Eighth Circuit also determined that the District Court did not err in concluding that the circumstances of the case justified a large award. The Eighth Circuit reasoned that the fee was justified based on the five relevant factors, including: "(i) the time and work required; (ii) the preclusion of other employment by the attorneys due to acceptance of this case; (iii) the contingent nature of the fee; (iv) the results obtained; and (v) the experience, reputation, and ability of the attorneys." *Id.* at 399. In evaluating these factors, the Eighth Circuit noted that "this case has been on-going since 2008 and has included extensive motion practice, discovery, and settlement negotiations. Furthermore, all of the attorneys worked on a contingent basis, and most attorneys retained on behalf of the class have relevant experience in class action litigation." *Id.* The Eighth Circuit also explained that, under the percentage-of-the-benefit method, the award was in line with other awards in the Eighth Circuit, and the District Court verified the reasonableness of its award by cross-checking it against the lodestar method. *Id.* Accordingly, because the amount of attorneys' fees was not unreasonable, the Eighth Circuit concluded that the District Court did not abuse its discretion in granting Plaintiffs' motion for attorneys' fees.

***Huyer, et al. v. Wells Fargo & Company*, Case No. 08-CV-507 (S.D. Iowa Oct. 10, 2017).** Two law firms, Scott & Scott and Reese Richman LLP, were appointed as co-lead counsel in a RICO class action against Defendant. The Court had previously certified the class. *Id.* at 2. Recognizing that sending notice to the class could cost over $1 million, Reese Richman LLP attempted to defray their share of the costs by enlisting another law firm, Finkelstein, Blankship, Frei-Pearson & Garber ("FBFG"), to contribute capital to the notice program. *Id.* at 3. Reese Richman LLP and FBFG entered into a Joint Prosecution Agreement ("JPA"), which divided up future attorneys' fees and costs. Scott & Scott would receive 50% of the fees and bear 50% of the costs. FBFG and Reese Richman LLP would each receive 25% of the fees and bear 25% of the cost. *Id.* at 4. The JPA expressly provided that FBFG and Scott & Scott, alone, would bear the costs for the notice program. *Id.* Therefore, Reese Richman LLP shared a portion of its attorneys' fees with FBFG in exchange for FBFG fronting the capital for the notice program. The dispute at issue arose because the case settled before notice ever went out. Thus, FBFG was never required to contribute capital to the notice program. *Id.* at 5. Subsequently, the Court granted final approval of the class settlement agreement and awarded approximately $8.5 million in attorneys' fees. *Id.* at 5-6. FBFG and Reese Richman LLP subsequently fought over the division of the fees. FBFG wanted the full amount to which it claimed it was entitled to under the JPA, regardless of the fact that it did not contribute to the notice program. *Id.* Reese Richman LLP essentially argued that it did not have to honor the JPA because the class settlement agreement called for allocation of the fees according to co-lead counsel's good faith judgment concerning each counsel's contribution to the case. *Id.* at 5. FBFG and Reese Richman LLP arbitrated their dispute pursuant to an arbitration clause in the JPA. *Id.* at 6. The arbitration panel sided with FBFG, finding that the JPA was enforceable and that FBFG was entitled to 50% of the fees awarded to Reese Richman LLP. *Id.* The panel, however, declined to express an opinion on what effect the class settlement agreement had on the JPA or how counsel must exercise their discretion in dividing the fees. *Id.* at 7. Instead, the panel stated that it was up to the Court to decide whether or to what extend good faith requires recognition of the Panel's conclusion that Reese Richman LLP had made a valid agreement to share equally with FBFG

whatever fees may be awarded by the District Court. *Id.* Subsequently, FBFG filed a notice of an attorneys' lien in the amount of approximately $2.1 million, and Reese LLP (successor in interest to Reese Richman LLP) brought the dispute back to the District Court. *Id.* Specifically, Reese LLP asked the Court to issue an order confirming that it was not required to recognize the arbitration decision in fulfilling its duty to allocate attorneys' fees under the class settlement agreement. *Id.* In this regard, Reese LLP made two primary arguments to set aside the arbitration decision, including: (i) the fee-splitting provision of the JPA was unenforceable under Eighth Circuit law; and (ii) the fee-splitting provision directly conflicted with the terms of the class settlement agreement. *Id.* at 8. With respect to Reese LLP's first argument, the Court held that it lacked jurisdiction to decide that the fee-splitting provision was unenforceable. *Id.* at 9-10. Because Reese LLP failed to substantively challenge the enforceability of the fee-splitting provision during arbitration, the Court held that Reese LLP waived those challenges in the Court. *Id.* at 10. Reese LLP's second argument was likewise rejected. The Court decided that it need not take corrective action "because the [arbitration] award is not inherently in conflict with the [class settlement agreement]." *Id.* at 11. The Court's noted that there was the lack of "consensus amongst the circuits regarding the extent of the …. Court's power to intercede in these matters . . . ." *Id.* at 15. "Eight Circuit case law," the Court further explained, "provides no support for the proposition that this Court can unilaterally supersede a valid and enforceable fee-sharing agreement in the circumstances of this case." *Id.* Accordingly, the Court found that FBFG was entitled to its share of attorneys' fees under the JPA.

***In Re Automotive Parts Antitrust Litigation,* Case No. 12-MD-2311 (E.D. Mich. Aug. 10, 2017).** The parties in this multi-district litigation involving antitrust claims – and allegations that auto parts makers engaged in bid-rigging and price-fixing on automotive wire harnesses –reached a class action settlement. The Court granted settlement approval and the direct purchaser Plaintiffs filed a motion for attorneys' fees, expenses, and incentive awards to class representatives. Subsequently, the Court granted the motion. The Court stated that it would award fees to direct purchaser Plaintiffs' counsel using the percentage-of-the-fund approach. *Id.* at 2. Plaintiffs' counsel requested a fee award of 30% of the settlement funds before costs, expenses, and incentive awards were deducted. *Id.* at 3. The Court found that 30% was well within the range of fee awards made in the Sixth Circuit. The Court stated that it considered six factors in weighing a fee award, including: (i) the value of the benefits rendered to the class; (ii) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others; (iii) whether the services were undertaken on a contingent fee basis; (iv) the value of services on a hourly basis; (v) the complexity of the litigation; and (vi) the professional skill and standing of counsel. *Id.* The Court found that the settlement fund of over $102 million conferred a substantial cash benefit to members of the class. *Id.* at 4. The Court also held that Plaintiffs' counsel vigorously and effectively pursued the class members' claims. *Id.* The Court opined that the results achieved were a clear benefit to the settlement class, and that Plaintiffs' counsel was operating on a contingency fee basis and the complex legal and factual issues in antitrust cases all were factors in favor of the fee award. *Id.* Further, the lodestar cross-check indicated that the requested fees represented 38% of the lodestar value. The Court therefore determined that an award of 30% of settlements funds was appropriate, after removing costs and $7.5 million for certain future litigation expenses. *Id.* at 5-6. The Court also found that the class representatives were deserving of service awards in view of the time and effort they expended and the burden and inconveniences they incurred, and it awarded $50,000 to each representative. *Id.* at 6. Accordingly, the Court granted the direct purchaser Plaintiffs' motion for attorneys' fees.

***In Re Lifetime Fitness TCPA Litigation,* 2017 U.S. App. LEXIS 1843 (8th Cir. Feb. 2, 2017).** In 2014, four law firms filed four separate class action complaints against Life Time, a fitness center, alleging that Life Time violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited text-message advertisements to putative class members' cellular telephones. After mediation, the parties entered into a settlement agreement under which Life Time agreed to pay a minimum of $10 million and a maximum of $15 million to settle the TCPA claims, to cover the costs of settlement administration, and to pay attorneys' fees and expenses in the amount awarded by the District Court. *Id.* at *2. After the claims period closed, class counsel filed a motion for attorneys' fees, requesting an award of $3 million, or 30% of the guaranteed $10 million minimum payment Life Time was required to remit under the settlement agreement. Class counsel attached declarations in support of the requested fee amount, which documented the hours and various billing rates of the individuals who had worked on the lawsuit and which resulted in a lodestar of $687,928.75. The District Court granted preliminary approval of the settlement agreement. The District Court utilized class counsel's requested percentage-of-the-benefit

method to calculate the fee amount, and rejected Life Time's argument for application of the lodestar method, and overruled an objection to the fee request. The District Court found that class counsel had "expended substantial time and effort in their able prosecution" of the lawsuit, which ultimately resulted in a good faith settlement that provided a "fair, reasonable, adequate, and certain result" for the class. *Id.* at *3. The District Court awarded a total sum of $2.8 million in attorneys' fees and expenses. An objector argued that the fee award was excessive. On appeal, the Eighth Circuit upheld the District Court's decision. The Eighth Circuit found that the District Court reviewed the parties' submissions on the attorneys' fee issue, heard extensive argument on the matter, and considered the fees awarded and the methods used to calculate those fees in similar cases. *Id.* at *5. The District Court engaged in a pointed inquiry into class counsel's requested percentage-of-the-benefit fee amount and Life Time's suggested lodestar and appropriate multipliers and considered in detail arguments from both parties. The District Court also reviewed *in camera* the itemized daily time records kept by each attorney and other legal professionals who participated in representing the class and ultimately accepted those records as additional evidence that class counsel "expended substantial time and effort in their prosecution of claims on behalf of" the class. *Id.* at *6. The Eighth Circuit determined that the District Court's analysis was thorough, its findings were amply supported by the record, and it did not abuse its significant discretion by electing to use the percentage-of-the-benefit method to calculate the fee award or by determining that an award of $2.8 million in attorneys' fees and expenses was reasonable. *Id.* at *7. The Eighth Circuit similarly found that the District Court did not abuse its discretion by including approximately $750,000 in fund administration costs. *Id.* at *8. Accordingly, the Eighth Circuit upheld the District Court's decision granting class counsel's motion for attorneys' fees and costs.

***In Re Sears, Roebuck and Co. Front-Loading Washer Products Liability Litigation*, 2017 U.S. App. LEXIS 15034 (7th Cir. Aug. 14, 2017).** Plaintiffs brought a class action based on two defects in washing machines sold by Sears and Whirlpool, including a control unit defect and a problem of mold. The District Court had previously certified two Plaintiff cases – one consisting of owners of machines manufactured between 2004 and 2006 that had been affected by the control unit defect, and one of owners of machines affected by the mold. Sears settled with both classes and indicated that class members would receive no more than $900,000 from the settlement. *Id.* at *2. Class counsel subsequently filed their attorneys' fees request and asserted that they incurred $3.16 million in fees. Class counsel further requested the District Court to use a multiplier of 1.9 to account for what they claimed to be their extraordinary effort in the case, amounting to approximately $6 million in requested attorneys' fees. *Id.* at *3. The District Court, however, concluded that class counsel were entitled to a base fee of $2,726,191 multiplied by 1.75, for a total fee award of $4,770,834. *Id.* Class counsel asserted that the requested award was warranted because of "the novelty/complexity of the legal issues involved, the degree of success obtained, the public interest advanced by the litigation, the fact that fees were contingent on the outcome of the case, and to a lesser extent the preclusion of certain class counsel from working on other cases." *Id.* On appeal, the Seventh Circuit concluded that class counsel failed to prove that a reasonable fee would exceed $2.7 million. *Id.* at *4. The Seventh Circuit found that the pre-multiplier figure sought by class counsel was already three times the damages awarded to the class and therefore no multiplier should be used in the fee calculation. The Seventh Circuit therefore reversed the judgment of the District Court and remanded with directions to award $2.7 million in fees to the class counsel.

***In Re Tremont Securities Law, State Law & Insurance Litigation*, 2017 U.S. App. LEXIS 11282 (2d Cir. June 26, 2017).** Plaintiffs, a group of investors in various hedge funds managed by Defendant Tremont and its affiliates, appealed from a District Court's ruling approving a post-settlement plan to allocate the liquidated assets of certain funds (the "Plan of Allocation" or "POA") and awarding attorneys' fees. The Second Circuit affirmed that District Court's approval of the POA, but vacated and remanded for a reduction of the fee award. Plaintiffs argued that the District Court erred in awarding Plaintiffs' counsel a fee equal to 3% of the settlement, capped at 2.5 times the lodestar of counsel's hourly rate multiplied by hours worked. The Second Circuit noted that, if the Trustee paid approximately $1.45 billion into the Fund Distribution Account ("FDA") as anticipated, this cap likely would be triggered and Plaintiffs' counsel would receive in excess of $40 million. *Id.* at *16. The Second Circuit determined that the District Court had insufficiently considered the lack of contingency risk, and that factor was generally the most important in determining whether to award a lodestar multiplier. *Id.* at *18. The District Court identified two risks that Plaintiffs' counsel supposedly faced, and the Second Circuit found that neither risk supported the requested 2.5 lodestar multiplier. *Id.* at *19. The first identified risk was "in bringing the

derivative claims that gave rise to the inclusion of the FDA as part of the investor settlement." *Id.* The Second Circuit stated that this was not a proper consideration in relation to this particular fee award, because: (i) Plaintiffs' counsel was already compensated for the risk in bringing the derivative claims; (ii) Plaintiffs' counsel requested fees for work completed only after the District Court approved the derivative claims settlement; and (iii) the hundreds of millions of dollars that had been flowing into the FDA were essentially guaranteed by a settlement in the Trustee Litigation, a separate case led by separate counsel (who already took their cut) involving money obtained by the Trustee (who was also being compensated). *Id.* at *20. The second risk identified by the District Court was the "risk in defending the Plan of Allocation against objectors." *Id.* at *21. However, the Second Circuit opined that the fee award was not tied to any particular plan of allocation; rather, it was dependent on the size of the settlement (which was a product of the Trustee's efforts) and the lodestar, which would only increase as the number of objections to the POA (and thus the hours spent defending it). *Id.* Accordingly, the Second Circuit reasoned that there was little (if any) risk in defending the POA against objectors, except for the remote possibility that the District Court would refuse to approve any plan of allocation submitted by Plaintiffs' counsel. *Id.* Given the lack of contingency risk, the Second Circuit found that a lodestar multiplier cap of 2.5 was unreasonable. *Id.* at *21. Accordingly, the Second Circuit remanded with instructions that the District Court revise the cap to reflect counsel's limited risk. *Id.* at *22.

***In Re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation,* 2017 U.S. Dist. LEXIS 39115 (N.D. Cal. Mar. 17, 2017).** In this multi-district class action litigation, Plaintiffs, a group of consumers, dealers, securities purchasers, and government agencies, alleged that Volkswagen used software designed to cheat emissions tests and deceive federal and state regulators in nearly 600,000 Volkswagen, Porsche, and Audi-branded turbocharged direct injection ("TDI") diesel engine vehicles sold in the United States. *Id.* at *719. With regards to the 2.0-liter TDI diesel vehicles, the parties agreed to a class action settlement ("Settlement") of the claims of the consumers, and the Court granted final approval of the Settlement. The Settlement established a funding pool of over $10 billion. *Id.* at *720. Class counsel subsequently submitted an application for $167 million in attorneys' fees and $8 million in costs, which the Court granted. Applying the relevant factors, the Court found that the Settlement supported class counsel's requested fees in the amount of $167 million and that the request for $8 million in costs was reasonable. *Id.* at *721. The Court determined that class counsel achieved extraordinary results in a short time-frame for class members and for the public as a whole. *Id.* at *722. The Court found that the Settlement provided restitution payments to each class member as well as the option for class members to: (i) return their vehicles to Volkswagen for a buy-back, or terminate their leases; or (ii) receive an emissions modification for their vehicles if such modification was approved by the U.S. Environmental Protection Agency ("EPA") and the California Air Resources Board ("CARB"). *Id.* at *723. The Court found that recognizing that there likely would not be 100% consumer participation, the funding pool's value was $8.528 billion and class counsel's $167 million fee request was approximately 1.96% of that value. The Court stated that this was substantially lower than the percentage rates of fee awards in similar cases and well below the Ninth Circuit's 25% benchmark rate. *Id.* at *731. The Court held that the lodestar cross-check also supported the reasonableness of class counsel's requested fees. Class counsel expended approximately 98,000 hours while litigating and settling the claim and implementing the Settlement and 21,000 hours guiding class members through the settlement process. *Id.* at *732. Class counsel submitted a blended average hourly billing rate of $529 per hour for all work performed and projected, resulting in a lodestar amount of $63.5 million. The Court determined that the resulting lodestar multiplier was 2.63, which was more than reasonable given the complexities of the case and the extraordinary result achieved for the Class. *Id.* at *733. Class counsel also sought reimbursement of $8 million in expenses, which the Court held was reasonable and that the reimbursement of such expenses was appropriate. Accordingly, the Court granted the motion for attorneys' fees and costs.

***In Re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation,* 2017 U.S. Dist. LEXIS 62144 (N.D. Cal. April 21, 2017).** In this multi-district class action litigation, Plaintiffs – a group of consumers, dealers, securities purchasers, and government agencies – alleged that Volkswagen used software designed to cheat emissions tests and deceive federal and state regulators in nearly 600,000 Volkswagen, Porsche, and Audi-branded turbocharged direct injection ("TDI") diesel engine vehicles sold in the United States. *Id.* at *797. With regards to the 2.0-liter TDI diesel vehicles, the parties agreed to a class action settlement ("settlement") of the claims of the consumers, and the Court granted final approval of the settlement.

Id. The Court also granted class counsel's motion for attorneys' fees of $167 million and $8 million in costs. *Id.* at *798. Attorneys who did not serve as class counsel ("Non-Class Counsel") subsequently filed 244 motions for attorneys' fees and costs, which the Court denied. The question at issue was whether the Court should require Volkswagen to pay attorneys' fees and costs to non-class counsel. The Court found that Volkswagen did not agree to pay such fees, and non-class counsel's work did not benefit the class as a whole. The Court stated that the settlement agreement provided that Volkswagen would "pay reasonable attorneys' fees and costs for work performed by class counsel in connection with the action as well as work performed by other attorneys designated by class counsel to perform work in connection with the action." *Id.* at *804. The Court opined that non-class counsel were not "class counsel," nor did they assert that the fees at issue were for work "designated by class counsel." *Id.* The Court found that non-class counsel's filing of individual and class complaints prior to the consolidation order for the MDL proceeding did not benefit the class because the cases were consolidated less than three months after the public disclosure of Volkswagen's use of a defeat device, and class counsel was appointed only months later. Consequently, there was little to any pre-trial activity in the cases filed by non-class counsel, and the filings did not materially drive settlement negotiations with Volkswagen. *Id.* at *804. Further, non-class counsel asserted that, before the appointment of class counsel, they fielded hundreds of phone calls from prospective and actual clients, and consulted with prospective class members about their potential legal claims. The Court determined that although such work required time and effort, it benefited individual class members, not the class as a whole. *Id.* at *805. Further, in the 244 motions at issue, counsel sought fees for work representing 3,642 class members, which represented only 0.74% of the total class of 490,000. *Id.* The Court opined that as such a small percentage of class members actually retained non-class counsel, this made it even less likely that non-class counsel's services benefited the class as a whole. *Id.* As for the time non-class counsel spent advising class members on the terms of the settlement, the Court found that the work was duplicative of that undertaken by class counsel, and therefore did not "confer[] a benefit beyond that conferred by lead counsel." *Id.* at *806. Finally, the Court held that non-class counsel's requests for fees and costs were also procedurally deficient. In a pre-trial order, the Court explained that all Plaintiffs' attorneys needed to obtain lead counsel's authorization to perform compensable common benefit work. The Court found that non-class counsel had not asserted that they obtained authorization from lead counsel to perform the common benefit work for which they now sought compensation, as required. Accordingly, the Court ruled that Volkswagen was not required to pay non-class counsel's attorneys' fees and costs as a result of the settlement.

***In Re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation,* 2017 U.S. Dist. LEXIS 114353 (N.D. Cal. July 21, 2017).** In this multi-district class action litigation, Plaintiffs – a group of consumers, dealers, securities purchasers, and government agencies – alleged that Volkswagen used software designed to cheat emissions tests and deceive federal and state regulators in nearly 600,000 Volkswagen, Porsche, and Audi-branded turbocharged direct injection ("TDI") diesel engine vehicles sold in the United States. *Id.* at *726. With regards to the 3.0-liter TDI diesel vehicles, the parties agreed to a class action settlement ("settlement") of the claims of the consumers, and the Court granted final approval of the settlement. *Id.* The settlement required Defendant to provide class members with benefits conservatively valued at $902 million. Class counsel subsequently submitted its application for $121 million in attorneys' fees and $4 million in costs. The Court noted that class counsel achieved extraordinary results for class members and for the public as a whole. The Court also observed that the settlement not only provided class members with significant value, but also class counsel obtained the Settlement swiftly. The Court found that the case was complex and additional litigation posed a risk of delayed payment to class members and, by extension, class counsel. *Id.* Further, the Court opined that if class counsel had proceeded to litigate Plaintiffs' claims to conclusion, any recovery would likely have come years in the future and at far greater expense. The Court also stated that the settlement provided significant non-monetary relief. The Court found that the requested $121 million in fees amounted to approximately 13.4% of the settlement total, which is well below the Ninth Circuit's 25% benchmark for common fund cases. *Id.* at *727. Further, the Court stated that class counsel brought this case on a purely contingent basis, agreeing to advance all necessary expenses and knowing that they would receive a fee only if there was a recovery. The Court also determined that of the approximately 88,500 3.0-liter class members, only 0.67% opted-out of the settlement, only 0.036% of the class objected to any aspect of the settlement, and no class members objected to the proposed fee award. *Id.* at *728. The Court noted that the lodestar cross-check also supported the reasonableness of class counsel's requested fees. Using the submitted hours and average billing rate, the Court found that the lodestar amounted to approximately $60 million, and the resulting lodestar

multiplier was 2.02. The Court opined that the lodestar multiplier was more than reasonable given the complexities of this case, the skill and diligence of class counsel, and the extraordinary results achieved for the class. *Id.* at *729. As to the requested costs, the Court noted that class counsel sought reimbursement of $4 million in reimbursable expenses, consisting of $3.4 million in costs already incurred and $0.6 million in anticipated future costs associated with implementing the settlement over the next two-and-a-half years. The Court found that these expenses were reasonable and that the reimbursement of such expenses is appropriate. The Court therefore granted class counsel's motion for attorneys' fees and costs relating to the 3.0-liter settlement.

***Kleen Products LLC, et al. v. International Paper Co*., 2017 U.S. Dist. LEXIS 183015 (N.D. Ill. Oct. 17, 2017).** Plaintiffs asserted class action claims for damages against Defendants resulting from alleged violations of federal antitrust laws. The parties settled the matter for $354 million, and the Court granted preliminary settlement approval. Plaintiffs subsequently filed a motion for final approval of the settlement and for attorneys' fees that sought 30% of the settlement funds. The Court considered eight factors bearing upon whether the settlement was fair, reasonable, and adequate, including: (i) the strength of Plaintiffs' case balanced against the amount offered in settlement; (ii) Defendants' ability to pay; (iii) the complexity, length, and expense of further litigation; (iv) the amount of opposition to the settlement; (v) the presence of collusion in reaching the settlement; (vi) the reaction of class members to the settlement; (vii) the opinion of competent counsel; and (viii) the stage of the proceedings and the amount of discovery completed. The Court concluded that these factors weighed in favor of granting final approval. *Id.* at *10-11. The Court also found the request for an award of attorneys' fees fair, adequate, and reasonable. *Id.* at *12. The Court noted that the relevant factors used to determine the reasonableness of a requested fee award in common fund cases are the market rate, fee awards in similar matters, the nature of the case, including the risk of non-recovery, and amount and quality of class counsel's work. *Id.* at *17. The Court determined that all factors supported awarding the fee request of 30% of the settlement funds. The Court explained that the percentage-of-recovery method is used in the Seventh Circuit, and the requested 30% recovery was well within the range of acceptable fees and less than the 33 1/3% referenced in the settlement agreement. *Id.* at *18. Further, using the lodestar method as a cross-check, the Court calculated a 1.1 multiplier using class counsel's historical hourly rates. *Id.* Further, the Court reasoned that class counsel's declarations in support of their request demonstrated that the requested fee percentage was reasonable and within the range of fees sought in non-contingent cases. *Id.* at *19. The Court also found that the requested 30% was within the range of the market rates approved in other complex antitrust cases, demonstrating the reasonableness of the request. *Id.* The Court further concluded that the risk of non-payment further justified the requested 30% fee award because antitrust cases are particularly complex and risky. The Court stated that class counsel vigorously represented their clients against substantial motion practice, including motions to dismiss, numerous discovery-related motions, significant opposition to class certification (including related appeals) summary judgment, and motions to exclude expert testimony. *Id.* at *20. Finally, the Court opined that the amount and quality of the work performed by class counsel justified the requested fee award because class counsel litigated the case for nearly seven years and expended more than 220,000 hours. The Court concluded that class counsel argued the case professionally and effectively at each stage of the litigation and received an outstanding result for the class. Accordingly, the Court granted final settlement approval and approved class counsel's requested 30% fee award.

***Puente Arizona, et al. v. Penzone*, 2017 U.S. Dist. LEXIS 176786 (D. Ariz. Oct. 25, 2017).** Following resolution of their class action, Plaintiffs sought attorneys' fees to recover out-of-state hourly rates for three sets of attorneys from the U.C. Irvine School of Law Immigrant Rights Clinic ("UCI IRC"), the National Day Laborer Organizing Network ("NDLON"), and the law firm of Hadsell, Stormer & Renick LLP ("HSR"). Plaintiffs also sought to recover existing hourly rates for three sets of Arizona lawyers, including The ACLU Foundation of Arizona ("ACLU-AZ"), attorney Ray Ybarra Maldonado, and the law firm of Quarles & Brady LLP ("QB"). *Id.* at *5. Defendants argued that Plaintiffs should be limited to reasonable Arizona rates for all lawyers because they have not shown that it was necessary to use out-of-state counsel. *Id.* at *5-6. The Court disagreed and found that Plaintiffs submitted persuasive evidence that there were insufficient local counsel with the willingness and requisite "degree of experience, expertise or specialization required to handle properly the case." *Id.* at *6. However, the Court capped out-of-state attorneys' fees at $750 per hour. *Id.* The Court concluded that this cap was reasonable given the fact that rates above this level represent premium billing in large legal markets, which

was a rate of pay not warranted for counsel who did not take a leading role in this case. Second, the Court reduced the hourly rate charged for U.C. Irvine law students from the requested $200 to $125. *Id.* The Court viewed $125 per hour as more than reasonable for law students who have not yet graduated from law school or passed the bar exam. The Court awarded lead attorney Lai's requested hourly rate of $565, despite Defendants' argument that her time in practice was insufficient to justify such a rate. *Id.* at *7-8. The Court opined that Lai acted as the lead attorney in the case and managed the litigation effectively, and it found her hourly rate was comparable to rates charged by lawyers handling sophisticated litigation in Southern California. *Id.* at *9. The Court also accepted the hourly rates charged by the Arizona-based attorneys. Plaintiffs explained that they reduced several categories of time by 50% and some categories by 75% or more for excessive, redundant, or otherwise unnecessary work. *Id.* at *10. The Court concluded that Plaintiffs' lack of success warranted a more substantial reduction than Plaintiffs had offered. *Id.* at *10-11. The Court held that Plaintiffs' voluntary 49% reduction – which was entirely warranted given the duplication of much of their work, the number of Plaintiffs' lawyers that attended hearings, participated in conference calls, and attended depositions, and the number of law student hours incurred in the U.C. Irvine clinical program – failed sufficiently to account for the fact that Plaintiffs lost three of their four claims and prevailed only partially on their fourth. *Id.* at *11. Rather than attempting an hour-by-hour reduction for the many lawyers and law students who worked on Plaintiffs' case, the Court concluded that a further 25% reduction in the compensable time for all lawyers and law students was required to accurately reflect the mixed success of the case. *Id.* at *12.

***Woburn Retirement System, et al. v. Salix Pharmaceuticals, Ltd.,* 2017 U.S. Dist. LEXIS 132515 (S.D.N.Y. Aug. 18, 2017).** The Court consolidated two putative securities fraud class actions against Defendant and two of its officers and directors alleging that they materially misled the public by deliberately making false or misrepresentative statements, or by failing to correct such statements. Plaintiffs claimed that Salix's fraudulent actions artificially increased the price of Salix securities. The parties settled the matter and subsequently requested settlement approval. The proposed settlement resolved all claims in the action in exchange for a payment of $210 million to the class members. *Id.* at *3. The Court granted final approval of the settlement, the plan of allocation, and the application for attorneys' fees and reimbursement of litigation expenses. Class counsel requested a fee award of 21.24% of the settlement fund of $210 million, or $44,609,218. Class counsel also requested reimbursement of litigation expenses in the amount of $1,983,708.41. *Id.* at *13. The Court stated that class counsel submitted detailed time records demonstrating over 34,000 hours of work done by the three firms. The Court determined that class counsel investigated the facts, moved to be appointed lead Plaintiffs' counsel, submitted amended pleadings, successfully defended the motion to dismiss, conducted discovery, took ten fact witness depositions, consulted experts, moved for class certification, and ultimately negotiated a favorable settlement for their clients. *Id.* at *15. The Court noted that the lodestar value of the work was $14,185,499.25. Class counsel request a fee equivalent to 21.24% of the net settlement fund, which reflected a lodestar multiplier of approximately 3.14. *Id.* Class counsel contended that this percentage and this multiplier were within the range of reasonable percentages and multipliers approved in the Second Circuit. *Id.* at *15-16. Although a lodestar multiplier of 3.14 for a settlement of $210 million is high, the Court found that it was still within the range of lodestar multipliers approved in the Second Circuit. The Court opined that investigating and litigating the action was complex and required expert consultation; which reinforced the reasonableness of the requested fees. *Id.* at *16. The lead Plaintiff also faced substantial hurdles to recovery, as they needed to prove scienter, loss causation, and damages, and agreed to litigate on a contingency basis. *Id.* at *17. The Court also found that the high quality of representation warranted the requested fee award. Finally, the Court noted that for a settlement in the hundreds of millions of dollars, a request of over 20% was substantial; however, because the percentage was within the range of what is reasonably granted in the Second Circuit, and the lodestar multiplier was reasonable, the Court approved class counsel's fee request.

(ix) Bankruptcy Issues In Class Actions

***Adler, et al. v. Lehman Brothers Holdings Inc.,* 855 F.3d 459 (2d Cir. 2017).** Claimants were a group of employees that held restrictive stock units that they received as compensatory awards when they worked at Lehman Brothers. Claimants filed proofs of claim in Lehman Brothers' bankruptcy proceeding and sought cash payments in an amount reflecting the face value of the restricted stock units because the restrictive stock units had not vested at the time of the bankruptcy filing and were rendered worthless. Lehman Brothers filed omnibus objections to these claims, and the Bankruptcy Court sustained the objections on the ground that the claims

were subordinate to the claims of general creditors pursuant to 11 U.S.C. § 510(b) because Claimants' claims arose from the purchase or sale of securities. On its review, the District Court affirmed the Bankruptcy Court's decision. On Claimants' further appeal, the Second Circuit affirmed the District Court's decision. The District Court concluded that the claims at issue must be subordinated pursuant to 11 U.S.C. § 510(b) because, within the meaning of that statute: (i) the restricted stock units were securities; (ii) Claimants acquired them in a purchase; and (iii) the claims for damages arose from that purchase or the asserted rescission. The Second Circuit affirmed the District Court's decision and held that the employees' claims were subordinated pursuant to 11 U.S.C. § 510(b) because the restrictive stock units were securities under § 101(49)(xiv) and bore the hallmarks of interests commonly known as securities. Further, the employees purchased them by agreeing to receive them, in lieu of cash, in exchange for a portion of their labor, and the claims arose from a securities transaction. The Second Circuit reasoned that Claimants took on the risk and return expectations of shareholders rather than creditors by agreeing to be paid a portion of their compensation in restrictive stock units. Claimants were bound by the choice that they made to trade the relative safety of cash compensation for the upside potential of shareholder status, as well as the risk of loss that accompanied that status. Accordingly, the Second Circuit affirmed the District Court's decision.

***In Re Peregrine Financial Group, Inc.,* 2017 U.S. App. LEXIS 14601 (7th Cir. Aug. 7, 2017).** This decision involved a consolidated appeal from judgments entered by the Bankruptcy Court and affirmed by the District Court in favor of Defendant Ira Bodenstein, the Chapter 7 trustee of the estate of Peregrine Financial Group ("Peregrine"). *Id.* at *2. Peregrine was a registered futures commissions merchant ("FCM") and a registered forex dealer member of the National Futures Association. In addition to futures, Peregrine dealt in retail foreign currency transactions ("retail forex") and spot metal transactions. Plaintiffs were investors who executed retail forex and spot metal contracts with Peregrine. *Id.* In July 2012, the Commodity Futures Trading Commission notified Russell L. Wasendorf, Peregrine's Chief Executive Officer and the Chairman of the Board, that Peregrine's accounts were going to be electronically monitored. *Id.* at *2-3. Wasendorf attempted suicide the next day, after submitting a statement admitting to embezzling millions of dollars over a 20-year period. Wasendorf was subsequently arrested and pled guilty to four criminal charges, including admitting that he embezzled and misappropriated nearly $200 million from Peregrine's segregated customer futures accounts. *Id.* at *3. As a result of the loss, Peregrine filed for bankruptcy and Bodenstein was appointed as trustee. Chapter 7 of the Bankruptcy Code governs the bankruptcy of a futures commissions merchant such as Peregrine, and provides for the distribution of "customer property" in priority to all other claims. *Id.* "Customer property" is defined as including funds received in connection with a commodity contract, which in turn is defined in § 761(4) of the Bankruptcy Code. *Id.* Bodenstein excluded Plaintiffs from the priority distribution based on his determination that forex and spot metal transactions did not constitute "commodity contracts" as so defined. *Id.* The Secured Leverage Plaintiffs then filed an adversary complaint against Bodenstein challenging his decision. *Id.* at *4. After that adversary proceeding was terminated, another group of customers (the "Miller Plaintiffs"), filed a class action adversary proceeding against Bodenstein alleging fraud, breach of fiduciary duty, unjust enrichment, and conversion, and seeking the imposition of a constructive trust. *Id.* The Bankruptcy Court dismissed the action as untimely. On appeal, Plaintiffs challenged the decisions of the Bankruptcy Court and the District Court. The Secured Leverage Plaintiffs asserted that: (i) their funds were held in a resulting trust and therefore were not included in the bankruptcy estate; (ii) the forex and spot metal contracts constituted commodity contracts under 11 U.S.C. § 761(4)(F)(i); and (iii) the Bankruptcy Court erred in precluding the expert testimony of Martin Doyle. *Id.* The Miller Plaintiffs argued: (i) that the District Court erred in holding that the Miller Plaintiffs' claim was untimely and did not constitute an amended claim; and (ii) that a constructive trust was a proper remedy. *Id.* at *4-5. The Seventh Circuit concluded that the District Court properly resolved all of the challenges, and that nothing argued in the appellate briefs led it to disagree with the District Court's analysis. *Id.* at *5. Therefore, because the Seventh Circuit agreed with the reasoning and conclusions of the District Court as to all of the issues raised on appeal. The Seventh Circuit adopted the District Court's opinion set forth at *Secure Leverage Group, Inc. v. Bodenstein*, 558 B.R. 226, 231 (N.D. Ill. 2016), and affirmed the District Court's orders.

(x) Breach Of Contract Class Actions

***Cafferty, Clobes, Meriwether & Sprengel, LLP, et al. v. XO Communication Services, LLC*, 2017 U.S. App. LEXIS 4096 (7th Cir. Mar. 8, 2017).** Plaintiff, a law firm, sought individual and class relief against Defendant, a large provider of telecommunications services. Plaintiff's contract with Defendant provided that the contract

would be automatically renewed at the end of the customer's current service term "for a similar term and at the same rates" set forth in the contract. *Id.* at *1. A customer who did not want to renew was required to so notify Defendant at least 30 days prior to the expiration date in the contract; if it failed to do so, the contract would renew automatically. *Id.* at *1-2. The contract also provided that Defendant would notify the customer of the automatic-renewal feature of the contract, thus reminding the customer that if it decided not to renew the contract it would have to notify Defendant at least 30 days before expiration. The contract further stated that if the customer terminated the contract after the deadline it would have to pay Defendant a termination fee. Plaintiff's contract with Defendant had an initial term of three years and renewed automatically three times. *Id.* at *3. Shortly after the third renewal began, Plaintiff wanted to terminate the contract because it was moving to a different location. Pursuant to its contract, Defendant sought a termination fee. Plaintiff alleged breach of contract, violation of Illinois consumer protection statutes, unjust enrichment, and unconscionability. Plaintiff filed a motion to amend its third complaint, which the District Court denied and it entered judgment in favor of Defendant. On appeal, the Seventh Circuit affirmed the ruling and dismissal of Plaintiff's claims. The Seventh Circuit stated that all of Plaintiff's claims pivoted on its contention that Defendant's monthly reminders of the automatic-renewal feature of the contract should have included the date of the automatic renewal, or that Defendant should have otherwise notified Plaintiff of the renewal date before the contract renewed. The Seventh Circuit held that because Plaintiff, having failed to keep track of the renewal date, terminated the contract after the contract had been renewed, it thereby violated the terms of the contract and was required to pay the termination fee. The Seventh Circuit opined that Plaintiff lost track of the terms of the contact, and failed to terminate it before the renewal took effect. *Id.* at *4. The Seventh Circuit determined that Plaintiff's argument came down to a baseless assertion that the renewal clause in the contract "assigned responsibility to Defendant to track customers' renewal dates and to give them fair warning that the window of opportunity to avoid renewal of their agreements was closing." *Id.* The Seventh Circuit stated that the renewal clause did not say that and did not have to, since every customer was informed that the contract automatically renewed at the end of the customer's term of service unless that renewal was cancelled by the customer at least 30 days before the end of the term. *Id.* at *5. The Seventh Circuit opined that Plaintiff claim on appeal that it had not been heard was inaccurate, as ultimately it had multiple options to do so, *i.e.*, it could have filed a motion, expanded its arguments at the hearing, or raised its procedural concerns with the District Court, and failed to do so. *Id.* at *6. The Seventh Circuit stated that given the insufficiency of the first and second amended complaints, the denial of leave to file a third amended complaint was proper, and it affirmed the District Court's decision dismissing the litigation.

***D'Apuzzo, P.A., et al. v. United States*, 2017 U.S. Dist. LEXIS 156270 (S.D. Fla. Sept. 25, 2017).** Plaintiff brought a putative class action lawsuit against the United States government alleging that the Federal Judiciary's Public Access to Court Electronic Records ("PACER") system improperly charged users for "judicial opinions" in violation of the contract between Defendant and PACER users. *Id.* at *1. Defendant filed a motion to dismiss, arguing that Plaintiff lacked subject-matter jurisdiction, or that Plaintiff failed to state a claim on which relief could be granted. The Court found that Plaintiff proved subject-matter jurisdiction as at the present stage of the case, as Plaintiff was required only to assert "no more than a non-frivolous allegation of a contract with the government." *Id.* at *5. Further, on a motion to dismiss, the Court was required to accept all of Plaintiff's allegations as true in determining whether a Plaintiff has stated a claim for which relief could be granted. Therefore, the Court determined that Plaintiff had sufficiently alleged that a valid contract with Defendant underlied his claims and that the Court had subject-matter jurisdiction over those claims. Plaintiff claimed that the alleged PACER contract and the attendant fee schedule beared the hallmarks of "clickwrap" contracts that are routinely formed over the Internet. *Id.* at *9. Defendant argued that the PACER system and fee schedule did not contain an offer to contract and that the "judicial opinions provision" was insufficiently definite. *Id.* at *9-10. Plaintiff argued that Defendant's clickwrap agreement set forth the obligations of the parties to the contract, requiring users to pay a 10 cent per page fee for access to documents other than judicial opinions. In return, Defendant provided access to electronic records and would provide access to judicial opinions free of charge. *Id.* at *10. Defendant claimed that these provisions did not create a contract between the parties. The Court stated that this type of conclusion would require the Court to interpret the agreement, which the Court declined to do at the motion to dismiss stage. *Id.* at *11. The Court therefore found that Plaintiff sufficiently pleaded the four elements of a claim for breach of contract. Accordingly, the Court denied Defendant's motion is denied as to the breach of contract claims. Defendant further argued that Plaintiff's breach of an implied covenant of good

faith and fair dealing claim should be dismissed. The Court disagreed, and stated that the implied covenant was not duplicative of Plaintiff's express contract claims, which alleged that the overcharges themselves violated the PACER contract's express terms. *Id.* at *13. Defendant also argued that the Court should dismiss Plaintiff's illegal exaction claims because he failed to allege that the fees he paid for judicial opinions were improperly paid. *Id.* at *14. The Court again disagreed, stating that the entire premise of Plaintiff's case was that he was improperly charged a fee to access judicial opinions that should have been provided free of charge. *Id.* at *15. Therefore, the Court found that Plaintiff sufficiently alleged that Defendant illegally overcharged him contrary to PACER's governing statutes and policies, and his complaint stated a claim for illegal exaction. Accordingly, the Court denied Defendant's motion to dismiss.

***Dawson, et al. v. Washington Metropolitan Area Transit Authority*, 2017 U.S. Dist. LEXIS 97235 (D.D.C. June 23, 2017).** Plaintiffs, a group of supervisors, filed a class action alleging that Defendant's Policy/Instruction 7.5.1 (the "Policy"), constituted a contract mandating that they would be paid at an amount equal to or greater than 5% of direct reports and that Defendant breached the alleged contract by refusing to pay Plaintiffs according to the 5% differential. Defendant filed a motion for summary judgment, which the Court granted. Defendant's Policy stated that it was "structured to address base salary adjustments using two distinct approaches: (a) comprehensive salary review and (b) individual salary adjustments." *Id.* at *2. The Policy further stated that "compression occurs when a supervisor or manager experiences less than a 5% higher pay differential between their salary and that of their highest paid direct reporting subordinate. Compression analyses are performed to monitor pay differentials and detect instances of compression based on annual review and analysis." *Id.* at *3. Plaintiffs argued that the Policy represented the parties' agreement that supervisors, such as Plaintiffs, were entitled to the 5% pay differential following an annual review. *Id.* at *4. Upon review of the Policy, the Court found that that its clear language demonstrated that it did not create a contract that mandated the 5% pay differential. *Id.* at *8. First, the Court noted that the Policy plainly stated that Defendant's comprehensive review "approach" examined several factors, not only a compression event, but also "equity, performance, salary ranges, and appropriately related comprehensive salary adjustments." *Id.* at *9. The Court found that this language did not constitute a promise by Defendant to maintain a 5% pay differential between supervisors and their highest paid direct reports, it merely set forth the manner in which Defendant conducted comprehensive salary reviews. *Id.* at *10. Further, the Court observed that the Policy further stated that salary adjustments fell within the General Manager's discretion and were "subject to budgetary conditions," "fiscal considerations," and "circumstances deemed to be in the best interests of" Defendant. *Id.* Even assuming the existence of a contract, the Court found that Plaintiffs' suggested interpretation of the Policy would require Defendant to meet the 5% pay differential obligation even if it were fiscally impossible to do so, which clearly contradicted the Policy's plain language reserving decisions regarding salary adjustments to the General Manager and made them "subject to budgetary conditions." *Id.* Accordingly, the Court concluded that Plaintiffs failed to carry their burden to establish that a valid and enforceable contract was created between them and Defendant, because the Policy did not show that Defendant intended to be bound by the 5% pay differential as Plaintiffs claimed. The Court therefore granted Defendant's motion for summary judgment.

***Dulberg, et al. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 120008 (N.D. Cal. July 31, 2017).** Plaintiff, a driver, filed a motion alleging breach of contract in relation Defendant allegedly charging higher rates to its passengers but not using the higher rates in calculating compensation for its drivers pursuant to their percentage-based fee agreement. Plaintiff contended that the standardized agreement with Defendant entitled him to higher compensation as a result of Defendant's higher rates for passengers. Defendant contended that it could raise its rates for passengers by instituting a more aggressive pricing regime while forcing drivers to accept the same compensation they would have received under the old pricing regime and keeping the difference. *Id.* at *2. Defendant filed a motion to dismiss for failure to state a claim, which the Court denied. Under the parties' driver agreement, Plaintiff could charge to passengers: (i) the fare; (ii) Defendant's booking fee; and (iii) any applicable tolls, taxes, or fees for each ride. *Id.* at *5. Defendant collected the amounts from passengers on Plaintiff's behalf. Additionally, under the agreement, Plaintiff owed to Defendant: (i) a service fee equal to 20% of each UberX ride and 28% of each UberSelect ride; and (ii) Uber's booking fee. *Id.* at *6. Defendant withheld these before remitting anything to Plaintiff. Defendant's policy subsequently changed from calculating the price for each ride after the ride to calculating the price upfront before the ride. *Id.* at *7. The

Court found that the driver agreement comprehensively regulated distribution of all payments collected from Defendant's passengers. Since the driver agreement contemplated only one "fare" consisting of a base amount plus applicable time and distance amounts, it must follow that the "fare" defined in the driver agreement corresponded exactly to the base amount plus applicable time and distance amounts included in Defendant's "upfront pricing" policy. *Id.* at *13. The Court found that the amended complaint plausibly alleged that, after shifting to "upfront pricing," Defendant had to calculate fares for drivers under the driver agreement using the same aggressively estimated time and distance amounts that it used for charging passengers, but continued to use actual time and distance amounts to calculate fares and shortchanged its drivers under the driver agreement, while retaining more money for itself. *Id.* at *14. At this stage, the Court found that Plaintiff's allegations were sufficient to survive dismissal. Accordingly, the Court denied Defendant's motion to dismiss.

***Hopkins, et al. v. United States Bancorp*, 2017 U.S. Dist. LEXIS 131140 (S.D. Ohio Aug. 17, 2017).** Plaintiff, on behalf of a group of hourly employees, brought an action alleging that Defendants entered into a compensation agreement with Plaintiff and the class members whereby Defendants agreed to compensate them an hourly wage for every hour worked, yet failed to do so. The Court had previously found that Plaintiff failed to identify or describe with specificity the circumstances under which any alleged contractual agreement was formed. The Court ordered Plaintiff to file an amended complaint identifying the contract that formed the basis of his claims. In an amended complaint, Plaintiff stated that, following his initial job interview, he was orally offered a job from a manager stating that the position was an "hourly position starting at approximately $15 per hour, plus benefits." *Id.* at *2. Plaintiff then received an offer letter where his salary was listed as "$32,614.40 annually, $15.68 hourly." *Id.* at *3. The letter explicitly stated that it did not create a contract of employment and that Plaintiff would be an at-will employee and that "the terms of [his] employment, compensation or benefits may change at any time, without advance notice or consent." *Id.* Defendant filed a motion to dismiss, which the Court granted. The Court concluded that there was no contract reached between the parties. The Court noted that a binding contract exists only if its terms are definite and certain. The Court held that the terms of the alleged agreement were too indefinite to be the basis of a binding contract. The Court found that Plaintiff's offer letter, which expressly disavowed the creation of a contract, could not itself be the basis for any alleged contract to pay Plaintiff hourly. Further, the Court determined that Plaintiff's lowest salary during his tenure with Defendant was $15.68 per hour at the time he was hired; which salary increased several times to a high of $19.60 per hour. *Id.* at *6. Therefore, the Court found that Defendant more than adequately compensated Plaintiff even if the oral agreement alleged by Plaintiff was considered a binding contract. Accordingly, the Court granted Defendant's motion to dismiss.

***Turping, et al. v. United States*, 2017 U.S. Claims LEXIS 1155 (Fed. Cl. Sept. 22, 2017).** Plaintiffs were a group of retired employees from one particular location that was managed by sub-contractors of the U. S. Department of Energy ("DOE"). Plaintiffs all participated in a multi-employer pension plan established by the DOE, but paid for by the sub-contractors. The plan promised that employees would be entitled to their entire term of service with the site, regardless of which sub-contractor managed it. In 1996, one sub-contractor decided that it would not credit prior service under the plan. Plaintiffs alleged damages for breach of an implied-in-fact contract under the Tucker Act, or in the alternative, that the DOE's actions were an "uncompensated taking under the Fifth Amendment for which they are entitled to just compensation." *Id.* at *8. The government argued that Plaintiffs' breach of contract claim should be dismissed because there was neither evidence of an implied-in-fact contract nor an uncompensated taking where the alleged deprivation of retirement benefits was not an action "authorized" by the government. *Id.* at *15. After determining that Plaintiffs' claims were timely, that the Court had jurisdiction over the claims, and that there was no taking claim, the Court dismissed Plaintiffs' remaining claims. The Court held that the allegations were insufficient to establish that the DOE entered into an implied-in-fact contract with Plaintiffs. Proving that there was an implied-in-fact contract "requires the Court to find that 'surrounding circumstances' show: (i) mutuality of intent to contract; (ii) consideration; (iii) lack of ambiguity in offer and acceptance; and (iv) actual authority on the part of the government representative to bind the government in contract," which may be "inferred . . . from the conduct of the parties showing, in the light of the surrounding circumstances, there was tacit understanding." *Id.* at *32. The Court reasoned that for there to be an implied-in-fact contract, "there must be an objective manifestation of voluntary, mutual assent," which it did not find here. *Id.* First, the Court held that the plan did "not evidence any DOE intent to contract with Plaintiffs, because DOE was not a party to the [plan]" and the allegation that the "DOE has actually controlled

the terms, administration, and operation of the [plan]" was merely conclusory. *Id.* at *34. Second, the Court found that the following were not evidence of the DOE's intent: (i) a solicitation "conveyed by the DOE to potential bidders" because it was an offer to bidders, and not intent to contract with Plaintiffs; (ii) regulations by the DOE because "regulatory proclamations are insufficient to create contractual obligations;" (iii) a conclusory statement by Plaintiffs that there were "other actions and policies of the government and agents acting on behalf of the government;" and (iv) the offer letter by the new sub-contractor that would manage the plan to the DOE. *Id.* at *35-36.

(xi) Civil Rights Class Actions

***Lippert, et al. v. Bandwin,* 2017 U.S. Dist. LEXIS 64687 (N.D. Ill. April 28, 2017).** Plaintiffs, a group of detainees, brought a putative class action alleging that Defendant violated the Eighth Amendment's prohibition against cruel and unusual punishment because of systemic deficiencies in the health care it provided to detainees. Plaintiffs sought injunctive relief to address the alleged violations. *Id.* at *3. The Court granted Plaintiffs' motion for certification of a class of prisoners in Defendant's custody with serious medical or dental needs. *Id.* at *4. The Court rejected Defendant's argument that Plaintiffs lacked standing because Defendant did not maintain a master list of inmates with serious medical or dental needs and therefore, the class was not ascertainable. *Id.* at *8. The Court noted that Defendant had lists indicating which inmates requested treatment and it could check individual files. The Court also rejected Defendant's argument that Plaintiffs lacked standing because they had all received proper medical treatment, ruling that the Eighth Amendment protects against risks of future harms and Plaintiffs "need not await a tragic event." *Id.* at *7. The Court further found that the commonality requirement was met and rejected Defendant's argument that it was not satisfied because Plaintiffs did not suffer from Defendant's policies. *Id.* at *11. The Court agreed with Plaintiffs that their expert report – that showed several systemic deficiencies exposed inmates to a substantial risk of harm – was enough to satisfy the commonality requirement. *Id.* at *14. The Court reasoned that Plaintiffs satisfied the typicality requirement even though Plaintiffs alleged a wide variety of serious medical and dental issues, as Rule 23 only requires that the claims be typical and not identical. *Id.* at *23. The Court ruled that certification was proper under Rule 23(b)(2) because if Plaintiffs prevailed, injunctive relief would benefit all members of the class. *Id.* at *27. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Mays, et al. v. Synder,* 2017 U.S. Dist. LEXIS 14274 (E.D. Mich. Feb. 2, 2017).** Plaintiffs, a group of citizens of Flint, Michigan, brought a class action against the Governor of Michigan, the State of Michigan, the City of Flint, and various others, alleging that Defendants caused a public health crisis by exposing Plaintiffs to contaminated drinking water. Plaintiffs asserted claims based on substantive due process relative to a state created danger; substantive due process due to violation of their bodily integrity; equal protection based upon race; and equal protection based upon wealth pursuant to 42 U.S.C. § 1983; conspiracy pursuant to 42 U.S.C. § 1985; and violation of the public service provisions of the Elliott-Larsen Civil Rights Act. *Id.* at *5. Defendants filed motions to dismiss each of Plaintiffs' claims, and the Court granted the motions. The Court noted that in another case involving Flint water contamination, the Court concluded that Plaintiffs' constitutional claims brought pursuant to § 1983 were precluded by the Safe Drinking Water Act ("SDWA"). *Id.* at *6. Defendants argued that Plaintiffs' § 1983 claims were not viable, and therefore Plaintiffs lacked a federal cause of action. Plaintiffs argued that their § 1983 claims were not precluded. The Court opined that the SDWA "establishes an elaborate enforcement scheme" with respect to safe drinking water. *Id.* at *9. The Court opined that allowing parallel § 1983 claims to proceed would "circumvent" the SDWA's procedures and would be "inconsistent with Congress' carefully tailored scheme." *Id.* at *10. The Court stated that the elaborate enforcement scheme of the SDWA led it to conclude that § 1983 claims seeking to remedy unsafe drinking water would be illogical. *Id.* The Court held that without viable constitutional claims, Plaintiffs' conspiracy claim under § 1985 based upon the same conduct also must fail. The Court therefore dismissed Plaintiffs' §§ 1983 and 1985 claims. The Court declined to exercise supplemental jurisdiction over Plaintiffs' remaining state law claim. The Court reasoned that if the federal claims are dismissed before trial, the state claims should be dismissed as well. *Id.* Accordingly, the Court granted Defendants' motions to dismiss and it dismissed Plaintiffs' complaint with prejudice.

***Valenzuela, et al. v. Ducey, 2*017 U.S. Dist. LEXIS 10993 (D. Ariz. Jan. 26, 2017).** Plaintiffs, a group of deferred action recipients seeking driver's licenses, brought a class action against the Governor of Arizona alleging that Arizona's policy of denying driver's licenses to certain deferred action recipients violated the

supremacy and equal protection clauses of the U.S. Constitution *Id.* at *1-2. The District Court and the Ninth Circuit previously held that this policy violated the Constitution with respect to individuals who receive deferred action through the Deferred Action for Childhood Arrivals ("DACA") program. Accordingly, Plaintiffs requested that the District Court to consider the constitutionality of Executive Order 2012-06 and Arizona Department of Transportation's ("ADOT") Motor Vehicle Division ("MVD") Policy 16.1.4 with respect to individuals who received deferred action outside the DACA program and individuals with deferred enforced departure. Plaintiffs filed motions for a preliminary injunction and class certification, and Defendants filed a motion to dismiss or, in the alternative, for judgment on the pleadings *Id.* at *2. The District Court denied the motion for class certification and directed the parties to conduct discovery before filing renewed briefs on the matter. The District Court also denied Defendants' motion to dismiss and Plaintiffs' motion for a preliminary injunction. *Id.* Defendants contended that Plaintiffs lacked standing and the District Court therefore lacked jurisdiction over their claims. Defendants argued that Plaintiffs were eligible for Arizona driver's licenses under existing policies and currently had the ability to obtain them. *Id.* at *8. Defendant asserted that without an identifiable injury, there was no live case or controversy as required by Article III of the Constitution. Plaintiffs alleged that Defendants had a policy of denying driver's licenses to deferred action recipients who presented Employment Authorization Documents (“EADs”) coded (c)(14) or (a)(11). *Id.* at *9. Plaintiffs further alleged that Defendants denied licenses to four of the named Plaintiffs. The District Court found that it was undisputed that other non-citizens, including individuals with EADs coded differently, may obtain licenses simply by presenting their EADs. The District Court thus determined that Plaintiffs were treated differently from other non-citizens who hold EADs. *Id.* The District Court held that denial of equal treatment – recognizing the authorized presence of some non-citizens based on their EADs, but not of others – was an injury sufficient to establish Article III standing. *Id.* at *10. Defendants also argued that the claims were barred by sovereign immunity because they did not issue Executive Order 2012-06 and that the failure to rescind the order was not sufficient to establish a connection between Defendants and ADOT's policy. The Court opined that this stage, the record was insufficient to find that Governor Ducey and Executive Order 2012-06 did not have a direct connection to the challenged ADOT policy. *Id.* at *18-19. The Court thereby denied the motion to dismiss with regard to this issue. The Court further found that the current record was insufficient to make a fair determination of whether a preliminary injunction was warranted. *Id.* at *19. Because Plaintiffs sought a preliminary injunction granting class-wide relief, the Court denied Plaintiffs' motion for a preliminary injunction and direct the parties to conduct discovery before filing renewed motions for class certification and a preliminary injunction.

(xii) Class Actions Involving Unions

***Beckhart, et al. v. Jefferson County Public Schools Board Of Education*, 2017 U.S. Dist. LEXIS 150704 (W.D. Ky. Sept. 18, 2017).** Plaintiffs, the Jefferson County Board of Education and the Jefferson County Association of Educational Support Personnel American Federation of State, County and Municipal Employees on behalf of Local 4011, entered into a collective bargaining agreement ("CBA"), under which Defendants, the American Federal of State, County and Municipal Employees, AFL-CIO ("AFSCME"), AFSCME Indiana-Kentucky Organizing Committee 962 ("Council 962"), and the Jefferson County Association of Educational Support Personnel, AFSCME, Local 4011 ("Local 4011") could collect a "fair share fee" from non-members employed in the Jefferson County Public Schools ("JCPS"). *Id.* at *3. Plaintiffs asserted that the CBA and its enforcement were violations of their rights to free speech and association protected by the First and Fourteenth Amendments. *Id.* Plaintiffs filed a motion for class certification, which the Court granted. Plaintiffs’ proposed class consisted of all union non-member employees who, at any time since September 23, 2014, are or were employed in the Job Family 1A job classification and salary schedule for Jefferson County Public Schools and are, were, or will be required to pay a compulsory fee to Defendants Local 4011, Council 962, and/or AFSCME pursuant to a compulsory unionism agreement between the Unions and the Board. *Id.* at *3-4. Plaintiffs estimated the proposed class included approximately 900 non-members, and therefore the Court found that Plaintiffs met the numerosity requirement. *Id.* at *6. The Court held that the commonality requirement was met because each potential class member was employed by the JCPS, had and/or will continue to have union fees deducted from his or her wages, and that Defendants failed to comply with the constitutional requirements relating to the withholding of funds. *Id.* at *11. The Court also determined that typicality existed because all of the claims of the proposed class members were virtually the same and derived from the same fee deducted from each class member's paycheck during the relevant time period and involved the same notice provided by Defendants. *Id.* at *12. The Court found Plaintiffs to be adequate class representatives because Plaintiffs' views

were not antagonistic to the proposed class. *Id.* at *28. Based on the claims asserted by Plaintiffs and the facts outlined in the complaint, the Court concluded that Plaintiffs satisfied the requirements for class certification pursuant to Rule 23(a). The Court stated that the present dispute clearly fell under Rule 23(b)(2) because while Plaintiffs did seek recovery of the fees paid under allegedly deficient notices, the main thrust of this action was a determination of whether the notices provided by the JCPS complied with applicable notice requirements. *Id.* at *30. The Court further noted that case law precedents supported certification of the proposed classes pursuant to Rule 23(b)(2). *Id.* at *31. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Demetris, et al. v. Transport Workers Union Of America*, 2017 U.S. App. LEXIS 8876 (9th Cir. May 22, 2017).** Plaintiffs in two consolidated class actions alleged that Defendant breached the duty of fair representation in its decision to distribute the proceeds of a bankruptcy settlement to all of its members unevenly in violation of the Railway Labor Act. American Airlines, Inc., and American Eagle Airlines, Inc. ("American") filed for Chapter 11 bankruptcy in November of 2011. As part of its reorganization process, American sought to reject and to renegotiate its collective bargaining agreements. Defendant represented mechanics, fleet service workers, and other laborers at American. After a series of negotiations, Defendant agreed to new collective bargaining agreements that drastically cut pension and medical benefits for its members, but American agreed to raises in base pay for members as well as to a 401(k) program incorporating employer contributions. *Id.* at *3. American also provided Defendant an additional 1.7% of the equity given to unsecured creditors, bringing Defendant's total stake to 4.8%. In order to prevent mandatory lay-offs, Defendant and American also negotiated an "early separation" program whereby more senior members could choose voluntarily to leave American in exchange for lump-sum cash payments. *Id.* at *5. Depending on seniority and contractual protections, members who chose to participate in early separation could leave with between $5,000 and $22,500 in addition to regular severance pay, unused vacation pay, and an additional two-weeks' compensation. *Id.* at *6. Plaintiffs, a group of workers who chose early separation, alleged that Defendant breached its duty of fair representation by excluding them from the bulk of the equity distribution. Plaintiffs alleged that they opted for early separation, and therefore did not receive a share of the equity. The District Court had previously dismissed the two actions, finding the allegations implausible. Plaintiffs appealed, arguing that the District Court erred in dismissing their duty of fair representation claims because Defendant's equity distribution scheme was: (i) arbitrary; (ii) discriminatory; and (iii) made in bad faith. *Id.* at *7. The Ninth Circuit upheld the District Court's decision. Plaintiffs contended that Defendant made a wholly irrational decision because the contractual concessions exchanged for the equity affected their rights just as much, if not more, than members who chose to continue working at American. The Ninth Circuit stated that Defendant approved of the final distribution plan through successive votes in both the committee charged with creating the distribution methodology and the union's governing council. The Ninth Circuit noted that this accorded with the District Court's finding, based on the pleadings, that Defendant gave careful consideration to its distribution plan, and therefore it could not deem Defendant's conduct wholly irrational. Plaintiffs further argued that Defendant discriminated against them because of their lack of political power. The Ninth Circuit held that the pleadings lacked facts from which it could plausibly infer that Defendant discriminated against them on the basis of raw political power. *Id.* at *12. Plaintiffs' bad faith allegations included claims: (i) that Defendant intentionally delayed disclosing the equity distribution plan until after the deadline for choosing early separation; and (ii) that Defendant manipulated internal decision-making procedures to ensure that equity went only to active members. *Id.* at *14. Regarding Plaintiffs' allegation of bad faith, the Ninth Circuit found the claims implausible, as Plaintiffs had not alleged that Defendant had already formed its plan for the equity before the deadline for choosing early separation. *Id.* at *15. The Ninth Circuit noted that after assuring membership that the equity would be distributed to them in due course, Defendant explicitly told those contemplating early separation that "the equity piece is very much undetermined at this point" and that it could not say, one way or another, what role the equity should play in retirement planning. *Id.* at *16. As a result, the Ninth Circuit found that the District Court did not err when it dismissed Plaintiffs' allegations that Defendant violated its duty of fair representation through conduct that was arbitrary, discriminatory, or done in bad faith. Accordingly, the Ninth Circuit affirmed the District Court's decision dismissing Plaintiffs' claims.

***Donohue, et al. v. Madison*, 2017 U.S. Dist. LEXIS 57319 (N.D.N.Y. April 14, 2017).** Plaintiffs, a group of union-tollway workers, filed a putative class action against Defendants New York State Thruway Authority and New York State Canal Corp. alleging that a reduction-in-force ("RIF"), which resulted in the termination of 198

union-represented employees, violated their constitutional rights. *Id.* at *6. First, Plaintiffs claimed that Defendants targeted Plaintiffs for inclusion in the RIF because of their union affiliation in violation of the First and Fourteenth Amendments. Second, Plaintiffs claimed that Defendants retaliated against Plaintiffs for engaging in union activities in violation of the First Amendment. The parties filed cross-motions for summary judgment. With respect to Plaintiffs' targeting claim, the Court denied summary judgment. The Court noted that, because conditioning public employment on union membership inhibits protected association, heightened scrutiny requirements apply to employment decisions based on union membership. *Id.* at *18. The Court, therefore, held that it must determine whether Defendants narrowly tailored the RIF to advance the compelling governmental interest of reducing the long-term costs of state government. *Id.* The Court found genuine disputes of material fact regarding several issues that precluded summary judgment, including whether the state fiscal crises required the lay-offs and whether neutral lay-offs would have achieved similar savings. *Id.* at *22. With respect to Plaintiffs' retaliation claim, the Court granted summary judgment in favor of Defendants. The Court noted that Plaintiffs had not alleged that they expressed any views protected by the First Amendment, but rather that Defendants retaliated against them because they refused Defendants' proposed concessions. *Id.* at *24. Finally, the Court referred Plaintiffs' motion for class certification to the Magistrate Judge for proposed findings of fact and recommendations for disposition.

***Riffey, et al. v. Rauner,* 2017 U.S. App. LEXIS 19868 (7th Cir. Oct. 11, 2017).** Plaintiffs, a group of health care assistants, alleged that Defendant owed them a refund of the fair-share fees they paid to a union for collective bargaining representation. Plaintiffs filed a motion for class certification, which the District Court denied. On appeal, the Seventh Circuit affirmed the District Court's ruling. Illinois, through its Department of Human Services Home Services Program, pays personal home health care assistants to deliver care to elderly and disabled persons in the state. *Id.* at *2. Under Illinois law, the assistants were considered public employees for purposes of collective bargaining, and the state was authorized to engage in collective bargaining with an exclusive representative of home care and health workers. Since 2003, SEIU Healthcare Illinois & Indiana (the "Union") had been the exclusive representative required to represent all public employees, whether or not they were members of the Union. *Id.* at *3. Under the terms of its collective bargaining agreement with the state, the Union was entitled to collect limited fees from workers who chose not to join the Union in order to help cover the cost of certain activities. Principally, the fees were for the collective bargaining representation the Union furnished to everyone. These fees were known as "fair-share fees," and were automatically deducted from the pay of assistants who were not Union members. *Id.* Plaintiffs objected to the fair-share arrangement and contended that the involuntary deduction and collection of the fair-share fees violated their First Amendment rights and entitled them to relief pursuant to 42 U.S.C. § 1983. Plaintiffs sought certification of a class of all non-union member assistants from whom fair-share fees were collected from April 2008 until June 30, 2014, when the state stopped the fair-share deductions. The District Court determined that class certification was inappropriate because the class definition was overly broad in light of evidence that a substantial number of class members did not object to the fees and could not have suffered an injury, the named Plaintiffs were not adequate representatives, individual questions regarding damages predominated over common ones, the class faced serious manageability issues, and a class action was not a superior method of resolving the issue. *Id.* at *4-5. Subsequently, the parties stipulated to a judgment permanently enjoining the future collection of fair-share fees and awarding money damages to the named Plaintiffs. The District Court entered final judgment, and Plaintiffs appealed. The Seventh Circuit stated that, although the named Plaintiffs objected to the collection of the fair-share fees and to collective bargaining representation, it had no way of knowing whether or how many of the remaining class members shared that opposition. *Id.* at *13. The Seventh Circuit also found that the District Court did not abuse its discretion in finding that there were serious intra-class conflicts of interest in Plaintiffs' proposed class and that the proposed representatives could not fairly and adequately protect all prospective members. The Seventh Circuit noted that the District Court requested Plaintiffs to suggest a more tailored class, but they did not do so. *Id.* at *15. Accordingly, the Seventh Circuit held that the proposed class representatives failed the adequacy requirement of Rule 23(a)(4). The Seventh Circuit also agreed with the District Court that the question of whether and what amount of damages were owed for many, if not most, of the proposed class members could be resolved only after a highly individualized inquiry. *Id.* at *17-18. The Seventh Circuit determined that it would require examination of not only each person's support (or lack thereof) for the Union, but also to what extent the non-supporters were actually injured. The Seventh Circuit ruled that this meant not only that individual questions predominated at this stage of the litigation, but also that it would be difficult to

manage the litigation as a class. The Seventh Circuit also found that Plaintiffs offered no plan to make class-wide determinations about support for the collective bargaining representation. *Id.* at *18. The Seventh Circuit therefore affirmed the District Court's ruling and concluded that the District Court was well within the bounds of its discretion to deny Plaintiffs' motion for class certification.

Valdez, et al. v. Airline Pilots Association, **2017 U.S. Dist. LEXIS 9263 (W.D. Tenn. Jan. 9, 2017).** Plaintiffs, a group of Federal Express pilots, brought a putative class action against Defendant, the Airline Pilots Association ("APA"), the official bargaining representative for Plaintiffs. Plaintiffs alleged that Defendant breached its duty of fair representation by making misrepresentations to Plaintiffs relating to the collective bargaining agreement ("CBA") when ratifying the agreement between Federal Express and the APA. Plaintiffs moved to certify their class claims and Defendant opposed the motion on the basis that Plaintiffs did not meet the Rule 23(a) requirements of commonality, typicality, and adequacy. Defendant also objected to class certification on the grounds that Plaintiffs did not meet the Rule 23(b)(3) requirements of predominance and superiority. The Court denied class certification and ruled that the named Plaintiffs did not satisfy the adequacy requirement, as well as the predominance and superiority requirements. The Court determined that the named Plaintiffs did not adequately represent the class because of the four named Plaintiffs, three voted to reject the CBA and one voted to ratify the agreement. *Id.* at *18. The proposed class consisted of 2,098 pilots who voted to ratify and 1,559 pilots who voted to reject the CBA. The Court determined that the pilots who voted to ratify may be content with some of the terms and have a conflict with those who voted against the CBA. *Id.* at *20. The Court reasoned that the named Plaintiffs did not adequately represent the class because they appeared to have potential conflicts of interest with other class members as the class members all had varying economic interests in the CBA. The Court also ruled that the proposed class did not satisfy the predominance requirement because an issue central to the case was whether each class member relied upon the misrepresentations, and if so, what damages were caused by such reliance. *Id.* at *24. The Court noted that questions that related to each individual member of the class would predominate over common questions and that the time saved by a class action would be relatively insignificant. The Court also determined that the superiority requirement was not satisfied because the class members' votes were secret and the Court would have to conduct numerous individual inquiries, thereby making management of the class difficult. *Id.* at *31-32. In its ruling that the superiority requirement was not met, the Court also considered the fact that the complaint contemplated damages of $25,000 per pilot, which it deemed was not an insignificant amount that would necessitate certification of a class (because class members would have their own economic incentive to bring their own lawsuits). Accordingly, the Court denied Plaintiffs' motion for class certification.

(xiii) Class Definition Issues

***Dewhurst, et al. v. Century Aluminum Co.*, 2017 U.S. Dist. LEXIS 77877 (S.D. W.Va. May 23, 2017).** Plaintiffs, a group of retirees, filed a class action alleging the Defendant's decision to unilaterally modify or cancel medical benefits that it provided to retirees, spouses, surviving spouses, and dependents of retirees contravened the applicable collective bargaining agreements ("CBA") in violation of the Labor-Management Relations Act ("LMRA") and the Employment Retirement Income Security Act ("ERISA"). The Court had previously certified a class consisting of approximately 437 individuals. The same day the Court certified the class, it also denied Plaintiffs' motion for a preliminary injunction, finding that Plaintiffs were not likely to succeed on the merits of their claims. Plaintiffs appealed, and the order was affirmed. The Court subsequently granted Defendant's motion for summary judgment, finding that the language in the applicable CBAs provided that the retirees' healthcare benefits only remained in effect for the terms of those agreements, and that those benefits did not vest beyond the terms of the agreements. *Id.* at *4. After Plaintiffs appealed the Court's summary judgment order, the parties settled the matter. The parties then filed a joint motion for modification of the class definition for settlement purposes *Id.* at *5. The parties sought to amend the class certification order by changing the definition of the class and additionally to change the class to a Rule 23(b)(1)(A) and/or Rule 23(b)(2) non-opt out class. *Id.* at *7-8. The parties asserted that the class certification order should be amended despite the entry of the judgment order because the limited remand order remanded the case for settlement approval proceedings pursuant to Rule 23, which included modification of the class certification order. *Id.* at *8-9. The Court found that there were a number of unusual circumstances present in this case that warrant amendment of the class certification order after the entry of the judgment order. For example, the Court stated that the parties agreed to settle Plaintiffs' claims after more than seven years of litigation, despite the Court's grant of summary judgment

in Defendants' favor. *Id.* at *11. Accordingly, the Court opined that what appeared to be the all but certain outcome of this case, together with the parties' cooperation in reaching a $23 million settlement after more than seven years of litigation, constituted highly unusual circumstances that warranted the modification of the class definition. *Id.* at *12-13. The Court therefore found that the modification of the class definition from the one contained in the class certification order was appropriate in order to facilitate the settlement between the parties and include additional persons affected by Defendants' decision to modify the health benefits of its retirees. The Court additionally held that the requirements of Rule 23(a) continued to be satisfied by the new definition. *Id.* at *13. The Court thereby amended the class definition and directed that the class be certified as a Rule 23(b)(1)(A) and (b)(2) non-opt out class. *Id.* at *14-15.

***National Veterans Legal Services Program, et al. v. United States,* 235 F. Supp. 3d 32 (D.D.C. 2017).** Plaintiffs, a group of organizations and individuals who paid fees to obtain records through the Public Access to Court Electronic Records system ("PACER"), alleged that PACER's fee schedule was higher than necessary to cover the costs of operating PACER and therefore violated the E-Government Act of 2002. PACER is an on-line electronic records system provided by the Federal Judiciary that allows public access to case and docket information from federal courts. Plaintiffs regularly paid fees to use PACER, and did not ask for exemptions from PACER fees, because they could not represent to a Court that they were unable to pay the fees. Plaintiffs moved to certify a class of all individuals and entities who paid fees for the use of PACER within the past six years, excluding class counsel and agencies of the federal government. *Id.* at 35. The proposed class representatives were three non-profit legal advocacy organizations, including the National Veterans Legal Services Program, the National Consumer Law Center, and the Alliance for Justice. The Court granted Plaintiffs' motion and certified the class under Rule 23(b)(3). Defendant argued that: (i) Plaintiffs failed to demonstrate that they satisfied the numerosity requirement, because they did not establish the number of users who raised their concerns with the PACER Service Center or the number of potential Plaintiffs who were non-profit organizations; (ii) the class representatives failed the typicality and adequacy requirements, because their non-profit status made them eligible to request fee exemptions, which not all class members could do; and (iii) individual questions predominated. *Id.* at 37. The Court determined that it was necessary to make two minor modifications to the proposed class definition before analyzing the requirements of Rule 23. The class definition that Plaintiffs produced had defined the class in terms of those "who have paid fees for the use of PACER within the past six years." *Id.* at 38-39. The Court found that the language was unclear when it is no longer associated with the dated complaint. Thus, the Court substituted the actual dates for the six-year period ending on the date of the complaint. Second, rather than stating that the definition excluded "class counsel," the Court stated that it excluded "class counsel in this case." *Id.* at 39. Therefore, Plaintiffs' modified class definition would be "all individuals and entities who have paid fees for the use of PACER between April 21, 2010, and April 21, 2016, excluding class counsel in this case and federal government entities." *Id.* The Court opined that Plaintiffs satisfied the typicality requirement because hundreds of thousands of Plaintiffs paid the alleged excessive fees. *Id.* at 40. Although the parties did not present precise data about the size of the class, the Court held that there was no question that the class satisfied the numerosity requirement. *Id.* The Court further determined that Plaintiffs met the adequacy requirement because Plaintiffs and all class members were challenging the PACER fee schedule on the theory that it violated the E-Government Act by generating revenue that exceeded the costs of providing PACER. *Id.* at 42. The Court also concluded that Plaintiffs met the predominance requirement because if Plaintiffs prevailed on their common legal theory that the Judiciary was required to set a lower rate that corresponded to PACER's funding needs, Defendant would be liable to any class member who paid the illegal higher rate. *Id.* at 44. Finally, the Court found that allowing this action to proceed as a class action was superior to requiring individual actions, both for reasons of efficiency and to enable individuals to pursue small claims. *Id.* Accordingly, the Court granted Plaintiffs' motion for class certification under Rule 23(b).

(xiv) Class-Wide Proof And Class-Wide Damages In Class Actions

***Golan, et al. v. Veritas Entertainment, LLC*, 2017 U.S. Dist. LEXIS 144501 (E.D. Mo. Sept. 7, 2017).** Plaintiffs brought a putative class action alleging violations of the Telephone Consumer Protection Act ("TCPA"). Plaintiffs alleged that Defendants engaged in an advertising campaign for a movie that included telephone calls to approximately four million residential telephone numbers throughout the United States. *Id.* at *2. Plaintiffs asserted they received telephone calls with a pre-recorded voice to their residential telephone numbers, without their consent. Plaintiffs claimed that Defendants violated § 227(b)(1)(B) of the TCPA, which prohibits persons

from initiating calls to residential telephone lines using a pre-recorded voice to deliver a message without the called party's prior express consent. Following a jury trial, the Court granted Plaintiffs' motion for judgment as a matter of law against Defendants but did not determine damages. *Id.* The Court noted that the TCPA states that a Plaintiff may recover either the actual monetary loss from a violation or $500 in damages for each violation, whichever is greater. Evidence in the case proved there were 3,242,493 calls placed in violation of the TCPA. Applying $500 per violation would result in a damages award of $1,621,246,500. Defendants asked the Court to reduce the amount of damages to $324,249, or $0.10 per call, arguing that the excessive damages award would violate the Constitution. *Id.* In support, Defendants cited three TCPA cases where damages were reduced. Plaintiffs argued that there was no constitutional basis for a reduction of statutory damages, and even if there were, damages should not be reduced in this case. *Id.* at *3. The Court's review of the applicable case law indicated that the TCPA's statutory damages clause was constitutional, but that a specific damages award may be unconstitutional if it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at *9. The Court thereby applied this standard and considered whether the amount of damages prescribed by the statute was so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable. *Id.* The Court concluded that a damages award of $1.6 billion was obviously unreasonable and wholly disproportionate to the offense. *Id.* at *10. The Court therefore awarded Plaintiffs $32,424,930, or $10.00 per call. The Court determined that the awarded damages reflected the severity of the offense, a six-day telemarketing campaign that placed 3.2 million telephone calls, as well as respecting the purposes of the TCPA to have a deterrent effect and to account for unquantifiable losses including the invasions of privacy, unwanted interruptions and disruptions at home, and the wasted time spent answering unwanted solicitation calls or unwanted voice messages. *Id.* at *10-11. The Court further stated that the amount took into account the significant time and expense needed to notify the class and to distribute the damages to the class. *Id.* at *11. Accordingly, the Court granted Defendants' request for a reduction in damages.

***In Re Dial Complete Marketing And Sales Practices Litigation,* 2017 U.S. Dist. LEXIS 44383 (D.N.H. Mar. 27, 2017).** Plaintiffs, a group of consumers, filed a consolidated multi-district class action suit alleging that Defendant made misrepresentations regarding its soap when it claimed that it "kills 99.9% of germs." *Id.* at *4. Plaintiffs' asserted four causes of action, including: (i) violation of the consumer protection laws of each state; (ii) breach of express warranty; (iii) breach of implied warranty; and (iv) unjust enrichment. *Id.* at *6. The Court had originally denied Plaintiffs' motion for class certification pursuant to Rule 23(b)(3) because Plaintiffs did not satisfy the requirement that common questions of law and fact predominate, as they failed to provide sufficient detail as to whether damages could be adequately calculated on a class-wide basis. *Id.* at *6. The Court granted Plaintiffs leave to amend their complaint. The Court opined that to satisfy the predominance requirement, Plaintiffs must present a reliable damages calculation model that was consistent with their theory of liability. *Id.* Plaintiffs' theory of liability was that they were induced to rely upon false representations when making decisions to purchase the product and were deprived of a measurable monetary portion of the benefit-of-the bargain that they struck with Defendant. *Id.* at *21. Damages were measured by the difference between what each Plaintiff paid and the value of what they received. *Id.* Defendant asserted that the opinion of Plaintiffs' expert was unreliable and it moved to strike their expert's report. *Id.* at *15. The Court rejected this argument, finding the report admissible under Rule 702, as the expert was qualified and the testimony rested on a reliable foundation. *Id.* Defendant further argued that the proposed methodology was fundamentally flawed and incapable of measuring only damages attributable to Plaintiffs' theory of liability. *Id.* at *17. Defendant asserted that Plaintiffs' model did not measure any change in market price, but only changes in consumer demand. The Court disagreed and held that because Plaintiffs' means to calculate class-wide damages appeared reliable to establish the full extent of damages on a class-wide basis, the model satisfied the demands of Rule 23. *Id.* at *32. The Court noted that at the class certification stage, damages need not be calculated to a "mathematical certainty." *Id.* at *33. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Krauker, et al. v. Dish Network, LLC,* 2017 U.S. Dist. LEXIS 77163 (M.D.N.C. May 22, 2017).** Plaintiffs filed a class action seeking damages against Defendant alleging that its agent, Satellite Systems Network ("SSN"), made more than 50,000 telemarketing calls on behalf of Defendant in 2010 and 2011 to phone numbers on the National Do Not Call Registry ("Registry") in violation of the Telephone Consumer Protection Act ("TCPA"). *Id.* at *2. A jury found for Plaintiff on the issue of liability and awarded Plaintiffs statutory damages in the amount of $400 per call. *Id.* at *6. After the verdict, the Court found that Defendant willfully and knowingly violated the

TCPA and that treble damages were appropriate. *Id.* at *34. The Court noted that while a finding of willfulness does not require bad faith, it does require that the caller "have reason to know, or should have known" that the conduct would violate the statute. *Id.* at *26. The Court ruled that Defendant knew that SSN had a history of TCPA violations and still allowed SSN to make marketing calls to sell Defendant's services. The Court found it significant that in 2009, Defendant entered into a compliance agreement with 46 state attorneys general that it would enforce TCPA compliance, paid a $6,000,000 fine, and yet it still failed to monitor SSN's compliance with telemarketing laws. *Id.* at *19. At trial, Plaintiffs established that Defendant received numerous complaints about SSN and was aware of lawsuits against SSN and that SSN was not scrubbing its call lists against the Registry. *Id.* at *28. Further, SSN knew that it was using lists that had not been scrubbed to remove numbers on the Registry and it called Plaintiffs repeatedly, even though it knew they were on the Registry and had requested not to receive any more calls. *Id.* at *34. Defendant knew that SSN had a long history of violations of both the TCPA and Defendant's rules related to TCPA compliance. In its ruling, the Court opined that Defendant easily could have discovered the full extent of the violations with a minimal monitoring effort. Accordingly, the Court concluded that Defendant's conduct was willful and treble damages were appropriate because of the need to deter Defendant from future violations and the need to give appropriate weight to the scope of the violations. *Id.* at *34. The Court increased the damages from $400 per call to $1,200 per call.

Editor's Note: The judgment of $60 million upheld in *Krauker* is believed to be the largest TCPA judgment ever.

(xv) Collateral Estoppel, *Res judicata*, And Settlement Bar Concepts Under Rule 23

***Amalfitano, et al. v. Google, Inc.,* 2017 U.S. App. LEXIS 4293 (9th Cir. Mar. 10, 2017).** Plaintiff filed a class action against Defendant in the U.S. District Court for the Eastern District of New York alleging that Defendant violated the Stored Communications Act, 18 U.S.C. §§ 2701-2712. Defendant sought to transfer the action to the Northern District of California, which was granted. The District Court subsequently dismissed the case without leave to amend the purported class action on *res judicata* grounds. On appeal, the Ninth Circuit affirmed the District Court's decision. The District Court determined that Plaintiff's identical claims had been resolved fully by the settlement of a 2010 class action lawsuit entitled *In Re Google Buzz Privacy Litigation*, No. 10-CV-672 (N.D. Cal. Feb. 17, 2010) ("Buzz Class Action"). *Id.* at *2. Plaintiff was a member of the Buzz Class Action settlement class, and did not timely opt-out of the settlement. The District Court found that *res judicata* therefore applied, and Plaintiff was bound by the Buzz Class Action settlement, which constituted a final judgment on the merits. *Id.* The Ninth Circuit agreed and ruled that Plaintiff might have contested his inclusion in the settlement class by filing a motion before the District Court in the Buzz Class Action pursuant to Rule 60(b), but he did not demonstrate the "grave miscarriage of justice" that would permit him to file an independent action challenging the final judgment. *Id.* at *3.

***In Re Flonase Antitrust Litigation*, 2017 U.S. App. LEXIS 26385 (3d Cir. Dec. 22, 2017).** GlaxoSmithKline ("GSK") sought to enforce a settlement agreement and enjoin the State of Louisiana from bringing allegedly released claims against GSK in Louisiana state court. Purchasers of Flonase, a brand name prescription drug, filed a class action against GSK in the U.S. District Court for the Eastern District of Pennsylvania alleging that: (i) GSK filed a sham citizens' petition with the U.S. Food and Drug Administration to delay introduction of a generic version of Flonase; and (ii) this forced the purchases to pay more for Flonase than they would have if the generic version were available. *Id.* at *5. The District Court approved notice of the settlement to class members and even though the State of Louisiana was an indirect Flonase purchaser and qualified as a potential class member, it did not receive the approved notice. Instead, it received a Class Action Fairness Act ("CAFA") notice. The District Court approved the final settlement and an order which permanently enjoined all members of the settlement class, including Louisiana, from bringing released claims against GSK even in Louisiana state court. Subsequently, the State of Louisiana brought claims against GSK in Louisiana state court alleging violations of Louisiana's antitrust laws. In an ancillary class action suit, GSK filed a motion to enforce the settlement agreement against Louisiana Attorney General on the grounds that Louisiana violated the settlement agreement. GSK sought to enjoin Louisiana from pursuing its own claims on the basis that it was bound by the settlement with Flonase purchasers. The District Court denied GSK's motion and held that: (i) the Eleventh Amendment covered the enforcement action; and (ii) GSK failed to show that Louisiana had waived its sovereign immunity and consented to the District Court's jurisdiction, as the receipt of the CAFA notice was insufficient to establish that the State was aware that it was a class member and voluntarily chose to have its

claims resolved. Before the District Court ruled on its motion to enforce the settlement, GSK moved for relief from the judgment pursuant to Rule 60(b)(2) because of newly discovered evidence that a third-party had allegedly submitted a settlement claim on behalf of Louisiana. The District Court also denied this motion and GSK appealed the District Court's rulings on both motions. On Defendant's consolidated appeal, the Third Circuit affirmed the orders of the District Court. The Third Circuit rejected GSK's argument that the District Court had authority to require Louisiana's Attorney General to abide by the settlement agreement, which included a release of future claims over its activity. The Third Circuit opined that such a holding would violate the State's sovereign immunity under the Eleventh Amendment. The Third Circuit held that the: (i) Eleventh Amendment applied to the settlement agreement and enforcement action; (ii) GSK could not avoid the Eleventh Amendment's prohibition by asserting that the State of Louisiana waived its sovereign immunity; and (iii) the District Court did not abuse its discretion when it denied Defendant's Rule 60(b) motion. Accordingly, the Third Circuit affirmed the District Court's orders.

***Morgan, et al. v. Yellowjacket Oilfield Services, LLC,* 2017 U.S. Dist. LEXIS 89359 (S.D. Tex. June 12, 2017).** Plaintiff alleged that Defendant failed to pay overtimes wages in violation of the FLSA. Defendant filed a motion for summary judgment asserting that Plaintiff previously settled and released his FLSA claim in connection with another case against it that was a collective action. *Id.* at *2. Plaintiff claimed he worked 40 to 60 hours of unpaid overtime as a mixing plant operator. Another co-worker Jonathan Juarez had filed a FLSA lawsuit against Defendant as a collective action. While *Juarez* was pending, Plaintiff filed this case in his individual capacity only. The parties in *Juarez* filed a motion for a stipulated judgment based upon a settlement agreement, which the Court approved. Pursuant to the *Juarez* agreement, a settlement class was formed that included Plaintiff within its scope. *Id.* Defendant alleged that Plaintiff submitted a settlement claim form, which Plaintiff denied. Defendant informed Plaintiff's counsel that it had received a *Juarez* claim form purportedly signed by him and it was taking the position that Plaintiff had agreed to settle his claim. *Id.* at *3-4. Plaintiff's counsel requested that all further communication to Plaintiff be done through counsel, and Defendant indicated that it would direct further communications to Plaintiff's counsel. However, Defendant then sent a settlement check in the amount of $1,058.10 directly to Plaintiff, bypassing his counsel. The back of the check stated that, by accepting payment, the recipient accepted the settlement terms and agreed to waive and release all claims against Defendant. *Id.* at *5. It was undisputed that Plaintiff endorsed the check and cashed it. *Id.* at *6. Plaintiff's counsel learned that Defendant had sent Plaintiff a *Juarez* settlement check in a manner contrary to his instructions regarding this pending litigation. *Id.* Plaintiff asserted that he cashed the settlement check under the mistaken impression that it was coming from his own attorney, it was his because it bore his name, and that he did not know that he was giving up any claims he had asserted in his lawsuit. The Court found that because Plaintiff's alleged participation in the *Juarez* collective action case came after the filing of his own individual case, the individual case governed based on the first-filed rule and the rule against claim-splitting. *Id.* at *7. The Court explained that under the first-to-file rule, Plaintiff's individual action required a discretionary determination by the Court whether Plaintiff's claim in the *Juarez* case could proceed and govern his claim. *Id.* at *8. The Court noted that in a claim-splitting scenario, the second suit would be barred if it involved the same parties and same transaction or series of transactions. *Id.* at *9-10. The Court further stated that both rules as to the first-to-file doctrine and claim-splitting recognized that jurisdiction attached in the first case. Plaintiff therefore invoked his due process rights, including the right to be represented by counsel of his choice. *Id.* at *10. By including Plaintiff in the *Juarez* settlement class, the Court held that Defendant defied the Court's jurisdiction and ignored Plaintiff's selection of counsel. In effect, the Court determined that Defendant replaced Plaintiff's selected counsel in his own case with class counsel in *Juarez* for purposes of claiming that the settlement complied with the FLSA's requirement that settlements be supervised. The Court held that conduct that interfered with the Court's jurisdiction and the parties' due process rights in the case cannot be permitted, and thereby denied Defendant's motion for summary judgment.

***Ross, et al. v. Lockheed Martin,* 2017 U.S. Dist. LEXIS 118373 (D.D.C. July 28, 2017).** Plaintiffs alleged that Defendant engaged in a pattern or practice of employment discrimination that was manifest in its performance appraisal system. After the parties negotiated a settlement that included a $22.8 million settlement fund and changes to Defendant's performance appraisal process, Plaintiffs moved for preliminary certification of the proposed class and preliminary approval of the settlement agreement. The Court denied the motions, holding that Plaintiffs failed to establish the commonality prerequisite for Rule 23 class certification and that the

proposed settlement agreement terms were improperly broad. Plaintiffs asserted that Defendant engaged in race discrimination against its African-American employees through the operation of the performance appraisal system that the company used to evaluate its employees. *Id.* at *8. Plaintiffs alleged that over the course of a three-year period between January 2013 and February 2016, Defendant's performance appraisal system produced a disparate impact in performance ratings, and consequently in the promotions, compensation, and retention of salaried African-American employees below the level of Vice President. Plaintiffs, who alleged that they were injured by the performance appraisal system, sought to certify a class of nearly all current and former African-American employees below the rank of Vice President who were evaluated pursuant to the performance appraisal system during the relevant three-year period. The putative class contained over 5,500 members who worked in over 40 states. *Id.* at *8, *9, *17. On the same day as they filed their complaint, Plaintiffs moved for both preliminary certification of the proposed class for settlement purposes under Rule 23(a) and (b), and preliminary approval of the settlement agreement under Rule 23(e). The Court denied Plaintiffs' motion for preliminary certification of the proposed class for settlement purposes and preliminary approval of the settlement agreement. Regarding Plaintiffs' motion for preliminary certification of the proposed class for settlement purposes, Plaintiffs argued that their proposed class satisfied the commonality requirement set forth in Rule 23(a)(2) because each member of the class was subject to the same performance evaluation system. The Court rejected this argument, noting that "[u]nfortunately for Plaintiffs, the Supreme Court's landmark decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), spoke directly to what is required in order to satisfy the commonality criterion in the context of an employment discrimination class action, and its reasoning makes abundantly clear that the commonality criterion is not satisfied under the circumstances presented in this case." *Id.* at *32. Applying *Wal-Mart*, the Court held that Plaintiffs failed to identify a "testing procedure or other company-wide evaluation procedure that can be charged with bias." *Id.* at *37-38. The Court opined that Plaintiffs' contention that the company-wide evaluation procedures often resulted in ratings that were poorly correlated with job performance, however plausible, did not supply an account of how those procedures themselves resulted in the racially disparate outcomes that Plaintiffs observed in Lockheed's overall workforce. Drawing a comparison to *Wal-Mart*, the Court further found that Plaintiffs did not provide "significant proof" that Defendant "operated under a general policy of discrimination." *Id.* at *39. Accordingly, "[w]ith neither an account of how the common features of the performance appraisal system led to racially disparate outcomes (other than by enabling discretionary decisions by individual supervisors), nor statistical evidence of a kind and degree sufficient to show that the practice in question has caused race discrimination, Plaintiffs cannot assure [the] Court that class members will actually share a common answer to the crucial question why was I disfavored." *Id.* at *43. As such, the Court held that the putative class did not meet the commonality requirement of Rule 23(a). Turning to the proposed settlement agreement, the Court held that the terms of the agreement were sufficiently problematic such that the agreement could not be approved. First, the Court held that there was a gross imbalance between the claims that were actually at issue in this case and the claims that the class members who might participate in the settlement would be required to release, including *all* race discrimination claims. *Id.* at *46. The Court also expressed various concerns regarding the opt-out procedure and the amount of information absent class members would receive. Accordingly, the Court held that Plaintiffs failed to demonstrate that the proposed Settlement Agreement was sufficiently "fair, reasonable, and adequate" to satisfy the standard for preliminary approval. *Id.* at *51.

***Sansoe, et al. v. Ford Motor Co.,* 2017 U.S. Dist. LEXIS 148617 (N.D. Cal. Sept. 13, 2017).** Plaintiffs, purchasers of Defendant's trucks, brought an action asserting that Defendant violated the Song-Beverly Consumer Warranty Act ("Song-Beverly Act") and the California Consumers Legal Remedies Act ("CLRA") and the California Unfair Competition Law ("UCL"). Plaintiffs asserted that they had numerous problems with their trucks. Defendant ultimately offered a vehicle refund or a replacement vehicle, subject to conditions including that Plaintiffs would be responsible for any missing equipment, abnormal wear, or collision damage. *Id.* at *2. Plaintiff accepted Defendant's offer, and relinquished the trucks to Defendant in exchange for payment. Plaintiffs then filed this action alleging that Defendant deducted charges for repairs for abnormal wear and tear from the refunded amount, because the Song-Beverly Act allows for a statutory mileage deduction but not for a deduction for abnormal wear. *Id.* at *3. Plaintiffs asserted that the same actions constituted unfair and unlawful acts and practices under the CLRA and unfair competition under the UCL. The parties filed cross-motions for summary judgment. The Court found that Plaintiffs' CLRA claim failed because the challenged conduct occurred after the sale of the vehicles, and thus could not have constituted deceptive acts that were intended to or did result "in the

sale or lease of goods or services to a consumer." *Id.* at *4. The Court held that Plaintiffs' UCL claim failed because it sought restitution and injunctive relief, and Plaintiffs had an adequate remedy at law. However, there is no right to equitable relief or an equitable remedy where there is an adequate remedy at law. Plaintiffs had an adequate remedy at law under the Song-Beverly Act. *Id.* at *4-5. Finally, with regard to the Song-Beverly Act claim, the Court determined that it was undisputed that there were executed and performed settlement agreements. The Court noted that settlement agreements are presumptively valid. Plaintiffs wanted the Court to sever two portions of the fully executed agreements – the release, and the condition that Plaintiffs pay the cost of repairs for abnormal wear and tear – and declare those portions unconscionable and unenforceable. *Id.* at *7. However, the Court found that Plaintiffs cited no case law authority granting partial enforcement of a settlement agreement, and the cases Plaintiffs relied on in support of their argument regarding severance did not involve fully executed and performed settlement agreements, but rather arbitration provisions in employment contracts, which case law authorities have found easily severable on the basis that they were "collateral agreements." *Id.* The Court opined that neither the settlement agreements themselves nor the challenged provisions were unconscionable. *Id.* The Court noted that they were not procedurally unconscionable because Plaintiffs were represented by counsel during the negotiation of the settlements, and both had a meaningful choice as to whether to accept Defendant's settlement offer or refuse it and file a civil lawsuit to achieve the relief they were seeking. Further, the agreements were not substantively unconscionable because they were freely-negotiated and did not lead to "overly harsh" or "one-sided" results. *Id.* More importantly, the challenged provisions were not severable from the fully executed settlement agreements, and Plaintiffs cited no authority that would permit the Court to sever portions of a fully executed and performed contract. *Id.* at *8. Accordingly, the Court granted Defendant's motion for summary judgment and denied Plaintiffs' motion for summary judgment.

***Smallwood, et al. v. Yates,* 235 F. Supp. 3d 280 (D.D.C. 2017).** Plaintiffs brought a class action seeking declaratory and equitable relief under § 706 of the Administrative Procedure Act ("APA") based on a settlement agreement between a class of Native American farmers and the U.S. Department of Agriculture ("USDA"). *Id.* at 281. Defendant filed a motion to dismiss Plaintiff's claims and Plaintiff filed a motion for class certification. The Court granted Defendant's motion and denied Plaintiff's motion as moot. On November 24, 1999, a class of Native American ranchers and farmers filed a class action lawsuit entitled *Keepseagle v. Veneman,* Case No. 99-CV- 03119, against the USDA, alleging discrimination in the USDA's administration of the farm loan program. *Id.* at 282. The Court certified the case as a class action pursuant to Rule 23(b)(2). Plaintiff was a member of the *Keepseagle* class. In 2011, the parties in *Keepseagle* reached a class-wide settlement agreement, which the Court approved. The settlement agreement stated that class members could choose between two claim tracks to request a settlement award, including: (i) track A claimants were eligible to receive a maximum payment of $50,000; and (ii) track B claimants were eligible to receive a maximum payment of $250,000. Plaintiff received a settlement under the terms of the settlement agreement. The settlement agreement also contained a *cy pres* provision, which provided that a claims administrator would direct any leftover funds to the *cy pres* fund. In December 2015, class counsel filed a motion to modify the settlement agreement. Plaintiff subsequently filed this action alleging that the *cy pres* provisions in the original settlement agreement, which authorized payments to non-class members, violated the Appropriations Clause of the U.S. Constitution and 31 U.S.C. § 1304 (the "Judgment Fund statute"). Defendants argued that Plaintiff failed to establish an injury-in-fact because he had no legally protected interest in the undistributed *Keepseagle* settlement funds, because the settlement agreement explicitly limited Plaintiff's payment to the amount he received through the claims process. Therefore, Defendants asserted that because Plaintiff retained no legal interest in the settlement fund, the prospective use of that fund for *cy pres* payments did not cause him any legal injury. *Id.* at 285. Plaintiff argued that he established injury-in-fact because the Court must assume the merits of Plaintiff's legal arguments, *i.e.*, that the *cy pres* provisions were unconstitutional and unenforceable, and that assumption invoked the settlement agreement's severability clause. *Id.* at 286. The Court found that even if the *cy pres* provisions in *Keepseagle* were eliminated for purposes of the Court's standing analysis, the express terms of the settlement agreement still limited Plaintiff's property interest to the monetary caps set forth under the settlement terms. *Id.* at 287. Accordingly, the Court held that because Plaintiff extinguished his legal claim by participating in the claims process and received an award as set forth in the agreement, Plaintiff had no legal interest that faced imminent invasion. *Id.* at 288. Thus, the Court ruled that Plaintiff failed to demonstrate an injury-in-fact. The Court stated that without demonstrating standing, the Court lacked the requisite subject-matter jurisdiction to consider the merits of Plaintiff's claims. The Court concluded that it must dismiss with prejudice Plaintiff's complaint for lack of

subject-matter jurisdiction. Accordingly, the Court granted Defendant's motion to dismiss and denied Plaintiff's motion for class certification.

***T.P., et al. v. Walt Disney Parks & Resorts U.S., Inc.,* Case No. 15-CV-5346 (C.D. Cal. April 11, 2017).** Plaintiffs, a group of families who visited Defendant's theme parks, filed a class action alleging that Defendant violated the Americans With Disabilities Act ("ADA") and §§ 51 and 54 of the California Civil Code, and committed various common law claims. Plaintiffs asserted that Defendant's disability accommodation program failed to sufficiently accommodate minor Plaintiffs who suffered from cognitive disabilities. *Id.* at 2. The case initially contained claims of 27 Plaintiff families and was transferred to the District Court in Florida which *sua sponte* dismissed the non-statutory claims of 13 Plaintiffs and retained jurisdiction over their ADA and California Civil Code claims. Subsequent to the Florida Court's order, the 13 families re-filed their dismissed common law tort and contract claims in this matter and added the claims of 14 additional families. *Id.* Defendant filed a motion for summary judgment on the claims brought by the overlapping Plaintiffs, which the Court granted. The Florida Court had held that Defendant's disability program did not violate the ADA or the California Civil Code because it provided sufficient accommodations to Plaintiffs and those with similar cognitive disabilities. *Id.* The Court thereby determined that collateral estoppel applied to bar relitigation of the issue of whether Defendant's existing accommodations failed to accommodate Plaintiffs. The Court further determined that the preclusive effect of the Florida Court's decision applied equally to the minors' parents. Therefore, the Court held that consistent with the findings, because Plaintiffs' common law claims were predicated on their contention that Defendant violated the ADA and the Civil Code, there was no basis for Plaintiffs to succeed on those claims. *Id.* at 3. The Court explained that all the requirement to foreclose relitigation of an issue under collateral estoppel were met, including that: (i) the issue at stake must be identical to the one alleged in the prior litigation; (ii) the issue must have been actually litigated in the prior litigation; and (iii) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment of the earlier action. *Id.* Accordingly, the Court granted Defendant's motion for judgement on the pleadings.

(xvi) Commercial Free Speech Issues In Class Actions

***Expressions Hair Design, et al. v. Schneiderman,* 137 S. Ct. 1144 (2017).** Plaintiffs, five New York businesses and their owners who wish to impose surcharges for credit card use, filed a class action against state officials, asserting that § 518 of the New York General Business Law violated the First Amendment by regulating how they communicate their prices, and that it was unconstitutionally vague. *Id.* at 1145. Section 518 provides that "no seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." *Id.* The District Court ruled in favor of Plaintiffs and on appeal, the Second Circuit vacated the judgment with instructions to dismiss. The Second Circuit concluded that in the context of single-sticker pricing – where merchants post one price and would like to charge more to customers who pay by credit card – the law required that the sticker price be the same as the price charged to credit card users, and therefore the law regulated a relationship between two prices. *Id.* Relying on U.S. Supreme Court precedent holding that price regulation alone regulates conduct, and not speech, the Second Circuit concluded that § 518 did not violate the First Amendment. *Id.* On writ of *certiorari*, the Supreme Court accepted the case for review. The Supreme Court unanimously decided the preliminary issue that § 518 regulates speech rather than conduct and remanded the constitutionality determination back to the Second Circuit. The Supreme Court found that § 518 regulates the relationship between "(i) the seller's sticker price; and (ii) the price the seller charges to credit card customers," requiring that these two amounts be equal. *Id.* at 1150. The Supreme Court thus determined that § 518 is not like a typical price regulation because it tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer; instead, it simply regulates how sellers may communicate their prices. *Id.* at 1151. Accordingly, while the Supreme Court agreed with the Second Circuit that § 518 regulates a relationship between a sticker price and the price charged to credit card users, it rejected the notion that § 518 is nothing more than a price regulation. In regulating the communication of prices rather than prices themselves, the Supreme Court concluded that § 518 regulates speech. The Supreme Court did not opine on the First Amendment question and therefore remanded the First Amendment question to the Second Circuit consistent with the decision that § 518 regulates speech.

(xvii) Consolidation Issues In Class Actions

***Bellweather Community Credit Union, et al. v. Chipotle Mexican Grill*, 2017 U.S. Dist. LEXIS 142626 (D. Colo. Sept. 1, 2017).** The parties filed a joint motion for consolidation, which the Court granted. The Court noted that Rule 42(a) provides that "[i]f actions before the Court involve a common question of law or fact, the Court may . . . consolidate the actions . . . ." *Id.* at *2. The purpose of Rule 42(a) is "to give the Court broad discretion to decide how cases on its docket are to be tried so that the business of the Court may be dispatched with expedition and economy while providing justice to the parties." *Id.* The Court found that the same group of attorneys filed two substantially similar cases in the Court on behalf of two different Plaintiffs, including this case, and *Alcoa Community Federal Credit Union v. Chipotle Mexican Grill, Inc.*, Case No. 17-CV-1283. Although the details of each case were slightly different, the Court determined that both "actions are substantively identical and are in the same stage of litigation." *Id.* The Court stated that both actions: (i) were brought by payment-card-issuing financial institutions against Defendant; (ii) were brought as a putative class action seeking to certify the same class of financial institutions; (iii) alleged the same legal claims for negligence, negligence *per se*, and declaratory/injunctive relief; and (iv) arose out of the same occurrence, *i.e.,* a data breach involving payment card information at Chipotle restaurants during the approximate period of March 2017 to the present. *Id.* at *3. Further the Court determined that all parties agreed that the matter should be consolidated. Accordingly, the Court granted the motion for consolidation.

***Jones, et al. v. Waffle House, Inc.*, Case No. 15-CV-1637 (M.D. Fla. Oct. 25, 2017).** Plaintiff, a job applicant, brought a putative class action alleging that Defendants' practice in procuring background checks on job applicants violated the Fair Credit Reporting Act ("FCRA"). A group of Interveners filed a motion to intervene and consolidate. The Court granted Interveners' motion to intervene in *Jones, et al. v. Waffle House*, Case No. 15-CV-1637 (M.D. Fla. 2015). At the same time, the Court denied Interveners' motion to consolidate the *Jones* action with *Holt, et al. v. Waffle House*, Case No. 17-CV-693 (M.D. Fla. 2017). *Id.* at 2. The Court directed the parties to filed a voluntary dismissal in the *Holt* action. The Court noted that Defendants preserved the right to assert arguments regarding the additional claims in the *Holt* action that were not asserted in the *Jones* action and specifically reserved the right to contest the relation back of the statute of limitations to claims not asserted in *Jones*. *Id.* The Court directed Plaintiffs to file a consolidation complaint. The Court further directed the parties to meet and confer prior to filing a proposed case management report or a joint motion to modify the case management and scheduled order in *Jones*. Accordingly, the Court granted Interveners' motion to intervene in the *Jones* action.

***McKinney, et al. v. Cohen,* 2017 U.S. Dist. LEXIS 85205 (S.D.N.Y. May 9, 2017).** Plaintiff brought a shareholder derivative action on behalf of Defendant Resource Capital Corp. Plaintiffs Dave Sherek ("Sherek") and Robert H. Spiegel ("Spiegel") commenced another class action arising from the same set of facts and alleging substantially overlapping causes of action as the first action. *Id.* at *3. Plaintiffs in both actions conferred and agreed that all claims arose out of a refusal by the Company's Board of Directors to prosecute the claims asserted in demands made by Plaintiffs. Plaintiffs agreed that in an effort to assure consistent rulings and decisions and the avoidance of unnecessary duplication of effort, they stipulated to consolidate the actions. *Id.* at *6. The Court approved the stipulation and ordered Plaintiffs to file a consolidated complaint within 60 days of the order. *Id.* at *7. The Court also ordered that the law firms of Johnson & Weaver, LLP and Profy Promisloff & Ciarlanto, P.C. were to serve as co-lead counsel for Plaintiffs in the consolidated action.

(xviii) Consumer Fraud Class Actions

***Mednick, et al. v. Precor, Inc.,* 2017 U.S. Dist. LEXIS 92629 (N.D. Ill. June 16, 2017).** Plaintiffs filed a consumer fraud class action alleging that Defendant deceptively marketed and sold treadmills incorporating a heart rate technology that Defendant knew did not accurately measure heart rates. In granting Plaintiffs' motion for class certification, the Court certified the class for the purposes of determining liability only, and reserved issues related to damages to individual hearings. *Id.* at *2. Defendant moved the Court to reconsider the certification order and the Court denied Defendant's motion. In their original motion for class certification, Plaintiffs sought to certify both a nationwide class to pursue a federal warranty claim and a multi-state class to recover under the consumer protection laws of 10 different states. Plaintiffs identified the class members as those who bought Defendant's exercise equipment that contained the touch sensor technology, or 20 models of

treadmills, elliptical machines, and stationary bikes. The Court refused to certify such a broad class and ruled that Plaintiffs had not satisfied Rule 23(b)(3)'s predominance requirement. *Id.* at *22. The Court was concerned that Plaintiffs' breach-of-warranty action, coupled with a claim of fraud, posed serious problems about choice-of-law, the manageability of the suit, and hence, the propriety of class certification. Plaintiffs then narrowed the scope of their case to satisfy Rule 23(b)(3) and dropped the warranty claim, reduced the number of states for which they pursued the consumer fraud claims from ten to five, and decreased the products they alleged to be deceptively marketed to just the treadmills. The Court found that this narrower class satisfied the requirements of Rule 23 and it certified the class. The Court construed Defendant's motion to reconsider as a motion to alter or amend a judgment under Rule 59(e) or a motion for relief from a final order under Rule 60(b), because the Federal Rules of Civil Procedure did not provide for a motion to reconsider. The Court rejected Defendant's argument that certification was precluded because the touch sensors performed differently for different individuals depending upon their individual physiology and the heart rate system that they used. *Id.* at *9. The Court found that neither the physiological differences nor the variations between the touch sensor systems defeated the class claims because most Plaintiffs experienced inaccurate heart rate readings and this meant that Defendant could not rely on individual differences to account for the differences in performance. Defendant also argued that Plaintiffs' damages model precluded certification because class members were not deprived of all value as set forth in the damage theories of Plaintiffs' damage theory expert. The Court rejected this argument because Defendant did not cite any binding authority that held that if a damages expert advocates for a full refund damages model – on the theory that class members received no value from the product – class certification should be denied when a partial refund model may be more appropriate. Accordingly, the Court denied Defendant's motion and reaffirmed its finding that certification was proper. *Id.* at *27.

***Mendez, et al. v. Avis Budget Group, Inc*., 2017 U.S. Dist. LEXIS 190730 (D.N.J. Nov. 17, 2017).** Plaintiff brought a putative class action on behalf of himself and others similarly-situated seeking to recover damages for all individuals who rented vehicles from Defendants that were equipped with, and charged for use of, an electronic system to pay tolls known as "e-Toll." *Id.* at *1-2. Plaintiff filed a motion for class certification, which the Court granted. Plaintiff alleged that before, during, and after his rental of a vehicle from Defendants, he was not advised that the vehicle: (i) could be equipped with an e-Toll device; and (ii) was pre-enrolled and activated for e-Toll. Plaintiff further alleged that he was not informed that, when he rented a vehicle that was equipped with an e-Toll device, he would be obligated to pay more than the actual toll charge incurred and be charged at a non-discounted rate. *Id.* at *2-3. Plaintiff sought to certify a nationwide class of all United States residents who: (i) rented an Avis or Budget vehicle in the United States during the class period; and (ii) in connection with that rental, paid Avis or Budget or their agent for their use of e-Toll. *Id.* at *5. The Court noted that the class was sufficiently numerous because it contained hundreds of individuals and, when dealing with such a large class, joinder was impracticable. *Id.* at *14. The Court found that Plaintiff met the commonality requirement because there were many questions common to the class. The Court also determined that the common questions capable of class-wide resolution predominated because the factual and legal thread of all claims was the alleged omission or non-disclosure of the e-Toll fees and up-charging. *Id.* at *15-16. Moreover, the Court held that no "individualized proof of 'highly case-specific factual issues'" would be required. *Id.* at *17. The Court reasoned that the typicality requirement of Rule 23 was met because the legal theory that formed the basis of Plaintiff's claims was typical of the claims asserted by the class members. *Id.* at *17-18. Specifically, Plaintiff averred that Defendants breached the rental contract when they failed to make various e-Toll disclosures and caused Plaintiff to be subjected to fees and upcharges about which he was unaware, and all class members asserted the same claim. *Id.* at *18. As to adequacy, the Court noted that class counsel were more than adequate representatives of the class based on the personal and law firm resumes submitted in support of the class certification motion. *Id.* at *19. The Court noted that class counsel had demonstrated their diligent and competent representation throughout the matter as it proceeded through discovery. *Id.* at *19-20. Additionally, the Court concluded that named Plaintiff was an appropriate class representative because his interests were not antagonistic to the rest of the class members and he had expressed his willingness to represent them. *Id.* at *20. Finally, the Court opined that class resolution would be a superior method of adjudication because the financial loss to most of the class members was relatively small, and it was unlikely that class members would have the resources to pursue successful litigation on their own because the cost of litigating separate actions would be far more than the amount each individual class member could recover. *Id.* at *21-22. Accordingly, the Court granted Plaintiff's motion for class certification.

***Mulder, et al. v. Kohl's Department Stores,* 2017 U.S. App. LEXIS 13546 (1st Cir. July 26, 2017).** Plaintiff brought a class action asserting that Defendant practiced deceptive labeling and marketing of products. Plaintiff alleged that Defendant used price tags listing both purchase prices and significantly higher "comparison prices." *Id.* at *1. Plaintiff alleged that the comparison prices were entirely fictional and were selected by Defendant to mislead unsuspecting consumers about the quality of its products. *Id.* Defendant filed a motion to dismiss, which the District Court granted. On appeal, the First Circuit affirmed the District Court's ruling. The District Court held that Plaintiff failed to adequately plead a legally cognizable injury under Chapter 93A of Massachusetts law, and it further denied her requests to certify several Chapter 93A questions to the Massachusetts Supreme Judicial Court ("SJC") and for leave to file a second amended complaint. The District Court also dismissed Plaintiff's common law claims. On appeal, Plaintiff challenged the dismissal of her Chapter 93A claim and her common law claims for fraud, breach of contract, and unjust enrichment. In dismissing Plaintiff's claims, the District Court noted that this case involved allegations "substantially identical" to those made against another retailer in *Shaulis v. Nordstrom Inc.*, 120 F. Supp. 3d 40 (D. Mass. 2015). Plaintiffs appealed in both cases, and their appeals were joined for oral argument. *Id.* at *4. The First Circuit discerned no relevant factual or legal distinctions between the two cases, applied its opinion in *Shaulis*, and affirmed dismissal of Plaintiff's Chapter 93A claim for damages and injunctive relief and her common law claims for fraud, breach of contract, and unjust enrichment. *Id.* at *4-5. The First Circuit therefore found that the only remaining issue was Plaintiff's challenge to the District Court's denial of her motion for leave to file a second amended complaint. Plaintiff sought leave to amend to add new allegations that she was "induced" to travel to Defendant's store by false advertising and that she suffered a resulting economic injury in the form of travel expenses incurred by driving ten miles from her home to the store. The District Court denied Plaintiff's motion to amend her complaint because of undue delay and because her proposed amendments to the complaint would have been futile. *Id.* at *6. With respect to delay, as the District Court noted, Plaintiff did not move for leave to amend after Defendant filed its motion to dismiss and instead opposed the motion, filed a sur-reply, opposed the motion again at oral argument, and then filed a third memorandum in opposition to Defendant's motion. The First Circuit, therefore, concluded that the District Court acted within its discretion in denying leave to amend for undue burden. The First Circuit also held that the District Court likewise acted within its discretion by denying Plaintiff's motion for leave to amend as futile. The District Court opined that the proposed second amended complaint failed to state a claim sufficient to survive a motion to dismiss. *Id.* The First Circuit held that Plaintiff's claim that she was "induced" to travel to Defendant by its "advertising in general" and its "reputation" of "amazing prices" was too vague to satisfy Rule 9(b), which required Plaintiffs to specifically plead "the time, place, and content of an alleged false representation." *Id.* at *8. Accordingly, the First Circuit affirmed the District Court's order granting Defendant's motion to dismiss.

***Shaulis, et al. v. Nordstrom, Inc.,* 865 F.3d 1 (1st Cir. July 26, 2017).** Plaintiff, a retail consumer, filed a class action when she bought a sweater at Defendant's store with a labeled purchase price of $49.97 with a higher "compare at" price of $218. *Id.* at 2. Plaintiff alleged common law claims of fraud, breach of contract, unjust enrichment, and violations of Massachusetts Consumer Protection Act ("MCPA"), and sought monetary and injunctive relief. *Id.* at 4. Plaintiff claimed that the listed "compare at" price was deceptive in that Defendant never sold the sweater for $218. The District Court granted Defendant's motion to dismiss, and on Plaintiff's appeal, the First Circuit affirmed. The District Court determined that Defendant's alleged pricing scheme constituted an unfair or deceptive practice under the MCPA and that Plaintiff had adequately alleged that Defendant's deception caused an identifiable harm in that she was directly induced to make a purchase she would not have made. However, the District Court held that Defendant failed to allege a legally cognizable injury for purposes of the MCPA because Plaintiff's subjective belief that she did not receive a good value was not enough to establish the existence of an injury under the MCPA. The First Circuit agreed and held that Plaintiff's theory was flawed because she failed to allege an injury as required under the MCPA and merged the alleged deception with the injury. *Id.* at 11. Plaintiff's purchase-as-injury claim collapsed the required distinction between deception and injury by attempting to plead an assertion about her disappointed expectations of value in place of the required allegation of real economic loss. Likewise, the First Circuit held that Plaintiff was not entitled to injunctive relief under MCPA because she had not alleged an injury. *Id.* at 14. The First Circuit held that Plaintiff's remaining common law claims for fraud, unjust enrichment, and breach of contract all failed as well. Plaintiff's fraudulent misrepresentation claim failed for the same reason as her MCPA claim failed, she had not alleged an actionable injury caused by Defendant's allegedly false statement. With respect to Plaintiff's breach of contract claim, the First Circuit found no allegations in the complaint that the sales contract itself was

breached, as the agreement between Plaintiff and Defendant was nothing more than a straightforward, everyday sales contract for the purchase of a sweater, and Defendant fulfilled its contractual obligations by charging the agreed price in exchange for ownership of the sweater. Further, Plaintiff's claim for unjust enrichment also failed because a party with an adequate remedy at law cannot claim unjust enrichment. The First Circuit rejected Plaintiff's contention that, if her other claims were dismissed, she had no adequate remedy. The First Circuit opined that this argument misapprehended the law, as it was the availability of a remedy at law, and not the viability of that remedy that prohibited a claim for unjust enrichment. The First Circuit also ruled that the District Court did not err when it denied Plaintiff's motion for reconsideration and for leave to amend as Plaintiff had not made the necessary showing of newly discovered evidence or a manifest error of law to warrant reconsideration. Accordingly, the First Circuit affirmed the District Court's decision. *Id.* at 17.

***Sud, et al. v. Costco Wholesale Corp*., 229 F. Supp. 3d 1075 (N.D. Cal. 2017).** Plaintiffs filed a putative class action against Defendants, Costco and C.P. Food Products Inc. ("CP"), claiming several violations of California law. Each of the claims were based on allegations that Defendants sold and supplied prawns farmed in Thailand, and that the supply chain was tainted by slavery, human trafficking, and other illegal labor practices. Defendant CP filed a motion to dismiss asserting that Plaintiffs lacked Article III standing under Rule 12(b)(1). Defendant CP asserted that Plaintiffs did not allege that Defendant CP supplied the prawns that they purchased. Accordingly, Plaintiffs failed to allege facts to establish that they had Article III standing to pursue a claim against Defendant CP. The Court granted the motion to dismiss. Plaintiffs further alleged that Defendant Costco was liable for false advertising because it published a "Disclosure Regarding Human Trafficking and Anti-Slavery" on its website and advertised that it had a supplier code of conduct prohibiting such labor abuses. The claims were based upon allegations that the disclosures were misleading. The Court also dismissed these claims. Defendant Costco asserted that Plaintiffs failed to allege that they relied upon any of Costco's statements. The Court agreed, noting that Plaintiffs did not allege that they relied upon the information or that they even read the disclosure before purchasing prawns from Defendant. Plaintiffs also did not allege with any particularity that they relied upon Defendant Costco's advertisements. Accordingly, the motion to dismiss based upon false statements was granted. Plaintiffs also alleged that because Defendant Costco made representations about excluding slave labor from its chain of supply, it had a duty to accurately disclose to consumers that slavery, forced labor, and human trafficking tainted Costco's supply chain. Defendant Costco also moved to dismiss these claims on the basis that it did not have a duty to disclose this information. The Court agreed and noted that while the labor practices alleged were "horrific," they did not constitute a safety risk to consumers or constitute a product defect. The Court noted that there is a need for a "bright-line limitation" on a duty to disclose, as it is difficult to anticipate what information consumers find material in purchasing decisions. The Court found that there was no duty to disclose in this case. Accordingly, the Court dismissed all of Plaintiffs' claims.

(xix) COBRA Class Actions

***Vazquez, et al. v. Marriott International, Inc.,* Case No. 17-CV-116 (M.D. Fla. Aug. 25, 2017).** Plaintiff, a housekeeper, filed a class action alleging that Defendant failed to provide her with a proper Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") notice of rights of healthcare coverage following her termination in violation of the ERISA. *Id.* at 1. Defendant filed a motion to dismiss, arguing that Plaintiff: (i) lacked standing for failure to allege an injury-in-fact; and (ii) failed to exhaust her administrative remedies. The Court denied Defendant's motion. Plaintiff alleged that both her and her husband lost healthcare coverage for two months, incurred significant medical expenses, and still had unpaid bills. *Id.* at 2. Defendant argued that Plaintiff failed to allege any harm resulting from the alleged deficient COBRA notice and that Plaintiff's loss of insurance coverage occurred because she was unable to afford it, not because of any alleged deficiency. *Id.* at 3. Plaintiff, however, contended that she suffered the loss of insurance coverage due to the deficient notice and that she obtained sufficient medical bills. *Id.* The Court found that these allegations were sufficient to state of plausible claim of injury-in-fact and therefore to confer standing for Plaintiff's COBRA claim. *Id.* at 4. Defendant also contended that Plaintiff failed to exhaust her administrative remedies. Plaintiff argued that there were no available administrative remedies for failure to give adequate notice, and therefore exhaustion would be futile. *Id.* The Court noted that as Defendant offered no available alternative remedy, its defense had no basis. Accordingly, the Court denied Defendant's motion to dismiss.

(xx) Data Breach Class Actions

***Beck, et al. v. McDonald*, 848 F.3d 262 (4th Cir. 2017).** Plaintiffs, a group of veterans, brought two separate putative class action suits against Defendant, a health care center, alleging data breach violations pursuant to the Privacy Act of 1974 and the Administrative Procedure Act ("APA"). Plaintiffs alleged that they suffered an injury-in-fact after a lap-top computer and pathology reports containing personal data were stolen. *Id.* at 267. Plaintiffs sought to establish Article III standing based on the harm from the increased risk of future identity theft and the cost of measures to protect against identity theft. The District Court dismissed the claims for lack of Article III standing. On Plaintiffs' consolidated appeal, the Fourth Circuit affirmed. *Id.* at 277. The Fourth Circuit ruled that the District Court properly concluded that Plaintiffs failed to establish a non-speculative, imminent, injury-in-fact for purposes of Article III standing. The Fourth Circuit noted that other circuits are divided on whether an increased risk of future identity theft may establish Article III standing. *Id.* at 273. The Fourth Circuit opined that a threatened injury, rather than an actual injury, may satisfy Article III standing requirements, but not all threatened injuries constitute an injury-in-fact. The Fourth Circuit opined that Plaintiffs failed to show any threatened harm of future identity theft, as there was no evidence that any of personal information from the breaches had been misused. *Id.* at 274. Therefore, the allegations were too speculative to constitute an injury-in-fact. *Id.* The Fourth Circuit also rejected Plaintiffs claims that emotional distress and fear of financial theft were adverse effects for purposes of Article III. Because the fear of identity theft was too speculative, any costs that Plaintiffs incurred to guard against identity theft did not constitute an injury-in-fact. *Id.* at 276. Accordingly, the Fourth Circuit affirmed the District Court's decision that Plaintiffs lacked Article III standing.

***Community Bank Of Trenton, et al. v. Schnuk Markets, Inc.,* 2017 U.S. Dist. LEXIS 66014 (S.D. Ill. May 1, 2017)**. Plaintiff, a group of banks, filed a class action against Defendant grocery stores after there was a data breach involving credit card processing. Plaintiffs claimed that stolen data was used in fraudulent transactions because of data not being properly encrypted and stored. *Id.* at *5. Defendant did not notify the public of the breach until 16 days after learning of the breach. *Id.* at *6. Defendant moved to dismiss Plaintiffs' amended seven-count complaint. The Court dismissed all counts of the complaint with prejudice. *Id.* at *23. Plaintiffs made a claim of gross negligence under Missouri law. *Id.* at *7. The Court ruled that Missouri's data breach law does not provide a civil remedy and merely gives authority to the Attorney General to prosecute violations for failure to notify of data breaches. *Id.* at *10. Accordingly, the Court dismissed the gross negligence claim, and declined to create a remedy where the Missouri legislature had failed to do so. *Id.* The Court also dismissed Plaintiffs' negligence claim, as they failed to identify any duty that Defendant had violated. *Id.* at *12. Third, the Court dismissed the breach of implied contract claim as there was no evidence that a contractual relationship existed between the parties or that any violation occurred. *Id.* at *15. Further, the Court dismissed the breach of contract third-party beneficiary claim because the Plaintiff failed to establish that they were more than an incidental beneficiary. *Id.* at *16. The Court ruled that there was no direct benefit intended to Plaintiffs resulting from the contractual relationship between the merchant and the credit card companies. The fact that Plaintiffs received fees was incidental. The Court likewise dismissed the violation of the Illinois Consumer Fraud and Deceptive Business Practices Act as the allegations were too "threadbare." *Id.* at *21. In addition, the Court dismissed the unjust enrichment claim because Plaintiff's allegation did not establish that Defendant made more from accepting credit cards after the breach than it would have made had it accepted only cash. *Id.* at *22. Finally, because the Court dismissed the substantive claims in Plaintiffs' complaint, it did not rule on the injunctive relief that Plaintiff' sought. *Id.* at *22. Accordingly, the Court dismissed Plaintiffs' complaint with prejudice.

***DolmageI, et al. v. Combined Insurance Co. Of America*, 2017 U.S. Dist. LEXIS 67555 (6th Cir. 2017).** Plaintiff, an insured individual, filed a class action against Defendant alleging breach of contract for failing to keep her personally identifiable information ("PII") private. Upon securing life insurance with Defendant, Defendant provided Plaintiff its "privacy pledge" detailed some of the safeguards that Defendant had in place to secure private information. However, Defendant's on-line portal Enrolltek was hacked, and Plaintiff and thousands of other individuals' PII was hacked. Plaintiff filed a motion for class certification pursuant to Rule 23, which the Court denied on the grounds that Plaintiff could not establish commonality, typicality, predominance, or superiority. Plaintiff asserted that several issues were common to all class members, including whether Defendant's privacy pledge was part of the insurance agreements between Defendant and class members, whether Defendant violated the privacy pledge when Enrolltek posted class members' PII on the internet, and whether class members suffered harm by having their information available on the internet. *Id.* at *10. Although

the Court agreed that it was one single action by Defendant that allegedly caused the class members' injury, the Court stated that one of the key issues in this case was whether the privacy pledge was part of the contract between Defendant and putative class members and, if so, what duties it imposed on Defendant. *Id.* at *11. The Court held that it was unclear how this issue could be resolved on a class-wide basis, because the proposed class covered individuals living in 30 or more states. Accordingly, the Court would have to apply the laws of multiple states to determine whether the privacy pledge was enforceable. *Id.* at *16. The Court, therefore, concluded that certification of a nationwide class would be improper. Further, the Court found that Plaintiff's claims were not typical of the class because Plaintiff claimed actual damages as a result of the data breach, whereas the vast majority of class members never reported becoming victims of identity theft. *Id.* at *27. The Court opined that issues pertaining to the theft of Plaintiff's data by third-parties, particularly whether it was caused by the data breach and what damages she suffered as a result, were therefore not "typical" of the claims of most class members. *Id.* at *28. The Court also found that Plaintiff failed to meet the predominance requirement of Rule 23(b)(3). Plaintiff argued that the common issues of contract formation and breach were class-wide issues that predominated. Defendant asserted that the individual issues overwhelmed any common issues, considering that both enforceability of the contract and damages would need to be determined on an individual basis. The Court agreed with Defendant because the issues in this case would require individualized damages inquiries for each class member. *Id.* at *31. In addition, the contract and insurance laws of multiple states governed the merits of class members' claims. The Court held that certifying a class under these circumstances was not the superior method of adjudicating the claims and instead would be entirely unmanageable. Accordingly, the Court denied Plaintiff's motion for class certification.

***Dugas, et al. v. Starwood Hotels,* 2017 U.S. Dist. LEXIS 102335 (S.D. Cal. June 28, 2017).** Plaintiff, on behalf of a group of current and former customers, brought an action asserting that Defendant violated the California Customer Records Act and the California Unfair Competition Law when malware installed on its computer systems targeted customer information. Plaintiff alleged that Defendant knew or should have known the value of the information it was storing and that such information made it a high-profile target. The Court had previously granted Defendant's motion to dismiss, and Plaintiff filed a second amended complaint asserting jurisdiction under the Class Action Fairness Act ("CAFA"). The Court issued an order to show cause why the action should not be dismissed for lack of subject- matter jurisdiction, and it ultimately dismissed Plaintiff's second amended complaint. The Court's order to show cause noted three deficiencies in Plaintiff's second amended complaint, including: (i) whether the amount-in-controversy exceeded the CAFA's jurisdictional threshold; (ii) that the facts alleged in the second amended complaint prevented the Court from determining whether it must decline to assert jurisdiction under the CAFA by way of the mandatory "local controversy" exception; and (iii) whether two-thirds of the proposed class were "citizens of the State in which the action was originally filed," given that Plaintiff's proposed class would seek relief only for violations of California law. *Id.* at *3-4. The Court noted that Plaintiff failed to respond to the deficiencies in its pleading or address the Court's concerns regarding whether it has original jurisdiction under the CAFA and whether it otherwise must decline to exercise such jurisdiction under § 1332(d)(4)(A). The Court determined that Plaintiff failed to explain its allegations concerning the CAFA's jurisdictional minimum. Plaintiff alleged that hundreds of thousands of customer records were stolen during the data breach, and even if conservatively valuing this at exactly 100,000 individuals, to reach the amount-in-controversy, the value of the breach per user would need to exceed just $50. *Id.* at *6. The Court concluded that Plaintiff's statement, however, did not adequately respond to the Court's observation that the second amended complaint's silence as to the restitution sought, in light of the California causes of action brought, failed to plausibly allege that the CAFA's jurisdictional minimum was met. *Id.* at *7. Second, the Court held that Plaintiff's response failed to provide the information required to assess whether it must decline to assert jurisdiction under the CAFA by way of the "local controversy" exception because Plaintiff's response did not adequately allege the citizenship of Defendants. According to the record, two of the Defendants were LPs and LLCs, and therefore for jurisdiction purposes were "citizens of every state of which its owners/members are citizens." *Id.* at *8. The Court determined that Plaintiff, therefore, failed to properly assert the citizenship of two of the Defendants and, as such, the Court could not determine whether the second prong of the mandatory "local controversy" exception to the CAFA applied. *Id.* at *9. The Court noted that Plaintiff's response also failed to address the first prong of the "local controversy exception," which inquiries into whether two-thirds, or more, of the individuals in the proposed class were California citizens. *Id.* The Court noted in the order to show cause that the proposed class could not be as broad as Plaintiff alleged because Plaintiff asserted only California causes of action. In sum, the Court

found that Plaintiff did not make a plausible showing that the CAFA's jurisdictional bar had been met. The Court also concluded that it could not assess whether it must, irrespective of the jurisdictional minimum, decline to assert jurisdiction under the CAFA pursuant to the mandatory "local controversy" exception because Plaintiff failed to properly allege the citizenship of two Defendants and had not specified the citizenship of the proposed class. *Id.* at *10. Accordingly, the Court dismissed Plaintiff's second amended complaint.

***Enslin, et al. v. Coca-Cola, et al.,* 2017 U.S. Dist. LEXIS 49920 (E.D. Pa. Mar. 31, 2017).** Plaintiff brought a putative class action alleging claims of breach of contract and unjust enrichment when he was a victim of fraud after Defendant discovered that an employee had removed laptop computers from the workplace containing personal information of some 74,000 employees. *Id.* at *2. Defendant moved for summary judgment and Plaintiff moved for partial summary judgment and class certification. *Id.* at *5-6. The Court granted Defendant's motion for summary judgment and denied Plaintiff's motions. *Id.* at*40. The Court rejected Defendant's assertion that Plaintiff's claims were preempted by collective bargaining agreements ("CBAs") pursuant to the Labor-Management Relations Act ("LMRA"). The Court ruled that because his claims did not substantially depend upon interpretation of the collective bargaining agreements, they were not preempted by the LMRA. *Id.* at *17. However, in granting Defendant's motion for summary judgment, the Court ruled that Defendant and Plaintiff had not entered into a contract, either express or implied, to safeguard his personal information. *Id.* at *40. The Court rejected Plaintiff's assertion that the agreement to safeguard Plaintiff's personal information was contained in three overlapping documents, including: (i) Plaintiff's employment application; (ii) Defendant's code of conduct; and (iii) Defendant's information technology policies. *Id.* at *33. The Court ruled that Defendant's information technology policies limited the scope of responsibilities to advising employees of personnel files, collecting data for employment purposes, and allowing employees and those authorized to access the personal information. Accordingly, Defendant did not take on additional responsibilities to safeguard the personal information. *Id.* at *34. Further, the "safeguarding company assets" clause in the code of conduct applied to employees' duties to keep Defendant's property safe and was an obligation on the part of employees and not of Defendant. *Id.* at *35. The Court also rejected the claim that there was an implied contract to safeguard information as Defendant's responsibilities were explicit in the code of conduct. *Id.* at *40. Accordingly, the Court granted summary judgment in Defendant's favor and denied the Plaintiff's motion for partial summary judgment and for class certification. The Court also denied Plaintiff's motion to amend his complaint to add claims pursuant to the FLSA, the Pennsylvania Wage Payment and Collection Law, and the Drivers' Privacy Protection Act, ruling the motion to amend was untimely as fact and certification discovery had already closed. *Id.* at *43.

***In Re Anthem, Inc. Data Breach Litigation,* Case No. 15-MD-2617 (N.D. Cal. Aug. 25, 2017).** Plaintiffs, a group of individuals subject to a data breach, filed a class action alleging that their personally identified information was leaked due to Defendant's conduct. The parties ultimately settled the matter after two years of litigation and Plaintiffs filed a motion for preliminary settlement approval. The Court granted the motion. The Court stated that it reviewed the proposed settlement agreement, Plaintiffs' motion papers and briefs, and counsel's declarations. *Id.* at 2. The Court determined that the settlement agreement appeared to be the result of good faith, informed, non-collusive negotiations conducted with the assistance of a former judge over the course of nearly three months. *Id.* The Court further observed that the settlement agreement was the result of more than two years of litigation, two rounds of motions to dismiss, extensive fact and expert discovery, and briefing on Plaintiffs' motion for class certification and the parties' motion to exclude expert testimony. *Id.* The Court found that the settlement agreement terms did not improperly grant preferential treatment to any individual or segment of the settlement class and fell within the range of possible approval as fair, reasonable and adequate. *Id.* The Court thereby granted Plaintiffs' preliminary approval to the settlement. The Court certified for purposes of settlement a class defined as "all individuals whose personal information as maintained on Anthem's Enterprise Data Warehouse and are in included in Anthem's Member Impact Database and/or received a notice relating to the data breach." *Id.* The Court found that the settlement class satisfied the requirements of Rule 23 (a) as: (i) it was comprised of approximately 79 million individuals; (ii) questions or law or fact were common to the settlement class; (iii) the representative class members' claims were typical of those in the settlement class; and (iv) the settlement class representatives would fairly and adequately protect the interests of the class. *Id.* at 2-3. The Court also determined that the settlement class satisfied the requirement of Rule 23(b)(3) because: (i) questions of law or fact common to the settlement class predominated over individual

questions; and (ii) class action litigation was superior to other available methods for the fair and efficient adjudication of the matter. *Id.* at 3. Accordingly, the Court granted Plaintiffs' motion.

***In Re Barnes & Noble Pin Pad Litigation*, 2017 U.S. Dist. LEXIS 97161 (N.D. Ill. Oct. 3, 2016).** Plaintiffs, a group of customers, brought a putative data breach class action after hackers obtained personal identifying information ("PII") belonging to Defendant's customers. Plaintiffs alleged that Defendant failed to secure their personal financial data and failed to provide timely notice of the data breach. After the Court dismissed Plaintiffs' original complaint for lack of Article III standing, Plaintiffs filed a first amended complaint. Defendant moved to dismiss again and argued that Plaintiffs failed to adequately allege injury-in-fact for purposes of Article III standing. The Court ruled that Plaintiffs' allegations – that they incurred injuries in the course of protecting themselves from a substantial risk of fraudulent charges – were sufficient to establish Article III standing. The Court denied the motion to dismiss on the basis of lack of Article III standing. The Court, however, found that Plaintiffs had failed to state a claim for relief. Plaintiffs subsequently filed their second amended complaint, which Defendant again moved to dismiss for failure to state a claim. Plaintiffs' original complaint alleged five causes of action, including: (i) breach of implied contract; (ii) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"); (iii) invasion of privacy; (iv) violation of §§ 1798.80 of the California Civil Code; and (v) violation of California's Unfair Competition Act ("UCL"). Plaintiffs sought damages for unauthorized disclosure of their PII, loss of privacy, expenses incurred attempting to mitigate the increased risk of identity theft or fraud, time lost mitigating the increased risk of identity theft or fraud, an increased risk of identity theft, deprivation of the value of Plaintiffs' PII, and anxiety and emotional distress. *Id.* at *4. In their second amended complaint, Plaintiffs alleged that Plaintiff Dieffenbach's bank account was put on hold, that she could not use her debit card until a new one was delivered, that she had to spend time with police and bank employees, that she had to use minutes from her cell phone plan to speak with bank employees, that she lost the value of her PII, and that she suffered emotional distress. *Id.* at *5. Plaintiffs further alleged that Plaintiff Winstead lost the value of her PII, could not use her credit card until a new one was delivered, and had to renew her credit monitoring service to protect against any further fraud. In its prior decision, the Court dismissed the breach of contract, ICFA, invasion of privacy, and UCL claims because Plaintiffs failed to show that they had any redressable injuries. *Id.* at *5-6. Because Plaintiffs' § 1798 claim was predicated on the theory that that Defendant provided untimely notice of the security breach, the Court dismissed that claim for failure to plead causation between the alleged violation and any alleged injuries. *Id.* at *6. Defendant argued that the changes made in the second amended complaint still failed to address any of the Court's concerns and that, consequently, the second amended complaint should be dismissed. The Court had previously ruled that, in order to state a claim based upon breach of contract, the ICFA, or the UCL, Plaintiffs had to allege economic or out-of-pocket damages caused by the data breach. The Court found that Plaintiffs' alleged injuries to the value of their PII, their time spent with bank and police employees, and any emotional distress they might have suffered were not injuries sufficient to state a claim. *Id.* at *7. The Court further determined that Plaintiffs' temporary inability to use their bank accounts was also insufficient to state a claim, because the temporary inability to use a bank account was not a monetary injury in itself, and Plaintiffs had not set forth any allegations about how they suffered monetary injury due to the inconvenience of not being able to access their accounts. *Id.* at *7-8. As for Dieffenbach's allegations that she lost cell phone minutes in speaking to bank employees, the Court found that the cost was *de minimis* and too attenuated to Defendant's conduct to qualify as a redressable injury. Accordingly, the Court granted Defendant's motion to dismiss with prejudice, and concluded that any further opportunities for amendment would be futile.

***In Re Premera Blue Cross Customer Data Security Breach Litigation,* 2017 U.S. Dist. LEXIS 18322 (D. Ore. Feb. 9, 2017).** Plaintiffs, a group of healthcare consumers, brought a putative class action against Defendant alleging various state common law and statutory claims after Defendant disclosed that its computer network had been breached. Plaintiffs alleged that after discovering the breach, Defendant unreasonably delayed in notifying Plaintiffs. Defendant filed a motion to dismiss Plaintiffs' complaint on multiple grounds. The Court granted in part and denied in part Defendant's motion to dismiss. Defendant moved to dismiss the affirmative misrepresentation claims on the grounds that the allegations of fraud did not "sound in fraud" as required by Rule 9(b). Plaintiffs argued that, because their misrepresentation claim was brought under the state Consumer Protection Act ("CPA") and merely alleged that the conduct was deceptive and unfair, it did not "sound in fraud" and was not subject to Rule 9(b). Defendant argued that the claims should be dismissed

because there was no allegation that Plaintiffs read and relied upon the allegedly false or misleading statements and Plaintiffs, therefore, failed to allege causation. The Court rejected this argument and denied Defendant's motion, holding that, because the CPA's purpose was intended to ease the burden ordinarily applicable in cases of fraud, proof of reliance was not required. Plaintiffs further alleged that two of Defendant's policy booklets – the "preferred" and the "bronze" booklet – both contained affirmative misrepresentations. The Court denied Defendant's motion to dismiss as to Defendant's preferred policy booklet. The preferred booklet stated, "[w]e protect your privacy by making sure your information stays confidential. We have a company confidentiality policy and we require all employees to sign it." *Id.* at *12. The Court found that this statement was a sufficiently specific representation and denied the motion to dismiss under Rule 9(b). The Court, however, dismissed Plaintiffs' fraud-based claims alleging active concealment and affirmative misrepresentations as to Defendant's bronze policy booklet. The bronze policy stated, "[t]o safeguard your privacy, we take care to ensure that your information remains confidential by having a company confidentiality policy and by requiring all employees to sign it." *Id.* at *12. The Court dismissed the claim because Plaintiffs failed to allege that Defendant did not have such a policy and that Defendant failed to require its employees to sign such policy. Finally, Defendant moved to dismiss claims of two named Plaintiffs on the basis that the claims were preempted by the Employee Retirement Income Security Act. The Court denied the motion finding that complete preemption did not apply in this case.

***In Re SuperValu, Inc. Customer Data Security Breach Litigation*, 870 F.3d 763 (8th Cir. 2017).** Plaintiffs were a group of customers whose financial information was allegedly accessed and stolen following a data breach at Defendants' grocery stores. The District Court dismissed Plaintiffs' complaint under Rule 12(b)(1), concluding that Plaintiffs failed to allege facts establishing Article III standing. On appeal, the Eighth Circuit affirmed in part, reversed in part, and remanded for further proceedings. *Id.* at 765. Plaintiffs asserted that hackers gained access to Defendants' network because Defendants failed to take adequate measures to protect customers' card information. As a result of the breaches, Plaintiffs' information was allegedly stolen, subjecting Plaintiffs "to an imminent and real possibility of identity theft." *Id.* Specifically, Plaintiffs contended that the hackers could use their card information to siphon money from their current accounts, make unauthorized credit or debit card charges, open new accounts, or sell the information to others who intended to commit fraud. *Id.* at 766-67. Plaintiff Holmes used his credit card at a store that was affected by the data breaches and alleged that he subsequently noticed a fraudulent charge on his credit card statement and immediately cancelled his credit card. *Id.* at 767. The District Court concluded that, because the complaint alleged only an "isolated single instance of an unauthorized charge" suffered by Plaintiff Holmes, there was insufficient evidence of misuse of Plaintiffs' card information connected to Defendants' data breaches to "plausibly suggest that the hackers had succeeded in stealing the data and were willing and able to use it for future theft or fraud." *Id.* On appeal, Plaintiffs argued that they sufficiently had alleged an injury-in-fact because the theft of their card information in the data breaches at Defendants' stores created a substantial risk that they would suffer identity theft in the future. In addition, Plaintiff Holmes specifically argued that his allegations of actual misuse of his card information were sufficient to allege a present injury-in-fact causally connected to Defendants' careless security practices. *Id.* at 768. The Eighth Circuit noted that the allegedly stolen card information did not include any personally identifying information, such as social security numbers, birth dates, or driver's license numbers, and did not plausibly support the contention that consumers affected by a data breach face a substantial risk of credit or debit card fraud. Although the complaint's allegations of future injury were insufficient, the Eighth Circuit found that Plaintiff Holmes had alleged a present injury-in-fact to support his standing. The misuse of Holmes' card information was credit card fraud and therefore a form of identity theft. Defendants challenged the sufficiency of Holmes' allegations, alleging that his theory of actual injury "is not properly before the Court because it is not alleged in the complaint." *Id.* at 772. Contrary to Defendants' contention, the Eighth Circuit explained that "it is unnecessary to set out a legal theory for Plaintiff's claim for relief" in his complaint. *Id.* Second, Defendants argued that Holmes had not sufficiently alleged that his injury was fairly traceable to Defendants' data breaches. The Eighth Circuit disagreed and found that Plaintiffs had stated a "causal connection" between the deficiencies in Defendants' security system and the theft and misuse of customers' card information. *Id.* The Eighth Circuit therefore concluded that the District Court erred in holding that Holmes' standing was dependent on the standing of other named Plaintiffs and unnamed class members, because standing must be assessed individually. Accordingly, because the complaint contained sufficient allegations to demonstrate that Holmes suffered an injury-in-fact, fairly traceable to Defendants' security practices, and likely

to be redressed by a favorable judgment, Holmes had standing under Article III. The Eighth Circuit therefore affirmed in part, reversed in part, and remanded to the District Court for further proceedings.

***Sackin, et al. v. Transperfect Global, Inc*., 2017 U.S. Dist. LEXIS 164933 (S.D.N.Y. Oct. 4, 2017).** Plaintiffs filed a class action against Defendant stemming from a data breach of Defendant's computer systems that disclosed Plaintiffs' sensitive personally identifiable information ("PII") to hackers. *Id.* at *1-2. Plaintiffs alleged five causes of action, including: (i) common law and statutory negligence; (ii) breach of express contract; (iii) breach of implied contract; (iv) unjust enrichment; and (v) violations of 203-d of the New York Labor Law ("NYLL"). Defendant filed a motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6). The Court denied the Rule 12(b)(1) motion and granted the Rule 12(b)(6) motion in part by dismissing Plaintiffs' claim of breach of express contract. The Court found that Plaintiffs had standing because the complaint alleged that Plaintiffs reasonably incurred the cost identity theft prevention services after being subjected to the data breach. Plaintiffs thereby sufficiently alleged an injury-in-fact, both regarding the risk of identity theft and remedial measures taken after the data breach. As the allegations of the risk of identity theft and related mitigating expenses were sufficient to allege injury-in-fact and thereby confer standing, the Court concluded that it had subject-matter jurisdiction. *Id.* at *6. Accordingly, the Court denied Defendant's motion to dismiss based on Rule 12(b)(1). The Court explained that under New York law, in order to recover on a claim for negligence, a Plaintiff must show: (i) the existence of a duty on Defendant's part as to Plaintiff; (ii) a breach of this duty; and (iii) injury to a Plaintiff as a result thereof. *Id.* at *11. The Court held that Plaintiffs sufficiently alleged that Defendant breached a duty owed to Plaintiffs under both common law and negligence *per se* principles, and that Plaintiffs suffered injury as a result. *Id.* at *12. Further, the Court found that Plaintiffs' complaint alleged a cognizable legal duty, *i.e.*, that Defendants had a duty to safeguard Plaintiffs' PII and the class members' PII. *Id.* at *13. Likewise, the Court determined that the complaint also sufficiently alleged that Defendant violated its duty to take reasonable steps to protect its employees' PII, thereby alleging a breach of a statutory duty. *Id.* at *14. The Court also explained that the NYLL makes it illegal for an employer to "communicate an employee's personal identifying information to the general public." *Id.* Accordingly, the Court determined that the NYLL claims could not be dismissed. As to breach of contract, the Court stated that under New York law, a breach of contract claim requires: (i) the existence of an agreement; (ii) adequate performance of the contract by Plaintiff; (iii) breach of contract by a Defendant; and (iv) damages." *Id.* at *16. The Court held that Plaintiffs failed to allege a sufficient claim for breach of express contract because they failed to allege any facts to support the conclusion that Defendant expressly contracted to protect employees' PII, and did not describe any express agreement to that effect *Id.* at *17. Accordingly, the Court dismissed the breach of express contract cause of action. However, the Court found that Plaintiffs' claim of unjust enrichment was sufficiently pled because Defendant received the benefits of Plaintiffs' labor, Defendant was enriched at Plaintiffs' expense when it chose to cut costs by not implementing security measures to protect Plaintiffs' PII, and it would be inequitable and unconscionable to allow Defendant to retain the money it saved by shirking data-security measures, while leaving Plaintiffs to suffer the consequences. *Id.* at *20-21. The Court therefore granted Defendant's motion as to the breach of express contract claims and denied it in all other respects.

***Whalen, et al. v. Michael's Stores,* 689 Fed. App'x 89 (2d Cir. 2017).** Plaintiff, a consumer, filed a class action alleging that Defendant violated § 349 of the New York General Business Law when her credit card information was exposed following at data breach of one of Defendant's stores. The District Court dismissed Plaintiff's claims for lack of standing, concluding that she had failed to allege a cognizable injury. On appeal, the Second Circuit affirmed the District Court's ruling. Plaintiff made purchases with her credit card at Defendant's store. Plaintiff's credit card was then used for payment to a gym in Ecuador for a charge of $398.16 and for payment to a concert ticket company in Ecuador for a charge of $1,320. Plaintiff subsequently cancelled her card. Plaintiff did not allege that any fraudulent charges were actually incurred on the card, or that, before the cancellation, she was in any way liable on account of these presentations. *Id.* at 90. Defendant subsequently issued a press release saying that there had been a possible data breach of its system, apparently involving theft of customers' credit card and debit card data. *Id.* After an investigation, Defendant confirmed the existence and scope of the data breach, and extended an offer of 12 months of identity protection and credit monitoring services to affected customers. The District Court held that the allegations in the complaint did not suffice to establish Article III standing for Plaintiff to pursue her claims, because she neither alleged that she incurred any actual charges on her credit card, nor that she had spent time or money monitoring her credit. *Id.* Plaintiff asserted: (i) her credit

card information was stolen and used twice in attempted fraudulent purchases; (ii) she faced a risk of future identity fraud; and (iii) she had lost time and money resolving the attempted fraudulent charges and monitoring her credit. *Id.* The Second Circuit found that Plaintiff failed to allege a particularized and concrete injury suffered from the attempted fraudulent purchases, because she never was either asked to pay, nor did she pay, any fraudulent charge. *Id.* The Second Circuit further stated that Plaintiff did not allege how she could plausibly face a threat of future fraud, because her stolen credit card was promptly cancelled after the breach and no other personally identifying information was alleged to have been stolen. *Id.* at 91. Finally, the Second Circuit held that Plaintiff pled no specifics regarding any time or effort that she spent monitoring her credit. *Id.* Accordingly, the Second Circuit found that Plaintiff alleged no injury that would satisfy the constitutional standing requirements of Article III, and that the District Court did not err in dismissing her claims.

(xxi) Decertification Under Rule 23

***Brodsky, et al. v. Humanadental Insurance Co.,* 2017 U.S. Dist. LEXIS 137608 (N.D. Ill. Aug. 28, 2017).** Plaintiff filed a class action alleging that Defendants improperly sent faxes in violation of the Telephone Consumer Protection Act ("TCPA"). The Court granted Plaintiff's motion for class certification. After discovery, Defendant moved to decertify the class and to stay proceedings and Plaintiff moved for an order approving his proposed class notice. *Id.* at *2. The Court granted Defendant's motion to decertify the class and denied Plaintiff's motion as moot. After the Court certified the class, the Federal Communications Commission ("FCC") issued Defendant a retroactive waiver from the Solicited Fax Rule ("SFR"). A panel of judges in the D.C. Circuit in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017), struck down the FCC's SFR, which required both unsolicited and solicited faxes to include opt-out notices with certain language. *Bais Yaakov* held that the SFR was unlawful to the extent that it required opt-out notices on solicited faxes. Defendant contended that the waiver and the *Bais Yaakov* decision implicated additional individual questions that defeated superiority and predominance, and that Plaintiff's present class must be decertified. *Id.* at *11. The Court agreed and decertified the class. *Id.* at *20. The Court reasoned that because Plaintiff claim was that Defendant's faxes did not comply with the TCPA's opt-out notice requirement, this case theory was no longer viable because now the TCPA did not impose an opt-out notice requirement on solicited faxes, *i.e.*, the obligation that was created by the SFR was no longer operable because of the waiver. The Court opined that for it to determine whether any putative member of the proposed class had a TCPA claim, the Court would be required to determine whether that proposed class member solicited the faxes it received. Accordingly, the Court held that individual consent issues defeated predominance and superiority, such that class treatment was no longer warranted under Rule 23. Accordingly, the Court granted Defendant's motion to decertify the class and to stay proceedings. The Court also denied Plaintiff's motion for an order approving class notice as moot. *Id.* at *27.

***In Re Processed Egg Products Antitrust Litigation*, 2017 U.S. Dist. LEXIS 128549 (E.D. Pa. Aug. 14, 2017).** Plaintiffs brought a class action alleging that Defendants conspired to decrease the supply of eggs. Plaintiffs further alleged that this supply conspiracy limited, fixed, raised, stabilized, or maintained the price of eggs, which caused purchasers to pay more for eggs than they would have otherwise paid. Defendants filed a motion requesting the Court to reverse its decision certifying a class of shell egg direct purchasers. Defendants mounted three main challenges centered on purported limitations of the models by Plaintiffs' expert, Dr. Gordon Rausser, including that: (i) post-2008 data should not be included in Dr. Rausser's model because the Court's order cut the class period off at December 31, 2008; (ii) that there were alleged inconsistencies between Dr. Rausser's class reports and merits reports; and (iii) that Dr. Rausser failed to account for individual factors, thereby rendering his results meaningless. *Id.* at *10. The Court disagreed with Defendant, and declined to decertify the class. The Court stated that it had already addressed and dispensed of the majority of Defendants' arguments at various stages of the litigation. The Court noted that the only new issues was whether cutting off the class period on December 31, 2008 called into question its prior class certification order. Defendants also challenged the Court's prior finding that Plaintiffs satisfied Rule 23(b)'s predominance requirement. *Id.* at *11. Defendants asserted that applying an overcharge regression that incorporated post-2008 data to the class period provided a regression 3.6% lower between September 2000 and December 2008 than the benchmark period. *Id.* at *12. Defendants asserted that the "disappearance" of the overcharge from September 2000 to December 2008 demonstrated that Plaintiffs could no longer show that class members suffered an antitrust injury or damages using common proof. *Id.* Plaintiffs argued, and the Court agreed, that removing all post-2008 data from Dr. Rausser's model was unnecessary. When it set the class cut-off date, the Court recognized that

"the UEP Certification program continued through 2013 and included the same types of instrumentalities as are alleged to have characterized the conspiracy pre-2008." *Id.* The Court therefore found that there was evidence for a jury to consider that the same allegedly conspiratorial conduct that occurred pre-2008 also occurred after 2008. *Id.* at *13. The Court stated that the basis on which it cut off the class period in 2008 was simply that Dr. Rausser's model could not parse out conduct that was legal in some states from conduct that was illegal in other states after 2008. *Id.* Defendant also asserted that the purported inconsistencies between Dr. Rausser's overcharge regression and his egg production model showed a disconnect between the impact and damages model and Plaintiffs' theory of the case, thereby undermining predominance. The Court opined that it had already accepted Dr. Rausser's overcharge regression and egg production modeling, and would not revisit any of its prior conclusions, particularly because these arguments could have been raised, or in some manner were raised, prior to the Court's order issuing class certification. Accordingly, the Court denied Defendants' motion for decertification.

***Lambert, et al. v. Nutraceutical Corporation,* 2017 U.S. App. LEXIS 17923 (9th Cir. Sept. 15, 2017).** 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. The Court previously certified a class 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. 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. The District Court agreed and granted Defendant's motion. Plaintiffs sought reconsideration and to appeal pursuant to Rule 23(f), and asserted that the District Court erred in not considering the alternative proposed damages model. The District Court denied Plaintiffs' motion for reconsideration, finding that Plaintiffs' proposed alternative still did not remedy the inability to calculate restitution for damages. On appeal, the Ninth Circuit reversed the District Court's ruling decertifying the class. *Id.* at *1. The Ninth Circuit found that the District Court abused its discretion in decertifying the class on the basis of Plaintiffs' inability to prove restitution damages because the damages model matched Plaintiffs' theory of liability, and Plaintiffs had shown that the damages model was supportable on evidence that could be introduced at trial. *Id.* Accordingly, the Ninth Circuit reversed and remanded the District Court's ruling decertifying the class.

***Suchanek, et al. v. Sturm Foods, Inc.,* 2017 U.S. Dist. LEXIS 138016 (S.D. Ill. Aug. 28, 2017).** Plaintiffs, a group of coffee purchasers, filed a class action under the consumer protection statutes of eight states. Plaintiffs and Defendants moved to exclude the opposing parties' damages expert pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and Rule 702 of the Federal Rules of Evidence. Defendants also moved to decertify the class. *Id.* at *2. The Court denied the parties' motions to exclude as well as Defendants' motion to decertify the class. First, Defendants challenged the reliability of the retail damages model and price premium model of Plaintiffs' experts. *Id.* at *13. The retail damages model, which provided consumers with a full refund of the purchase price of the coffee, was based on the notion that the product was worthless to consumers and that they would not have purchased the coffee if not for the deceptive packaging. Defendants argued that the retail damages model was legally and factually insufficient. The Court concluded that Defendants' criticisms regarding the retail damages model did not provide any grounds for finding the experts' opinion unreliable and inadmissible. *Id.* at *21. Likewise, the Court found that purported deficiencies that Defendant identified in the price premium model went to the weight and credibility of the expert's opinion, and not its admissibility. *Id.* at *27. Accordingly, the Court denied Defendants' motion to exclude Plaintiffs' expert report on damages. *Id.* As to Plaintiffs' motion to exclude, the Court determined that Plaintiffs failed to convince the Court that Defendants' expert's opinions and analysis were so unreliable that they were inadmissible under *Daubert* and Rule 702. *Id.* at *30. Consequently, the Court denied Plaintiffs' motion to exclude the expert's testimony. In their motion to decertify the class, Defendants challenged whether Plaintiffs satisfied Rule 23(b)(3)'s predominance requirement. Defendants asserted that neither of Plaintiffs' models was adequate for measuring damages on a class-wide basis because neither model provided a measure of damages attributable only to the alleged misconduct and that could be calculated on a class-wide basis. Defendants contended that Plaintiffs did not have a valid way to measure damages on a class-wide basis; therefore, individualized proof would be necessary

to determine each class member's damages, and as a result, decertification was required. *Id.* at *41. At the outset, the Court noted that even if Defendants established that neither damages model was valid and Plaintiffs were left without a way to measure damages on a class-wide basis, decertification was still not required, as individualized assessments of damages did not preclude class certification entirely. *Id.* at *42. In sum, the Court concluded that the retail damages model and the price premium damages model were both acceptable methods for calculating damages across the entire class. Consequently, the Court held that the predominance requirement was satisfied and it denied Defendants' motion to decertify. *Id.* at *61.

(xxii) Default Judgments In Class Actions

***Hancock, et al. v. A&R Flag Car Service,* 2017 U.S. Dist. LEXIS 136187 (E.D. Pa. Aug. 24, 2017).** Plaintiffs, a group of drivers, filed collective and class action against Defendants for unpaid overtime compensation, unpaid minimum wage compensation, and unlawful deductions, alleging violations of the FLSA, the Pennsylvania Minimum Wage Act ("PMWA"), the Pennsylvania Wage Payment and Collection Law ("PWPCL"), and Pennsylvania's common law. *Id.* at *1. Plaintiffs operated what are called "flag cars" that "escorted" over-sized wide load trucks on the highway. *Id.* at *2. Plaintiffs asserted that they regularly worked more than 40 hours per week and were paid $0.85 per mile for the miles that they drove while escorting oversized loads, $10 per hour for time spent sitting during delays, and approximately $25 and $55 per day for trips which required them to stay overnight in motels. *Id.* Plaintiffs filed the action on November 13, 2013. A summons was returned and filed on January 2, 2014, indicating that service had been accepted by authorized agent John Flagler on behalf of Defendant A&R. A summons was returned and filed on January 2, 2014, indicating that Defendant Flagler had been personally served on December 19, 2013. *Id.* at *3. Rule 12(a)(1)(A)(i) required Defendant to file a responsive pleading with the Court within 21 days after being served with the summons and complaint, *i.e.,* by January 9, 2014. *Id.* at *3-4. On February 4, 2014, because Defendants did not file an answer, Plaintiffs requested the Clerk of Court to enter a default against Defendants pursuant to Rule 55(a). *Id.* at *4. Plaintiffs subsequently filed an application for default judgment against Defendants pursuant to Rule 55(b). The Court ordered Defendants to show cause on or before June 16, 2014, as to why the Court should not grant the relief sought in Plaintiffs' application. Defendants did not respond, and the Court entered a default judgment in favor of Plaintiffs for an amount of $70,894.20. Plaintiffs filed a motion to compel post-judgment discovery, which the Court granted. Plaintiffs also filed a motion for sanctions against Defendants for failure to comply with the Court's order. Defendants did not respond and the Court ultimately granted Plaintiffs' motion for sanctions, and found Defendants to be in contempt for failure to comply with its order. *Id.* at *5-6. The Court ordered Defendants to pay attorneys' fees and costs of $1,125 to Plaintiffs on October 26, 2015, and to provide full, complete, and verified responses to Plaintiffs' discovery. Subsequently, Plaintiffs filed a second motion for sanctions, asking that the Court issue a bench warrant for the arrest of Defendant Flagler as president of Defendant A&R, which the Court denied. *Id.* at *6. Almost two months later, defense counsel entered his appearance on behalf of Defendants, filed a motion to set aside the default judgment against Defendants, and also filed a response to Plaintiffs' second motion for sanctions. *Id.* at *6-7. The Court stated that Defendants repeatedly chose to forgo participation in the action and failed to submit responsive pleadings to Plaintiffs' complaint and motions, ignored several orders of the Court, and refused to participate in post-judgment discovery. *Id.* at *16-17. The Court held that Defendants willfully disregarded repeated communications from Plaintiffs and the Court, and acted in bad faith and with callous disregard of their responsibility to defend the action. The Court found that Defendants were given many opportunities to respond to Plaintiffs, and to come to Court to show cause why a default judgment should not be entered against them, and why they should not be held in contempt. *Id.* at *18. Accordingly, the Court denied Defendant's motion to set aside and vacate the entry of a default judgment.

(xxiii) Discovery Issues In Class Actions

***Broyles, et al. v. Convergent Outsourcing, Inc.*, 2017 U.S. Dist. LEXIS 79151 (W.D. Wash. May 23, 2017).** Plaintiff, a consumer, alleged that Defendant accessed her credit report, despite knowing that her debts had been discharged in bankruptcy, in violation of the Fair Credit Reporting Act ("FCRA"). Plaintiff sent Defendant a deposition notice communicating her intent to depose its in-house counsel and litigation support specialist. Defendant moved to quash Plaintiff's notice of deposition and requested a protective order precluding the depositions of the identified individuals. Plaintiff moved to compel discovery and for Defendant to provide

additional information in response to interrogatories, requests for admission ("RFAs"), and requests for production of documents ("RFPs"). *Id.* at *3. Plaintiff contended that deposing Defendant's in-house counsel, Timothy Collins, was necessary because he anticipated that Defendant would raise an "advice of counsel" defense. *Id.* at *4. The Court disagreed and found that, as Defendant noted in its response, it neither pled advice of counsel as an affirmative defense nor otherwise put the defense at issue. Therefore, the Court held that Plaintiff's speculation that Defendant might raise the defense was an insufficient basis for permitting a deposition of Collins about the advice he rendered to his client, particularly given the plainly privileged nature of that advice. *Id.* at *5. Plaintiff's primary argument for deposing Defendant's litigation support specialist, Alisia Stephens, was that she waived attorney-client privilege through discussions with Plaintiff's counsel. The Court stated that, even if this contention had merit, Plaintiff must show that the information in Stephens' possession was unattainable elsewhere and that the information was crucial to her case. Because Plaintiff failed to do so, the Court also granted Defendant's motion to quash the deposition notice and request for a protective order. *Id.* at *6. As to Plaintiff's motion to compel, as a threshold matter, Plaintiff contended that Defendant objected on the basis of privilege, yet failed to produce a privilege log. *Id.* at *7. Having reviewed Defendant's responses to Plaintiff's discovery requests, the Court found that Defendant withheld information on the basis of privilege. Accordingly, the Court ordered Defendant to either produce a privilege log that complied with Rule 26 or withdraw its objections. *Id.* at *8. Plaintiff also moved to compel information through broader responses to interrogatories, RFAs, and RFPs. Defendant contended that it need not comply with this discovery because Plaintiff failed to make a *prima facie* showing under Rule 23. The Court noted that Plaintiff alleged that her proposed class consisted of "at least thousands of members," that the class was united by the common issue of Defendant obtaining a class member's consumer report despite knowing that the class member's debt had been extinguished, that the claims were typical across the class, and that the class action procedure was adequate because her interests were aligned with those of the class members. *Id.* at *10. The Court found that Plaintiff's allegations were sufficient to state a *prima facie* showing under Rule 23. Accordingly, the Court concluded that limited pre-certification discovery was warranted and it denied in part and granted in part Plaintiff's motion to compel. Specifically, the Court limited the overbroad categories and requests that asked for personal information of class members' bankruptcy proceedings, and it granted the motion to compel as to issues relevant to class certification.

***City Of Pontiac General Employees' Retirement Systems v. Wal-Mart Stores, Inc., et al.*, 2017 U.S. Dist. LEXIS 72516 (W.D. Ark. May 11, 2017).** Plaintiff, an investor, brought a putative securities fraud class action against Defendants based on a media report, according to which certain company officials at Wal-Mart's Mexican subsidiary allegedly paid bribes to obtain permits for new stores in Mexico. Plaintiff issued a deposition notice for C. Douglas McMillon, Wal-Mart's President and Chief Executive Officer. Ten days before the deposition was to take place, Defendant filed a motion seeking a protective order prohibiting the deposition of McMillon. Defendant asserted that deposing McMillon would create an undue burden on him by running afoul of the "apex doctrine" applicable to senior officials' depositions. *Id.* at *1. The Court noted that the apex doctrine has been discussed in case authorities in Arkansas when resolving discovery disputes, but there was no controlling authority that directed the Court on how to apply the doctrine. The Court explained that the apex doctrine "protects high-level corporate officials from deposition unless: (i) the executive has unique or special knowledge of the facts at issue; and (ii) other less burdensome avenues for obtaining the information sought have been exhausted." *Id.* at *2. The Court recognized that taking the deposition of a high-level corporate executive has the potential for abuse, and it must balance the competing interests of allowing discovery and protecting the parties and deponents from undue burden." *Id.* at *4. The Court stated that McMillon had certified the accuracy and completeness of statements describing on-going investigative activities and risk assessment related to the alleged bribery scheme. *Id.* at *5. McMillon was one of only four individuals who had signed certifications related to the alleged bribery scheme. McMillon was listed by Wal-Mart as a custodian whose records were likely to contain documents relevant to this case. Wal-Mart also identified McMillon as an employee who received or provided information, documents, and other input regarding the statements at issue in this case. McMillon sent or received over 100 different communications about the article published in *The New York Times*, the Mexican government's potential responses to bribery allegations in Mexico, and Wal-Mart's public statement concerning the Foreign Corrupt Practices Act in Mexico. Given McMillon's direct and personal involvement in the acts and issues in this case, the Court held that McMillon had unique knowledge of relevant issues in the litigation. *Id.* at *6. Moreover, the Court stated that Defendant provided no support for a

finding of undue burden. *Id.* at *7. Additionally, the Court noted that Plaintiff offered to minimize the inconvenience to McMillon by limiting the allotted time for the deposition and scheduling the deposition at a time and place that was most convenient for McMillon. *Id.* Accordingly, the Court denied Defendant's request for a protective order.

***Craft v. S.C. State Plastering, LLC,* 2017 U.S. Dist. LEXIS 4510 (D.S.C. Jan. 12, 2017).** Plaintiffs brought a class action alleging that Defendant caused construction defects when building new houses in its Sun City development. Defendants served subpoenas seeking production of documents and recordings related to town hall meetings that Plaintiffs' counsel conducted in advance of litigation. Plaintiffs move to quash the subpoenas on the grounds that, with the exception of two PowerPoint presentations, the requested materials did not exist. As for the presentations, Plaintiffs asserted that their counsel prepared them for the express purpose of giving legal advice to individuals seeking to become class members and were therefore protected by attorney-client privilege. Additionally, Plaintiffs claimed that the presentations were covered by the work-product doctrine because they were prepared in anticipation of related state court litigation. *Id.* at *3. Defendants disagreed about the existence of the requested materials and about whether any privilege applied to them. As to the missing materials, the Court stated that Plaintiffs were strongly encouraged to thoroughly search for the requested materials and for information that could lead to those materials. *Id.* at *4. As for whether the two existing presentations were privileged or protected, Defendants argued that Plaintiffs' counsel gave presentations at town hall meetings that were expressly open to the public and to the media. Because those meetings and their website were open to the public, Defendants contended that the requested materials could not be attorney-client privileged or protected under the work product doctrine. *Id.* Based on the evidence Defendants presented about the meetings, as well as the paucity of evidence to the contrary presented by Plaintiffs, the Court opined that the presentations were not communicated in confidence, and therefore were not protected by the attorney-client privilege. *Id.* at *5. Further, the Court stated that assuming, without deciding, that the presentations were subject to work product protection, any work product protection was waived when Plaintiffs' counsel decided to give the presentations at meetings that were open to the public. *Id.* at *6-7. The Court found that the public nature of the meetings, and the media attention paid to them, created a significant likelihood that Defendants might obtain the presentations, thereby waiving work product protection. *Id.* at *7. Moreover, Defendants informed the Court that they were permitted to send a court reporter to one of the meetings at which Plaintiffs' counsel made the presentations. *Id.* Accordingly, the Court concluded that any work product protection applicable to the presentations previously had been waived. The Court therefore denied Plaintiffs' motion to quash Defendant's subpoenas.

***D'Apuzzo, et al. v. United States*, Case No. 16-CV-62769 (S.D. Fla. April 11, 2017).** Plaintiff, a consumer, asserted that the Public Access to Court Electronic Records ("PACER") system charged users to access written opinions that should be free of charge pursuant to PACER's fee schedule. Defendant moved to stay discovery pending the Court's decision on Defendant's motion to dismiss. The Court granted the motion to stay. Defendant argued that it raised several facial challenges to Plaintiff's complaint and that discovery would be overly burdensome and costly. *Id.* at 1. Defendant asserted that discovery would inevitably entail a determination of whether PACER's system included written opinions that had not been classified as such and whether users had been charged for access to those misclassified documents. *Id.* Defendant submitted an affidavit of Wendall Skidgel, Jr. the Senior Attorney for the Administrative Office of the United States Courts ("AO"). Skidgel averred that the AO would have to develop software to search the "hundreds of millions of pages" to locate documents that might constitute written opinions. *Id.* Skidgel stated that the AO then would need to develop software that could match those records against the "2.2 to 2.4 billion PACER billing transaction records" to determine whether PACER users incurred charges for the documents. *Id.* Skidgel estimated that the analysis could cost in excess of $500,000. *Id.* at 2. Plaintiff did not provide any affidavits in response and stated that Defendant could respond to interrogatories or requests for admission in lieu of document production. *Id.* The Court, however, noted that Plaintiff failed to explain how Defendant could accurately and truthfully answer interrogatories or requests for admission without first conducting the database research. *Id.* The Court, therefore, found that Defendant made a specific and unrefuted showing that it would suffer prejudice and undue burden should discovery proceed. The Court, therefore, granted Defendant's motion to stay discovery pending the Court's decision on the motion to dismiss.

***Hapka, et al. v. CareCentrix, Inc*., 2017 U.S. Dist. LEXIS 113824 (D. Kan. Aug. 7, 2017).** Plaintiff filed a class action asserting a claim for common law negligence. Plaintiff alleged that wage and tax statements belonging to her and other employees of Defendant were stolen from Defendant by an unknown third-party. Plaintiff contended that Defendant "owed a duty to Plaintiff and the class to exercise reasonable care in obtaining, securing, safeguarding, deleting and protecting Plaintiff and class members' personal and tax information within its control from being compromised, lost, stolen, accessed and misused by unauthorized persons." *Id.* at *1-2. A fraudulent tax return was subsequently filed in Plaintiff's name. Plaintiff, therefore, further contended that she continued to be at a heightened risk for tax fraud and identity theft. *Id.* at *2. The Court had previously denied Defendant's motion to dismiss, finding that Plaintiff had sufficiently plead duty, breach, and causation. *Id.* Defendant requested permission to send a questionnaire to putative class members. Plaintiff contended that the questionnaire was misleading and would result in unfair prejudice. At the outset, the Court noted that discovery requests to absent class members were "generally disfavored." *Id.* at *3. In considering the propriety of such requests, Courts look to whether the information sought is necessary for trial preparation and whether the discovery requests made to class members were designed to be a tactic to take undue advantage of or otherwise limit the number of class members. *Id.* Defendant contended that, in order to test Plaintiff's claim that her experiences were substantially similar to those of a large class of people, it must first know what that class of people experienced. *Id.* Defendant also argued that, while Plaintiff feared an increased risk of encountering some unknown problem sometime in the future as a result of the identity theft, it needed to determine whether anyone else in the class shared Plaintiff's fear. *Id.* Plaintiff responded that "such an individualized damages inquiry was unnecessary and irrelevant to a trial of class-wide issues," particularly where Plaintiff intended "to show class-wide injury through the use of expert testimony." *Id.* at *4. Defendant asserted that it must be allowed to conduct discovery into whether the injuries and damages suffered by putative class members were similar to that suffered by the proposed class. *Id.* at *4-5. The Court held that Defendant's contention that it was "necessary" to take discovery at this stage in the proceedings regarding the damages of all putative class members was unfounded. *Id.* at *5. The Court ruled that Defendant failed to establish the necessity of receiving the requested information, particularly at this stage of the proceedings. *Id.* Accordingly, the Court denied Defendant's motion.

***Hardy, et al. v. Equitable Life Assurance Society Of The United States*, 2017 U.S. App. LEXIS 10600 (2d Cir. June 15, 2017).** Interveners Time, Inc. ("Time") and the Reporters Committee for Freedom of the Press appealed an order from the District Court denying their request to unseal several documents on the docket of a class action. *Id.* at *1. On appeal, the Second Circuit vacated the order of the District Court and remanded so it could balance the presumptions of public access to court documents against countervailing interests. *Id.* at *1-2. In 1983, a member of a demolition-workers union filed a class action against various parties involved in demolishing the Bonwit Teller building. In 1998, the class members settled with various Defendants, and the District Court approved the settlement. *Id.* at *2. The District Court sealed four documents, including: (i) a transcript of a conference on October 26, 1998; (ii) Plaintiffs' brief filed on November 9, 1998; (iii) the District Court's order approving the settlement dated December 30, 1998; and (iv) the District Court's order approving the settlement dated February 9, 1999. *Id.* The Second Circuit noted that two of the documents requested to be unsealed – the transcript and the brief – had been destroyed pursuant to the District Court's standard document retention policies, and, therefore, it refrained from ruling on the unsealing request as it pertained to those documents. *Id.* The Second Circuit explained that both the common law and the First Amendment created presumptions that certain types of documents should be publicly available. The Second Circuit opined that both applied to the two District Court orders but that the presumptions of access did not automatically mean that the documents should be unsealed. *Id.* at *3. The Second Circuit therefore remanded the case to the District Court for a determination as to whether countervailing interests overcame the two presumptions. *Id.* The Second Circuit held that the common law presumption of access attaches to "judicial documents," and judicial documents are those that are "relevant to the performance of the judicial function and useful in the judicial process." *Id.* The Second Circuit concluded that the District Court's orders in this case were judicial documents, and that the common law presumption therefore attached. *Id.* at *3-4. The Second Circuit stated that the next analytical step would be to determine the strength of the presumption as it applied to these documents. The Second Circuit held that interests such as protection of on-going investigations, safety of witnesses, national security, and trade secrets may be sufficient to defeat the presumption, and it would leave it for the District Court to identify any interest in favor of secrecy sufficient to defeat the presumption that court orders be open to the

public. *Id.* at *4. The Second Circuit noted that the First Amendment also created a presumption of public access that likewise attached to the District Court's orders; however, it also may be overcome by competing values. On remand, the Second Circuit directed the District Court to consider whether any interests could overcome the common law and First Amendment presumptions of access to the two District Court orders. *Id.* The Second Circuit further instructed that any decision that the documents should remain sealed must be supported by "specific, on the record findings" and must explain why sealing was "essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at *5. Accordingly, the Second Circuit vacated the District Court's order and remanded for further proceedings.

***In Re Anthem Inc. Data Breach Litigation,* 2017 U.S. Dist. LEXIS 23486 (D.D.C. Feb. 21, 2017).** Plaintiffs brought a multi-district consolidated class action against Defendant, a health insurance provider and its affiliates, after the sensitive information of 80 million customers was compromised. *Id.* at *7. Plaintiffs alleged that Defendant: (i) failed to adequately protect its data systems; (ii) failed to disclose to customers that it did not have adequate security practices; and (iii) failed to timely notify customers of the data breach. *Id.* at *8. Plaintiffs subpoenaed documents from the United States Office of Personnel Management ("OPM"), the agency responsible for negotiating and administering the federal government's health insurance contracts with Defendant. *Id.* at *2. The subpoenaed records related to audits of Defendant's informational technology systems that the OPM conducted before and after the cyberattack. The OPM released a portion of the documents requested, but withheld audit work papers, meeting write-ups, and emails on the basis that they were privileged under the deliberative process and/or law enforcement privileges. *Id.* Plaintiffs filed a motion to compel the OPM to disclose the withheld records. *Id.* The Court granted the motion in part and denied it in part. After an *in-camera* review of the documents, the Court held that most of the withheld documents were protected by the deliberative process privilege, and some of the documents contained only factual information, and therefore were not protected under either privilege. *Id.* at *3. The Court concluded that all withheld emails were subject to the deliberative process privilege because they were pre-decisional and deliberative. *Id.* at *17. The emails encompassed a wide range of suggestions, opinions, productive disagreements, and preliminary conclusions involving revisions to the OPM's standard federal contracts and recommendations for modifications to Defendant's contract that were uniformly deliberative. The Court further determined that only a portion of the audit work papers and meeting write-ups were subject to the deliberative process privilege. *Id.* at *17. The Court ruled that two reports, which contained only factual information, were not deliberative and, therefore, were not protected by the privilege. However, the Court agreed with the OPM that Plaintiffs did not sufficiently establish that their need to use the documents protected by the deliberative process privilege outweighed the government's interests in withholding those documents. Accordingly, the Court determined that the OPM was not required to produce those privileged documents. Because the Court concluded that several audit work papers, two meeting write-ups, and portions of three other meeting write-ups were not subject to the deliberative process privilege, the Court considered the OPM's secondary argument that those materials were protected from disclosure under the law enforcement privilege. Plaintiffs maintained that the privilege did not apply to the audit work papers and meeting write-ups because the materials were not created for and did not otherwise relate to an on-going criminal investigation. *Id.* at *32. The Court ruled that, even assuming the law enforcement privilege applied, the balance of interests warranted disclosure because the work papers and meeting write-ups did not pertain to an on-going criminal or civil investigation. *Id.* at *33. In sum, the Court granted in part and denied in part Plaintiffs' motion to compel. *Id.* at *36.

***In Re Broiler Chicken Antitrust Litigation*, 2017 U.S. Dist. LEXIS 73219 (N.D. Ill. April 21, 2017).** Plaintiffs filed a motion to compel and a request for leave to issue preservation subpoenas to halt destruction of critical data by non-parties. Plaintiffs asked the Court to: (i) grant leave for the End-User Plaintiffs to serve document preservation subpoenas on some of Defendants' customers; and (ii) order Defendants to produce certain information to the End-User Plaintiffs that they needed to prepare and serve the subpoenas. *Id.* at *13. The Court denied the motion without prejudice. The End-User Plaintiffs sought leave to serve hundreds or more of Defendants' customers with document preservation subpoenas that required preservation of large amounts of transaction-level data for potentially thousands of products spanning roughly a decade. Plaintiffs further requested Defendants to produce: "for each year, each of your customer's names, phone number(s), and address(es); the UPC, SKU, product number, or other unique purchaser-specific identifier, and associated product description for each type of Broiler sold to each customer, and respective unit sales to each customer."

Id. at *14. Defendants argued that producing the information and allowing the End-User Plaintiffs to serve document preservation subpoenas on their customers would be extremely burdensome on them and their customers, and would likely require the disclosure of confidential information about their businesses and their customers. *Id.* at *15. The Court stated that it did not find the End-User Plaintiffs' broad requests proportional to the needs of the case and consistent with efficiency and judicial economy. *Id.* at *18. As an initial matter, the Court explained that Defendants had filed motions to dismiss and, although the Court could deny those motions in their entirety, if those motions were granted in their entirety, the discovery that the End-User Plaintiffs ultimately requested from Defendants' customers would be moot. *Id.* at *19. Further, even if the motions were granted only in part, the Court's ruling still could limit the scope of the case in terms of the claims asserted, the years involved, the states covered, the products implicated, and the number of Defendants remaining in the case. Further, the Court was not convinced that, even if the motions to dismiss did not narrow the case, the End-User Plaintiffs had sufficiently shown that there was a substantial risk that Defendants' customers would destroy information necessary to their case before the Court ruled on Defendants' motions to dismiss or that the risk that would occur outweighed the burden on Defendants and the third-parties presented by Plaintiffs' very broad early discovery requests and the broad subpoenas they proposed to serve on third-parties. *Id.* at *21. Accordingly, the Court held that, although there may be a need to increase the likelihood that relevant information in the hands of Defendants' customers was not destroyed before formal discovery began, the End-User Plaintiffs had not carried their burden to show that the broad document preservation subpoenas that they wanted to serve were proportional to the needs of the case and consistent with judicial efficiency and economy. *Id.* at *29. Accordingly, the Court denied the End-User Plaintiffs' motion to compel.

***In Re Cook Medical Inc. Filters, Marketing, Sales Practices & Products Liability Litigation*, 2017 U.S. Dist. LEXIS 149915 (N.D. Ind. Sept. 15, 2017).** In a products liability action regarding an implanted filter, Plaintiff sought damages including pain and suffering, loss of enjoyment of life, and continuing medical care. The matter was part of a larger MDL and the first bellweather trial set. Defendants filed a motion to compel several discovery items. Defendants sought as a sanction a blanket waiver of objections to their first interrogatories and first requests for production due to Plaintiff's delayed response and failure to produce a privilege log. *Id.* at *2-3. The Court found that a waiver of all objections was not warranted because waiver of all objection is generally reserved as a sanction only for unjustified delays. In this instance, the Court determined that Plaintiff's delay was only 11 days and was caused in part by office closures due to a hurricane. The Court held that under these circumstances, such a harsh sanction would be unjust. *Id.* at *3. The Court further determined that the lack of a privilege log did not justify waiver of all privileges. The Court stated that a blanket waiver is not an appropriate sanction when the party seeking protection makes a good faith showing that the requested material is privileged. Defendants also moved for an order to compel responses and a privilege log for interrogatory numbers eight and 20 and requests for production numbers two, 12, 20, 27-30, and 37, which covered various topics. Plaintiff objected on privilege grounds and contended that she did not provide responses or a privilege log for those discovery requests because they were so broad that Plaintiff could not tell what Defendants wanted, and that they would require Plaintiff to log everything. The Court found that Plaintiff's assertion that Defendants made providing a privilege log impossible by defining "you" to include Plaintiff, her attorneys, and her representatives was not persuasive because half of the interrogatories and requests in question did not contain the word "you." *Id.* at *4. Accordingly, the Court concluded that Plaintiff must respond to Defendants' interrogatories and requests for production and provide a privilege log within 14 days. Finally, the Court limited the requests as to Plaintiff's social media postings and ruled that Plaintiff need not turn over any screen shots of private social media pages. *Id.* at *9. Accordingly, the Court granted in part and denied in part Defendants' motion to compel.

***In Re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation,* 2017 U.S. Dist. LEXIS 150427 (N.D. Cal. Sept. 15, 2017).** In this multi-district class action litigation, Plaintiffs – a group of consumers, dealers, securities purchasers, and government agencies – alleged that Volkswagen used software designed to cheat emissions tests and deceive federal and state regulators in nearly 600,000 Volkswagen, Porsche, and Audi-branded turbocharged direct injection ("TDI") diesel engine vehicles sold in the United States. Shortly after the litigation began, the parties, including Volkswagen and the U.S. Department of Justice, agreed to the terms of a stipulated protective order, which facilitated the production of confidential and highly confidential discovery material ("protected material.") *Id.* at *303. Volkswagen then shared nearly 25 million pages of documents with the DOJ (the "discovery material"), and the DOJ used those documents to prosecute

claims against Volkswagen based on the emissions fraud. The DOJ also shared these documents with its Civil Division, which investigated whether Volkswagen violated certain U.S. customs laws and other federal laws. *Id.* at *304. Counsel for the DOJ then informed Volkswagen that the Civil Division intended to provide the discovery material to a German law firm ("GSK") to use in the German securities action against Volkswagen, and that GSK might file some of the discovery material with the German court overseeing that litigation. *Id.* Volkswagen argued that the protective order did not authorize the Civil Division to share the discovery material with GSK. *Id.* at *305. The Court found that the default rule under the protective order was that discovery material could not be disclosed to counsel who planned to use the material in foreign litigation against Volkswagen. *Id.* The Court opined that Volkswagen's participation in the MDL proceeding did not obligate it to produce discovery in other proceedings, let alone foreign proceedings. The DOJ argued that the Civil Division obtained discovery material by following the procedures laid out, as Volkswagen originally provided the discovery material to the DOJ, counsel for the DOJ then notified Volkswagen that it intended to share the material with the Civil Division pursuant to § 13.7. *Id.* at *309. The Civil Division asserted that it therefore had authority to share the discovery material with GSK pursuant to § 13.7, because by doing so it would be "using that material in accordance with the agency's applicable statutes, rules and regulations." *Id.* at *310. The Court noted that nothing in § 13.7 directly addressed disclosure to foreign counsel. *Id.* at *313. The Court stated that it was clear that the parties contemplated that the protective order did not permit the discovery material to be disclosed to Plaintiffs in domestic securities actions. *Id.* at *314. As a result, the Court determined that it seemed almost inconceivable that Volkswagen would have been willing to permit the discovery material to be used by Plaintiffs in foreign securities litigation. The Court concluded that if the DOJ and Volkswagen had intended for the United States to be able to use the MDL discovery material in any proceeding – foreign or domestic – they easily could have said so. *Id.* at *315. The Court accordingly found that it was clear parties did not mutually intend for the order to permit the DOJ to share discovery material with foreign counsel in securities litigation against Volkswagen in Germany. Accordingly, the Court denied the DOJ's motion.

***In Re Volkswagen "Clean Diesel" Marketing, Sales Practices & Products Liability Litigation,* 2017 U.S. Dist. LEXIS 173165 (N.D. Cal. Oct. 18, 2017).** In this multi-district class action litigation, Plaintiffs – a group of consumers, dealers, securities purchasers, and government agencies – alleged that Volkswagen used software designed to cheat emissions tests and deceive federal and state regulators in nearly 600,000 Volkswagen, Porsche, and Audi-branded turbocharged direct injection ("TDI") diesel engine vehicles sold in the United States. Volkswagen subsequently settled the emissions-fraud claims brought by a consolidated class of consumers. *Id.* at *669. In litigating those claims, Volkswagen produced more than 20 million pages of documents with class counsel ("MDL Production"). Plaintiffs in on-going shareholder litigation against Volkswagen ("ADR Plaintiffs") sought access to the entire MDL Production. *Id.* Volkswagen refused, and ADR Plaintiffs sought an order to compel Volkswagen to make the MDL Production available. The Court denied the motion to compel. The Court noted that the size of the MDL Production was substantial and although it might include documents relevant to whether Volkswagen violated federal securities laws, the repository also included irrelevant documents. *Id.* at *670. The Court found that the ADR Plaintiffs must comply with Rule 34(b) and serve Volkswagen with requests for production. The Court also determined that Volkswagen must then produce the requested documents or "state with specificity the groups for objecting to the request." *Id.* The Court concluded that the ADR Plaintiffs were not entitled to complete access of the MDL Production simply because there may be an overlap between their claims and those in the consolidated consumer class action. Accordingly, the Court denied the ADR Plaintiff's motion to compel.

***Mann, et al. v. City Of Chicago*, 2017 U.S. Dist. LEXIS 146029 (N.D. Ill. Sept. 8, 2017).** Plaintiffs sued Chicago police officers and the City of Chicago (the "City") alleging that Defendants wrongfully arrested, detained, and prosecuted them and that they were abused at the Chicago Police Department's ("CPD") "off the books" detention center located at the intersection of South Homan Street and West Filmore Avenue in Chicago ("Homan Square"). *Id.* at *2. Plaintiffs filed a motion to compel Defendants to include certain custodians from the Mayor's office in their email search, including Mayor Emanuel and ten members of his senior staff. Defendants argued that Plaintiffs' request was burdensome and that Plaintiffs failed to provide any grounds to believe that the proposed custodians were involved with the CPD's policies and practices at Homan Square. *Id.* at *3. Plaintiffs argued that communications within, from, and to the Mayor's Office regarding Homan Square were relevant to the issues of notice, ratification, cover-up, and deliberate indifference. *Id.* at *7. In light of the

allegations in the complaint, the Court agreed that these communications were relevant for purposes of discovery. The City argued that Plaintiffs' request for additional custodians lacked a "factual basis." *Id.* at *8. The City specifically took issue with Plaintiffs' assertion that the Mayor was a "policy-maker" for the City. *Id.* The City asserted that Plaintiffs "do not contend that the Mayor or his aides created or influenced any CPD policies at Homan Square" and Plaintiffs' only attempt to link the Mayor to Homan Square was a "double hearsay statement" in an April 2015 newspaper article which the Plaintiffs had "no evidence to support." *Id.* The Court determined that the City's arguments imposed too high a burden on Plaintiffs. On summary judgment or at trial, Plaintiffs would have to provide evidence that "the unlawful practice was so pervasive that acquiescence on the part of policy-makers was apparent and amounted to a policy decision" or that a policy-making official responsible for final government policy on the police practices at issue directed the particular conduct that caused Plaintiffs' harm. *Id.* at *9. However, the Court opined that, at this stage of discovery, Plaintiffs did not have to establish that the Mayor was a policy-maker or had final authority on the police practices at issue or that there was a "nexus" between the custodians of the emails and CPD's alleged activities at Homan Square. *Id.* at *10. The Court concluded that Plaintiffs did not have to provide evidence of the Mayor's connection to Homan Square in order to get discovery potentially showing (or not showing) the Mayor's connection or his staff's connection to Homan Square. *Id.* at *12. The Court held that Plaintiffs were entitled to discover, among other things, whether the Mayor or his high ranking staff made non-public statements or were involved in non-public communications about Homan Square. The City argued that it would be "burdened with the time and expense of searching the email boxes of nine additional custodians." *Id.* at *14. However, the Court found that the City did not offer any specifics or even a rough estimate about the burden. The Court stated that it was mindful that every additional custodian increased the risk of duplication of emails and the time and resources necessary to review emails. Therefore, the Court rejected Plaintiffs' request for the emails of Forest Claypool, Adam Collins, Joan Coogan, and Eileen Mitchell because of their short tenure. *Id.* at *16. However, the Court ordered Defendants to include Mayor Rahm Emanuel, Joe Deal, Kelly Quinn, Lisa Schrader, and Shannon Breymaier as custodians in their email search.

***Palombaro, et al. v. Emery Federal Credit Union*, 2017 U.S. Dist. LEXIS 6365 (S.D. Ohio Jan. 17, 2017).** Plaintiffs filed a putative class action alleging that Defendant violated that Real Estate Settlement Procedures Act ("RESPA") by receiving cash and/or sham marketing services for referrals of business to Genuine Title, LLC, a title services company. Defendant moved to compel Plaintiffs' responses to several interrogatories, and the Court granted the motion in part. First, Defendant argued that several Plaintiffs waived all objections to the interrogatories by failing to serve timely objections to them. *Id.* at *8. Plaintiffs argued that the delay in serving discovery responses should be excused because Plaintiffs made good faith attempts at compliance and provided their responses timely or within one week. Further, Plaintiffs asserted that the delay was minor and the delayed responses were "nearly identical" to those that were timely. *Id.* at *9. The Court determined that Plaintiffs' delay in responding was minimal as all objections were filed within one week of the deadline. The Court opined that the delay constituted only a minor technical violation of the discovery rules and did not justify waiver of the objections in this case. The Court further found that Plaintiffs had advised Defendant before the deadline expired that they were finalizing their answers and would provide them to Defendant "promptly upon their receipt." *Id.* at *12. Finally, the Court held that Plaintiffs' objections raised serious issues implicating the attorney work product doctrine in answering Defendant's interrogatories, and it would therefore be inequitable to waive Plaintiffs' objections. *Id.* at *12-13. Based on the foregoing, the Court declined to find that Plaintiffs waived their objections to the interrogatories. As to Defendant's motion to compel interrogatories 11, 12, and 13, the Court found that Plaintiffs' objections under the work-product doctrine were well-taken. The Court stated that Rule 26(b)(3) provides work-product protection to documents and tangible things prepared in anticipation of litigation or for trial by or for an attorney. *Id.* at *17. The Court stated that Defendant requested Plaintiffs to describe how they planned to "establish" that alleged referral payments and fee-splitting payments would be tied to each putative class member for purposes of the anticipated class certification motion, and how they planned to "ascertain" the diligence taken by each putative class member to investigate their RESPA claims. *Id.* at *20. The Court found that Defendant's questions did not seek underlying facts that would shed light on the class certification issues, but rather were focused on Plaintiffs' legal strategy. Therefore, the Court denied Defendant's motion to compel as to interrogatories 11, 12, and 13. In interrogatory 15, Defendant asked Plaintiffs to describe "the putative class you seek to represent," including whether the putative class included individuals who: (i) are currently aware of their alleged rights to prosecute a claim against Defendant; (ii) received a communication

from Plaintiffs' counsel; (iii) were not referred to Genuine Title; or (iv) were referred to Genuine Title by an employee of Defendant who did not receive a kickback or split fee in exchange for the referral. *Id.* at *22. The Court found that Plaintiffs failed to respond to the question of whether they sought to represent a class that will include class members who were not referred to Genuine Title or who were referred to Genuine Title by an Emery employee who did not receive a kickback or split fee. *Id.* at *24. Accordingly, the Court granted Defendant's motion in part as to interrogatory 15, and ordered Plaintiffs to amend their responses to provide answers to the remaining questions. The Court stated that in interrogatory 16, Defendant requested Plaintiff's trial plan. The Court found that there was no requirement that Plaintiffs submit a formal trial plan for purposes of class certification and thereby it denied Defendant's motion to compel with regard to the trial plan. Accordingly, the Court granted in part and denied in part Defendant's motion to compel.

***Washtenaw County Employees' Retirement System, et al. v. Walgreen Co.,* 2017 U.S. Dist. LEXIS 64688 (N.D. Ill. April 28, 2017).** Plaintiffs, a group of stockholders, alleged that Defendant made material misrepresentations and omitted material facts concerning its pharmacy business in violation of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. The Court had previously bifurcated class certification and merits discovery. Plaintiff filed a motion to compel Defendant to produce documents in response to Plaintiffs' document request. *Id.* at *2. The Court found that Plaintiff had not met his burden to demonstrate the relevance of the particular discovery requests to class certification. The discovery at issue requested Defendant's internal documents that: (i) Defendant considered prior to making certain announcements in public statements; (ii) supported Defendant's public statements in SEC filings or in the press in 2013-2014 or that were prepared for various Board meetings regarding four specified topics; and (iii) the causes of changes in the price of common stock between March 25, 2014, and August 8, 2014, listing specified dates. *Id.* at *3. Plaintiff asserted that the information was relevant because Defendant might argue, in response to Plaintiff's motion for class certification: (i) truth-on-the-market and loss causation; and (ii) that the class period should end on June 24, 2014. *Id.* Regarding the first issue, the Court stated that Defendant represented that it would not argue materiality and loss causation in response to the class certification motion. Defendant also stipulated that it would not rely on any of the non-public information that was the subject of Plaintiff's motion to compel to respond to the motion for class certification. The Court concluded that none of the discovery requests at issue impacted the question of class certification. In most standard securities fraud class actions, the class period coincides with "the period during which Defendants' fraud was allegedly alive in the market." *Id.* at *5. Thus, the Court explained, the only documents relevant to the class certification decision involved information that was publicly available in the market. *Id.* at *5-6. Therefore, the Court determined that the internal Walgreens documents would not assist the Court in finding when Defendant's alleged fraud was alive in the market. *Id.* at *6. Similarly, the Court held that questions of typicality, adequacy, predominance, and superiority were not affected by internal information that was not otherwise disseminated to the investing public. Therefore, the Court denied Plaintiff's motion to compel.

(xxiv) Disqualification Of Counsel In Class Actions

***Wade, et al. v. The Barton Law Group,* 2017 U.S. Dist. LEXIS 1006 (E.D. Mo. Jan. 4, 2017).** In this class action, Defendant filed a motion to disqualify Plaintiffs' counsel. The Court determined the behavior that Plaintiffs' counsel had exhibited during the litigation was unacceptable and concerning in this and other similar cases involving Defendant.. The Court opined that the disqualification of a party's counsel of choice is an extreme measure and should be imposed only when "absolutely necessary." *Id.* at *1. The Court, therefore, found that disqualification of Plaintiffs' counsel would be inappropriate, and instead it imposed certain protective measures to ensure that the case progressed in an orderly and professional manner. *Id.* at *2. The Court held that all future communications between the parties must be in writing, any communication from Plaintiffs' counsel to Defendant be directed to Defendant's counsel, and that depositions be conducted in a designated location by making arrangements with the Office of the Clerk of Court or by telephone at the discretion of Defendant's counsel. *Id.* The Court also directed that Defendant would be permitted to participate by telephone in third-party depositions, and in the event the parties engaged in mediation, the mediation would be conducted in the Court's chambers. *Id.* The Court thereby denied Defendant's motion for disqualification of Plaintiffs' counsel.

(xxv) Employee Testing Issues In Class Actions

***Arndt, et al. v. City Of Colorado Springs*, 2017 U.S. Dist. LEXIS 107772 (D. Colo. July 12, 2017).** Plaintiffs, a group of female police officers, filed a class action alleging that Defendant's use of a physical fitness test to determine continuation of employment as Colorado Springs police officers had a disparate impact on women officers over 40 years of age in violation of Title VII of the Civil Rights Act. The parties then filed motions *in limine* under Rule 702 challenging the opinions in reports and deposition testimony of several experts that were submitted under Rule 26(a)(2)(B). After reviewing the papers filed on those motions, the Court proceeded with the bench trial and permitted the witnesses to testify; the Court considered the objections in determining the credibility of those witnesses. After consideration of the evidence submitted at trial and the written and oral arguments of counsel, the Court made findings of fact and conclusions of law required by Rule 52. Defendant contracted with Human Performance Systems, Inc. ("HPS") to develop a physical abilities test to evaluate all of its officers for fitness for duty. Defendant then adopted a four-part physical abilities test ("PAT"), comprised of a one-minute sit-up test; a one-minute push-up test; an agility run; and a running test known as a BEEP test. *Id.* at *4. The first year in use, 421 of 467 men passed, for a passing rate of 90.5%, and 40 of 67 women passed the practice test, for a passing rate of 59.7%. *Id.* at *4-5. Defendant then issued General Order 1915, stating that all police officers were required to participate in the PAT test and "any employee who does not meet the Minimum Performance Standard will be placed on light duty and on a Performance Improvement Plan (PIP) until he/she can successfully complete the process." *Id.* at *5. The Court explained that a Plaintiff claiming disparate impact discrimination must establish that an identifiable employment practice or policy caused a significant disparate impact on a protected group. If a Plaintiff makes that showing, the burden shifts to the employer "to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity." *Id.* at *6. The Court found that Plaintiffs identified a specific employment practice, *i.e.*, the requirement to meet the minimum performance standard or be placed on light duty. *Id.* The Court further held that the evidence presented at trial supported the conclusion that the PAT disparately impacted women. The Court determined that Plaintiffs' evidence of disparate impact was sufficient to consider whether Defendant's defense of business justification was proven, and therefore it looked to the validity of the PAT. *Id.* at *15-16. The Court stated that the evidence did not show that the PAT tested an officer's ability to perform the minimum amount of physical activity necessary to effectively and safely perform their job. *Id.* at *18. The Court looked to Plaintiff's expert testimony from Dr. Arthur Weltman, a professor of kinesiology and exercise physiology, who concluded that there was insufficient validity evidence to support use of the PAT. *Id.* at *21-22. Dr. Weltman opined that the push-up test, the sit-up test, and the BEEP test did not measure the physical abilities that the PAT purported to assess with accuracy. The HPS' job analysis ranked physical abilities required for the job and identified muscle strength as the highest, but according to Dr. Weltman, the one-minute sit-up and push-up tests measured muscle endurance rather than muscle strength. *Id.* at *22. Dr. Weltman therefore stated that that those tests were not appropriate for assessing a person's ability to perform tasks for which muscle strength is the most significant physical ability. Most significantly, the Court found that the evidence presented at trial revealed that the scoring system and cut-off score selected by HPS were meaningless. Accordingly, the Court ruled that the Colorado Springs Police Department's employment policy of using the PAT as the exclusive standard for determining whether an incumbent officer was fit for regular duty violated Title VII of the Civil Rights Act.

***Smith, et al. v. City Of Boston,* 2017 U.S. Dist. LEXIS 116637 (D. Mass. July 26, 2017).** Plaintiffs, a group of current and former African-American police officers, brought an action alleging that Defendant's exam for promotion from sergeant to lieutenant discriminated against minority candidates in violation of Title VII of the Civil Rights Act of 1964. In its prior ruling of *Smith v. City of Boston*, 144 F. Supp. 3d 177, 180-81 (D. Mass. 2015) ("*Smith I*"), the District Court agreed with Plaintiffs after a bench trial, holding that the "lieutenants' exam had a racially disparate impact and was insufficiently job-related to survive the Plaintiffs' challenge." *Id.* at *5. In a different case entitled *Lopez v. City of Lawrence*, 2014 U.S. Dist. LEXIS 124139 (D. Mass. Sept. 5, 2014) ("*Lopez I*"), a group of African-American and Hispanic patrolmen challenged the civil service exam for promotion from patrolman to sergeant, also claiming disparate impact discrimination. The District Court in *Lopez I* rejected Plaintiffs' claim after a bench trial. The District Court reasoned that, although the sergeants' exam "imposed a significantly disparate impact on minority applicants," Defendants established that the exam was nevertheless justified by business necessity. *Id.* at *48, 60-61. Plaintiffs appealed in *Lopez*, and the First Circuit issued a ruling affirming the District Court's decision in *Lopez I* entitled *Lopez v. City of Lawrence*, 823 F.3d 102 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1088 (2017) ("*Lopez II*"). The First Circuit concluded that the sergeants' exam

had a significant disparate impact on racial minorities, and that the District Court did not clearly err in concluding that business necessity nevertheless justified the exam. In light of the First Circuit's order, the District Court revisited its earlier ruling in *Smith I*. Defendant argued that *Lopez II* compelled the District Court to reach a different conclusion on the issue of business necessity, and to consider whether there existed an equal or better exam that identified the best candidates for the lieutenant position, which had a less disparate impact on racial minorities. Defendant argued that the District Court used the wrong legal standard to evaluate the exam's validity. It argued that *Lopez II* required the District Court to determine the exam's validity by utilizing a "better than random selection" standard, not the "representative sample test" established by the EEOC's Uniform Guidelines on Employee Selection Procedures ("Guidelines"). *Id.* at *15. In its earlier analysis, the District Court reasoned that the Guidelines "provide a sensible way of evaluating whether a given test . . . measures an important work characteristic, and whether the outcomes of that test are actually correlated with the characteristic measured." *Id.* at *11. Using the Guidelines, and relying on expert testimony, the District Court determined that the exam results were not predictive of or correlated with the important work behaviors of police lieutenants. *Id. Lopez II*, according to the District Court, did not require a different conclusion. Indeed, the District Court stated that the "First Circuit certainly did not ban the use of the Uniform Guidelines' representative sample test." *Id.* at *15-16. Such a ban, the District Court observed, would be "surprising" because they come from the EEOC and "are due an appropriate degree of deference." *Id.* at *16. Second, Defendant argued that the District Court should reconsider its rejection of the education and experience ("E&E") component of the lieutenants' exam. Because the First Circuit found in *Lopez II* that the E&E component of the sergeants' exam was useful to assess qualities important to a sergeant's daily work, Defendant argued that the District Court should not have excluded the E&E component from its validity analysis of the lieutenants' exam. The District Court was unpersuaded, noting that it did consider the E&E in its ruling, but held that the "E&E did not rescue an otherwise invalid written exam." *Id.* at *21. The holding in *Lopez II* did not change the District Court's opinion given the variations between the two cases. The District Court: "(1) relied on expert testimony that the E&E component failed to differentiate among candidates or demonstrate the [knowledge, skills, and abilities] necessary in a lieutenant; (2) had no evidence that incumbent lieutenants performed better on the written exam; and (3) had no evidence to show that the E&E component was valid on its own." *Id.* at *21-22. Accordingly, unlike the evidence at issue in *Lopez II* regarding the sergeants' exam, the evidence before the District Court did "not establish that the E&E measured qualities important to a lieutenant's daily responsibilities." *Id.* at *22. Defendant further asserted that, in light of *Lopez II*, the District Court "inappropriately applied a heightened validity requirement for rank ordering" and that "rank ordering furthers [the City's] interest in eliminating patronage and intentional racism." *Id.* The District Court disagreed and reasoned that "[w]here a selection procedure not only has a disparate impact on a pass-fail basis, but also compounds that effect through use of rank ordering, each hiring decision carries an increased risk of a discriminatory result." *Id.* at *24. In that case, the District Court held that it "did not err in applying a heightened validity requirement for rank ordering," and the First Circuit's decision in *Lopez II* did not compel a contrary conclusion. *Id.* The District Court stated that the evidence before it did not support an inference that candidates who performed better on the lieutenants' exam would be better performers on the job. *Id.* at *25. Defendant also challenged the District Court's finding of liability without first addressing whether an equally valid, less discriminatory alternative test existed to identify successful candidates for the lieutenant position. Specifically, Defendant argued that the District Court could not reject Defendant's justification for the lieutenants' exam absent "some showing that there exists an available alternative with less disparate impact that serves [the City's] legitimate needs." *Id.* at *26. The District Court again disagreed and held that the First Circuit's ruling in *Lopez II* did not change the burden-shifting framework that applies to the analysis of disparate impact cases. *Id.* If Plaintiffs proved that a test has a significant disparate impact, and Defendant then failed to prove that the test was job- related and consistent with business necessity, "then Defendant loses, regardless of Plaintiffs' showing of an alternative." *Id.* Accordingly, the District Court did not change its previous ruling in favor of Plaintiffs.

(xxvi) Experts In Class Action Litigation

***Bryd, et al. v. Aaron's Inc.,* 2017 U.S. Dist. LEXIS 41030 (W.D. Pa. May 22, 2017).** 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 had previously filed a motion for class certification including an expert report from Dr. Micah Sherr

("Original Sherr Report"). The Court denied the motion, which was reversed and remanded on appeal for further consideration. Plaintiffs subsequently filed a renewed motion for class certification including the Original Sherr Report as an exhibit in support of the motion for class certification. Defendant filed an opposition and continued to rely upon its previously filed expert report ("Rubin Report"). Thereafter, Plaintiffs submitted a reply brief including a new expert report ("New Sherr Report"). *Id.* at *5. Defendant filed a new motion to strike, arguing that the report was improper rebuttal testimony, and the Court granted the motion. Defendant argued the New Sherr Report went beyond the permissible purpose of rebuttal evidence and attempted to advance new theories and methodologies to account for deficiencies in Plaintiffs' original rebuttal expert report as it pertained to their Rule 23(b)(3) predominance argument. *Id.* Plaintiffs claimed that it was not their burden at this stage of the proceedings to prove more than a common proof for each and every class member. However, Plaintiffs included a new rebuttal report that refuted Defendants' previous arguments and would prove that a liability analysis could be completed on a common class-wide basis rather than an individualized analysis. *Id.* at *10-11. The New Sherr Report concluded that Dr. Sherr was able to create a software system that could identify most instances of communications that the PCRA software captured contemporaneously with its transmissions with very few false positives. The Court found that there was no claim in the Original Sherr Report that software existed that could identify violations of the ECPA in a common fashion that precluded individualized analysis. *Id.* at *13-14. The Court held that the New Sherr Report's parameters were an indication that Plaintiffs attempted to create a new theory or methodology for their Rule 23(b)(3) argument. After reading the New Sherr Report's parameters, the Court found Plaintiffs' argument unpersuasive that the New Sherr Report was merely elaborating and expanding upon opinions consistent with Plaintiffs' previous arguments. Therefore, the Court determined that Plaintiffs were attempting to establish a new theory and methodology in pursuit of class certification. Accordingly, the Court granted Defendant's motion to strike.

***Dover, et al. v. British Airways,* 2017 U.S. Dist. LEXIS 86709 (E.D.N.Y. June 5, 2017).** Plaintiffs filed an action alleging that Defendant used fuel surcharges to maximize revenues rather than recover unanticipated fuel costs. The parties filed cross-motions to exclude expert testimony pursuant to Rule 702. The Court denied the motions except the motion to strike Dr. Andrew Hildreth's report and expert testimony, ruling that it must conduct an evidentiary hearing to consider more fully the admissibility of the report. Robert Kokonis, a previous airline budgeting and forecasting manager, submitted an expert report on behalf of Plaintiff opining that it would have been feasible for Defendant either to operate without using a fuel surcharge, accounting for fluctuations in the fuel markets through fare adjustments alone, or to impose a fuel surcharge calculated automatically and directly related to the cost of fuel. *Id.* at *4. Defendant asserted that Kokonis was unqualified because he had not previously testified as an expert witness, lacked industry-specific certifications and education, and had never worked on an airline's frequent flyer, fuel surcharge, or revenue management programs. *Id.* at *5. The Court found that Kokonis' airline industry experience, however, plainly qualified him to offer expert opinions in this case. Defendant also argued that Kokonis' testimony was irrelevant and unreliable. The Court disagreed and noted that the central question in this case was whether British Airways breached a contract, and if so, whether and to what extent Plaintiffs were damaged. *Id.* The Court opined that Kokonis' opinions plainly related to those questions. Jonathan Arnold, an economist, prepared three reports for use in this case, including opinions: (i) that the fuel charges did not bear a "close relationship" to the airline's fuel costs and were not fuel surcharges at all "as a matter of economics;" (ii) that Defendant used an irrelevant figure as a baseline in setting the charge over time, (iii) that these actions resulted in economic harm to the members of the class, and (iv) that damages to the class under several alternative assumptions varied from $143 million to $161 million. *Id.* at *8. Defendant argued that Arnold's proposed testimony was irrelevant principally because the contract in question did not expressly require that fuel surcharges be determined "as a matter of economics." *Id.* at *9. The Court held that Arnold's opinion that the charges were not fuel surcharges as a matter of economics "`tend[s] to make the existence of [a] fact that is of consequence to the determination of the action more probable or less probable . . . ,'" *i.e.,* namely whether Defendant breached the contract. *Id.* Defendant also challenged Arnold's calculation models. However, the Court found that Arnold's methodology was a reasonable and sufficiently reliable method of assessing the relationship between the charge and fuel prices. *Id.* at *10. Plaintiffs also moved to exclude the testimony of Daniel Kasper on the grounds that he did not prepare his report. The Court, however, noted that Kasper testified at his deposition that he prepared the report, and the Court could not infer that the report was not the product of his own research and analysis simply because he spent less time preparing the report than other experts in this case. *Id.* at *12. Plaintiffs also challenged the report and testimony of Andrew Hildreth, an

econometrician. Plaintiffs contended that several regressions that Hildreth ran were afflicted by a fundamental error that rendered their results meaningless as a matter of statistics. *Id.* at *14. The Court concluded that it could not decide, however, whether Hildreth's testimony was admissible based solely on the parties' submissions. Given the complexity of the issues presented in the parties' submissions and the duty of the Court to discharge its gatekeeping function, the Court found that an evidentiary hearing was warranted to consider more fully the admissibility of Hildreth's testimony.

***In Re National Hockey League Players' Concussion Injury Litigation*, 2017 U.S. Dist. LEXIS 24881 (D. Minn. Feb. 21, 2017).** 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 denied Defendant's request to compel production of an annotated bibliography compiled by Plaintiffs' expert, Dr. Stephen Casper, and referenced in Dr. Casper's expert report. *Id.* at *3. Plaintiffs opposed the production of the annotated bibliography, and argued that the information compiled in the document constituted a rough draft for a section of Dr. Casper's report and was therefore protected work product. *Id.* Pursuant to the Court's request, Plaintiffs provided a copy of the annotated bibliography for *in camera* review, along with a copy of Dr. Casper's expert report. *Id.* The Court explained that Rule 26(b)(4)(B) "protects drafts of any report or disclosure . . . regardless of the form in which the draft is recorded." *Id.* In finding that the expert's underlying documents constituted a draft, the Court reasoned that the documents were in fact created for use in an expert report, that the expert anticipated that the document would form a part of the report being drafted, and that the underlying information was in fact inserted in the draft report. *Id.* at *5. Based on its *in camera* review of the annotated bibliography, the Court confirmed that it was prepared by Dr. Casper, who anticipated that it would form a part of the report that he was drafting, as the document was referenced in his report. *Id.* at *8. In addition, the Court opined that the underlying information was included in the report, the report was been submitted in the litigation, and the document applied to Dr. Casper's own development of the opinions presented in his report. *Id.* The Court therefore concluded that the information was protected work product, and denied Defendant's motion to compel.

***In Re National Hockey League Players' Concussion Injury Litigation*, 2017 U.S. Dist. LEXIS 115164 (D. Minn. July 25, 2017).** 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, Plaintiff moved to exclude Defendant's experts for purposes of Plaintiffs' motion for class certification. The Court granted in part and denied in part the motion. Defendants disclosed a total of 19 experts in support of their opposition to Plaintiffs' class certification motion and in support of the NHL's contemporaneously filed motions to exclude the testimony of 3 of Plaintiffs' experts. Plaintiffs raised concerns about the number of experts Defendant had disclosed. In particular, Plaintiffs argued that Defendant's disclosure of 19 experts was disproportionate to their own disclosure of five, and "the number of experts that were filed in connection with the class certification motion are cumulative and duplicative in many respects." *Id.* at *4. Plaintiffs argued that an unspecified number of Defendant's expert declarations should be excluded because the Court should not be burdened or inconvenienced with the task of sorting through 19 expert reports at the class certification stage. Framing their arguments around thirteen class certification "issues," Plaintiffs asked the Court to determine that Defendant's 19 expert declarations were cumulative or not relevant in the context of a motion for class certification; to require Defendant to designate one expert on each of the 13 class certification issues; and to exclude such portions of Defendant's expert declarations that do not fall within those parameters. *Id.* at *6. Defendant argued that its expert opinions were not cumulative, but even if they were, Plaintiffs' motion was premature because concerns about cumulative evidence related to the presentation of evidence to a jury at trial, not to a Court's ruling on class certification. *Id.* Defendant also argued that Plaintiffs' proposed rule that only one expert be allowed to speak on any issue was both prejudicial and impracticable because it would mean that Defendant and Plaintiffs would have to submit new expert declarations. Moreover, Defendant argued that Plaintiffs themselves offered multiple experts on a range of issues. Finally, even if some of Defendant's expert opinions related to merits issues, Defendant argued this offered no justification to strike because class and merits issues often overlap for purposes of the Court's rigorous class certification analysis. The Court found insufficient overlap to warrant limiting the experts or excluding all or part of Defendant's expert declarations for purposes of class certification. *Id.* at *11. To the extent there was overlap, the Court held that Plaintiffs' burden to rebut duplicative opinions was outweighed by the burden Defendant would face if required to

revise its expert declarations and opinions. *Id.* at *12. However, the Court noted that Defendant did not identify or rely upon Drs. Norman, Funk, or Neale, and therefore it granted Plaintiffs' motion to exclude only to the extent that it was not necessary for Plaintiffs to rebut Drs. Norman, Funk, or Neale for purposes of class certification. In all other respects, the Court denied Plaintiffs' motion.

(xxvii) FACTA And FDCPA Class Actions

***Crupar-Weinmann, et al. v. Paris Baguette America, Inc.*, 861 F.3d 76 (2d Cir. 2017).** Plaintiff brought a putative class action alleging that Defendant violated the Fair and Accurate Credit Transactions Act ("FACTA") by issuing a sales receipt containing her credit card expiration date. *Id.* at 78. Defendant moved to dismiss Plaintiff's claims, and the District Court granted the motion on the ground that Plaintiff lacked standing to bring a FACTA claim. On appeal, the Second Circuit affirmed the District Court's ruling. Plaintiff challenged the District Court's dismissal of her complaint on the basis that she did not plead a concrete injury-in-fact sufficient to establish Article III standing to bring suit against Defendant. *Id.* at 79. The Second Circuit stated that it previously applied *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), to a similar action and recognized that "an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a Plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest." *Id.* at 80. The Second Circuit noted, however, that even where Congress has accorded procedural rights to protect a concrete interest, a Plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presented no material risk of harm to that underlying interest. *Id.* The Second Circuit determined that the central inquiry was whether the particular bare procedural violation presented a material risk of harm to the underlying concrete interest Congress sought to protect. *Id.* Therefore, the Second Circuit opined that the key inquiry here was whether Defendant's alleged bare procedural violation – printing Plaintiff's credit card expiration date on her receipt – presented a material risk of harm to the underlying concrete interest Congress sought to protect in passing the FACTA. The Second Circuit noted that Congress clarified the FACTA in the Credit and Debit Card Receipt Clarification Act of 2007 ("Clarification Act"), stating that "[e]xperts in the field agree that proper truncation of the card number, . . . regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud." *Id.* at 31. The Second Circuit held that the language included in the Clarification Act made clear that Congress did not think that the inclusion of a credit card expiration date on a receipt increases the risk of material harm of identity theft. *Id.* Plaintiff asserted that the Clarification Act maintained the FACTA's prohibition on printing credit card expiration dates on receipts, which reflected Congressional belief that such action does pose a material risk of harm. The Second Circuit disagreed, and found that Congress expressly observed that the inclusion of expiration dates did not raise a material risk of identity theft. *Id.* The Second Circuit concluded that Congress was clear when stating that "[t]he purpose of this Act is to ensure that consumers suffering from any actual harm to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers." *Id.* at 81-82. The Second Circuit opined that Plaintiff failed to alleged that Defendant's bare procedural violation of the FACTA posed a material risk of harm to her. Accordingly, the Second Circuit affirmed the District Court's ruling.

***Dickens, et al. v. GC Services,* 2017 U.S. App. LEXIS 16095 (11th Cir. Aug. 23, 2017).** Plaintiff brought a class action alleging that Defendant, a debt collector, sent him and putative class members a collection letter that violated the Fair Debt Collection Practices ("FDCPA"). Plaintiff filed a motion for class certification, and the District Court denied the motion. In addition, the District Court awarded Plaintiff $1 in statutory damages. Plaintiff argued that the District Court erroneously deprived him of a jury trial on statutory damages. Plaintiff further argued that the District Court abused its discretion by determining that he was an inadequate class representative and that a class action was not the superior method of adjudicating the putative class' claims. *Id.* at *1-2. On appeal, the Eleventh Circuit vacated the District Court's damages determination and denial of class certification and remanded for further proceedings. *Id.* at *2. Plaintiff asserted that Defendant's letter to him failed to include "a statement that if the consumer notifies the debt collector in writing within [a] thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer," in violation of the FDCPA. *Id.* at *3. Plaintiff sought to certify a class of all persons with a Florida address, to whom Defendant mailed an initial debt collection communication that stated: (i) "if you do dispute all or any portion of this debt within 30 days of receiving this letter, we will obtain verification of the debt from our client and send it to you," and/or (ii) "if within 30 days of receiving this letter you request the

name and address of the original creditor, we will provide it to you in the event it differs from our client;" (iii) in the one year prior to the complaint; (iv) in connection with the collection of a consumer debt. *Id.* at *4. The District Court concluded that Plaintiff failed to meet Rule 23(a)'s adequacy requirement, because he sought only statutory damages, while some class members may have suffered actual damages. *Id.* at *6. The District Court further concluded that Plaintiff failed to satisfy Rule 23(b)(3)'s superiority requirement because the cost of administering a class action would likely dwarf the nominal statutory damages to which the class would be entitled. *Id.* at *7. The Eleventh Circuit found that the District Court abused its discretion in concluding that Plaintiff was an inadequate class representative. *Id.* at *8. As an initial matter, the Eleventh Circuit stated that the District Court's stated reason for finding Plaintiff inadequate – that he sought only statutory damages – was error because these circumstances created no substantial conflict of interest. The District Court concluded that absent class members likely suffered only statutory damages and no actual damages, yet it used the remote possibility that some class members may have suffered actual damages as a reason to deem Plaintiff inadequate. The Eleventh Circuit also found that the District Court's holding contradicted its admonition that minor conflicts alone are insufficient to deem a class representative inadequate. *Id.* at *20. Further, the Eleventh Circuit held that any conflict between Plaintiff and class members who have suffered actual damages was especially minimal given that in the rare circumstance in which a class member suffered actual damages, the class member could simply opt-out of the class and pursue litigation on his own. *Id.* at *22. The Eleventh Circuit therefore vacated the District Court's denial of class certification and remand this case to the District Court for a new class certification determination employing the proper legal standards and considering the factors it identified.

Flaum, et al. v. Doctor's Associates, Inc., **Case No. 16-CV-61198 (S.D. Fla. Mar. 22, 2017).** Plaintiff brought a putative class action on behalf of over 2.6 million class members alleging that Defendant, which does business as a Subway franchisee, violated the Fair and Accurate Credit Transactions Act ("FACTA") by issuing sales receipts that displayed the full credit card expiration date. *Id.* at 2. The parties subsequently reached a settlement and Plaintiff filed a motion for preliminary settlement approval, which the Court granted. *Id.* at 1. The Court found that the agreement was entered into only after extensive arm's-length negotiations by experienced counsel and following on-going mediation efforts presided over by a professional mediator. *Id.* The Court further determined that the settlement embodied in the settlement agreement was sufficiently within the range of reasonableness. *Id.* The Court stated that in making this determination, it considered the current posture of the litigation and the risks and benefits to the parties involved in both settlement of the claims and continuation of the litigation. *Id.* at 1-2. The Court also granted Plaintiff leave to amend his complaint to add Jason Alan, a Plaintiff in a related class action, as an additional named Plaintiff in this matter for purposes of settlement. *Id.* at 2. The Court found that Plaintiff's proposed settlement class met Rule 23's requirements as the class: (i) was so numerous that joinder of all members was impractical; (ii) there were questions of law or fact common to all members of the settlement class; (iii) the claims on Plaintiff were typical of the claims of the other members of the settlement class; (iv) Plaintiff would fairly and adequately protect the interests of the settlement class; (v) common questions of law and fact predominated over individual questions; (vi) the settlement class was ascertainable; (vii) and resolution of the claims by nationwide settlement was superior to other available methods of litigation. *Id.* at 3. The Court also approved Plaintiff's proposed forms of notice, including the summary notice, the full notice for the settlement website, the publication notice, the parties' proposed press release, and the settlement claim forms. *Id.* at 4. The Court further ordered that costs for preparing and disseminating the notice will be paid from the settlement fund. *Id.* The Court also scheduled a final approval hearing. Accordingly, the Court granted Plaintiff's motion for preliminary settlement approval.

Editor's Note: The nearly $31 million settlement in *Flaum* is the largest ever FACTA settlement in history.

Gesten, et al. v. Burger King Corp.**, 2017 U.S. Dist. LEXIS 158173 (S.D. Fla. Sept. 28, 2017).** Plaintiff, a consumer, filed a class action alleging that Defendant printed transaction receipts revealed more than the last five digits of a consumer's debit or credit card number in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). Defendant filed a motion to dismiss the complaint for lack of subject-matter jurisdiction. Plaintiff argued that the disclosure of one's private information is a concrete harm that has long been recognized by Courts, and that the FACTA recognizes a right of privacy not to have credit card account information exposed. *Id.* at *19. The Court held that Plaintiff failed to show that any disclosure of his private information actually

occurred. Since Plaintiff asserted that he took possession of the receipt at the time of the transaction, the "heightened risk of identity theft" alleged in Plaintiff's complaint was a risk that had not, and could not, materialize. *Id.* at *19-20. Although Plaintiff alleged that the information was disclosed to Defendant's employees, this "disclosure" was no different than the "disclosure" that happens any time a consumer uses a credit card to pay for a transaction. *Id.* at *20. The Court found that this disclosure was not the type of harm that Congress identified in enacting the FACTA. Moreover, the Court noted that the additional digits of Plaintiff's account number that were displayed were digits that identify only the issuer of the card. Therefore, the Court held that Plaintiff had not alleged that any additional private financial information was displayed beyond that included in the last five digits of his credit card account number, nor had he alleged that such information was disclosed to anyone other than the employees who handled his transaction. Accordingly, the Court determined that Plaintiff lacked standing to pursue a FACTA claim absent an allegation of actual harm or a material risk of harm. *Id.* at *21. Accordingly, the Court granted Defendant's motion to dismiss.

***Hernandez, et al. v. Midland Credit Management,* 2017 U.S. Dist. LEXIS 108512 (N.D. Ill. July 13, 2017).** Plaintiff brought a class action alleging that Defendant, a debt collector, violated the Fair Debt Collection Practices ("FDCPA") by sending him a false and misleading dunning letter. Defendant moved to dismiss on the basis of lack of subject-matter jurisdiction, arguing that the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), made plain that Plaintiff had not suffered sufficient injury to establish standing in this case. *Id.* at *1. The Court denied Defendant's motion. *Spokeo* concerned the first of standing's elements, *i.e.*, the requirement of injury-in-fact. To establish injury-in-fact, *Spokeo* held that a Plaintiff must show that he suffered an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent, not conjectural or hypothetical. To be particularized, an injury must affect Plaintiff in a personal and individual way. *Id.* at *3. To be concrete, an injury "must actually exist," and be real and not abstract. *Id.* The Court found that here, the injury alleged was both particularized and concrete. *Id.* at *4. The Court stated that the injury was particularized because the allegedly improper dunning letter was sent directly to Plaintiff in violation of his rights. Further, the Court determined that the alleged injury was concrete based on 15 U.S.C.§ 1692(a), in which Congress articulated its findings that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." *Id.* Such practices "contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.* The Court reasoned that an injury is adequately concrete as long as there is some "appreciable risk of harm" to a Plaintiff. *Id.* The Court noted that in § 1692(b), Congress explicitly found that "[e]xisting laws and procedures for redressing these injuries are inadequate to protect consumers." *Id.* at *5. The Court noted that Defendant allegedly provided Plaintiff with false information, putting him at risk of falling victim to all the ills detailed in § 1692. The Court stated that the fact that Plaintiff sought the assistance of counsel rather than responding to Defendant's allegedly improper notice did not obviate the risk that Plaintiff or others could easily respond to such an inadequate notice to their detriment. *Id.* Having considered Congress' findings in § 1692, the relationship of the trickery targeted by the FDCPA to intangible harms that have historically conferred standing to sue, and the risk of harm to consumers who receive inaccurate or inadequate collection letters from debt collectors, the Court concluded that Plaintiff had standing to sue, and thus it denied Defendant's motion to dismiss.

***Katz, et al. v. Donna Karen International, Inc.,* 2017 U.S. Dist. LEXIS 48368 (S.D.N.Y. May 17, 2017).** Plaintiff brought a putative class action alleging that Defendant violated the Fair and Accurate Credit Transactions Act ("FACTA") by issuing a sales receipt containing her credit card number. *Id.* at *1-2. Plaintiff alleged that she made two purchases from Defendant and received receipts that contained the first six and last four digits of her credit card number, which violated FACTA's truncation requirement that allows no more than the last five digits of a card number to be printed. *Id.* at *3. Defendant filed a motion to dismiss arguing that Plaintiff lacked Article III standing in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Defendant argued that Plaintiff failed to allege an injury-in-fact. The Court found that Defendants' issuance of two partially-truncated receipts, without any allegations of stolen identity or that a third-party had access to the receipts, did not cause Plaintiff any actual harm, nor did the receipts present a "material risk of harm to [the] underlying interest" created and identified by FACTA, which was the prevention of identity theft. *Id.* at *9. The Court also determined that Plaintiff alleged only a "bare procedural violation" of FACTA, "divorced from any concrete harm." *Id.* at *10. The Court held that Plaintiff failed to demonstrate an injury-in-fact, and therefore Plaintiff had no

constitutional standing. Plaintiff contended that the FACTA conferred a substantive "truncation right," the violation of which created a present concrete injury that automatically created Article III standing. *Id.* at *10-11. Defendant disagreed, and asserted that Plaintiff erroneously read the FACTA as "an electronic receipt privacy statute, not an identity theft prevention statute." *Id.* at *11. Defendant also argued that Plaintiff failed to allege any actual concrete harm to himself. The Court noted that the substantive "truncation right" alleged by Plaintiff was irreconcilable with the holding in *Spokeo* that not all statutory violations confer Article III standing. *Id.* Moreover, the Court explained that there was no evidence that Congress, in enacting the FACTA, intended to create for consumers a substantive right to receive a redacted copy of their credit card receipt; rather, the truncation requirement was a means to the end goal of identity theft prevention. *Id.* at *12. The Court determined that as Plaintiff did not allege any facts showing that he experienced identity theft, he failed to present an injury-in-fact. The Court found that Plaintiff failed to allege that anyone aside from the store employees who handed Plaintiff the receipt, Plaintiff, and his lawyer ever saw either receipt; or that his identity or other financial information was stolen or lost; or even that the risk of such events was imminent. *Id.* at *12-13. Accordingly, the Court granted Defendant's motion to dismiss on the basis that Plaintiff failed to establish Article III standing.

***Koby, et al. v. Helmuth,* 2017 U.S. App. LEXIS 1317 (9th Cir. Jan. 25, 2017).** Plaintiffs brought a class action alleging that Defendant, a debt collector, violated the Fair Debt Collection Practices ("FDCPA") by leaving automated voice-mail messages that failed to disclose that it was a debt collector and that the purpose of the call was to collect a debt. The parties engaged in settlement discussions with the assistance of a Magistrate Judge and consented to have the Magistrate Judge conduct all further proceedings. While litigation was pending, Defendant voluntarily changed its automated voice-mail messages to disclose that the calls were for collecting a debt and were from a debt collector. The parties reached an agreement and sought certification of a nationwide settlement class of 4 million people pursuant to Rule 23(b)(2).. *Id.* at *5. Because the class would be certified under Rule 23(b)(2), the parties agreed that no notice would be sent to the four million class members and no one would be permitted to opt-out of the class. *Id.* at *5-6. The class consisted of everyone in the United States who received calls from Defendant between April 2008 and August 2011, where Defendant failed to disclose that it was a debt collector and that the purpose of the call was to collect a debt. *Id.* at *6. The Magistrate Judge approved a settlement agreement whereby each of three named Plaintiffs would receive $1,000. *Id.* Defendant agreed to an injunction requiring it to continue to use the new voice-mail message for a period of two years. In exchange, the class waived their right to any future class claims against Defendant. *Id.* at *7. The four million unnamed class members received no monetary compensation under the agreement. A class member that was the class representative in another class action against Defendant – based upon essentially the same allegations – appealed to the Ninth Circuit. On appeal, the Ninth Circuit determined that the Magistrate Judge abused her discretion by approving the settlement as fair, reasonable, and adequate under Rule 23(e)(2). *Id.* at *17 -18. The Ninth Circuit ruled that the settlement should not have been approved because there was no evidence that the settlement afforded any value to the class members, as the class members were required to give up their right to seek damages in future class actions in exchange for "worthless" injunctive relief. *Id.* at *18. Accordingly, the Ninth Circuit reversed and remanded.

***Paci, et al. v. Costco Corp.,* 2017 U.S. Dist. LEXIS 48368 (N.D. Ill. Mar. 30, 2017).** Plaintiff brought a putative class action alleging that Defendant violated the Fair and Accurate Credit Transactions Act ("FACTA") by issuing a sales receipt containing her credit card number. *Id.* at *1-2. The parties filed cross-motions for summary judgment, and the Court declined to rule on the motions because it found that Plaintiff lacked Article III standing. *Id.* at *1. Plaintiff initially received a receipt from Defendant that complied with FACTA. Defendant required customers to display a receipt for all transactions as they were leaving the store. Plaintiff misplaced her receipt and therefore went to a customer service area to obtain a duplicate receipt. *Id.* at *2. A supervisor then printed out a document that displayed the first six digits and the last four digits of Plaintiff's American Express card, which she had used to purchase her groceries that evening. *Id.* at *2-3. Plaintiff alleged that Defendant's violation of the FACTA was willful. Plaintiff argued that she was entitled to summary judgment because Defendant knowingly violated the FACTA. Defendant asserted that it was entitled to summary judgment because it did not violate the FACTA. Defendant also argued that, even if it did violate the FACTA, Plaintiff suffered no harm as a result of that violation, and therefore she lacked Article III standing to sue. *Id.* at *4. The Court noted that to establish Article III standing, a Plaintiff must show: (i) she has suffered an injury-in-fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (ii) the injury is fairly

traceable to the challenged action of Defendant; and (iii) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* Defendant asserted that it was not enough to prove a technical FACTA violation; rather, to have standing, a Plaintiff must also have suffered some independent harm caused by the violation. Defendant argued that Plaintiff suffered no such harm. *Id.* at *5. The Court found that there was no question that Plaintiff failed to make the requisite showing to establish standing. *Id.* at *6-7. The Court stated that even assuming that Defendant violated the FACTA, Plaintiff did not show that the violation caused her any harm. *Id.* at *7. The Court held that Plaintiff failed to articulate any harm caused by the printing of the extra digits on her receipt, as she did not testify that the change in her receipt-handling routine cost her anything in terms of time, expense, or emotional distress; there was no evidence that her identity was ever at risk of being stolen; and nothing to show that she ever even fretted about her identity being stolen as a result of the alleged FACTA violation. *Id.* at *8-9. Because Plaintiff failed to offer any evidence to support a finding of actual harm, the Court found that she lacked standing to sue. The Court therefore dismissed the case for lack of jurisdiction.

***Smith, et al. v. GC Services,* 2017 U.S. Dist. LEXIS 110046 (S.D. Ind. July 17, 2017).** Plaintiff brought a class action alleging that Defendant, a debt collector, sent her and putative class members collection letters that violated the Fair Debt Collection Practices ("FDCPA"). Plaintiff filed a motion for class certification, which the Court granted. Defendant sent Plaintiff a form collection letter, which stated: "As of the date of this letter, our records show you owe a balance of $3,095.00 to Synchrony Bank. If you dispute this balance or the validity of this debt, please let us know in writing. If you do not dispute this debt in writing within 30 days after you receive this letter, we will assume this debt is valid. However, if you do dispute all or any portion of this debt in writing within 30 days of receiving this letter, we will obtain verification of the debt from our client and send it to you. Or, if within 30 days of receiving this letter you request in writing the name and address of the original creditor, we will provide it to you in the event it differs from our client, Synchrony Bank." *Id.* at *1-2. Plaintiff alleged that Defendant violated the FDCPA by wrongfully informing Plaintiff that disputes must be in writing when, in fact, an oral dispute is valid. Plaintiff further alleged that Defendant's statement that any dispute of the debt must be in writing was false, deceptive, and misleading, and unfair and unconscionable. *Id.* at *2-3. Plaintiff sought to represent a class of persons similarly-situated in Indiana from whom Defendant attempted to collect a delinquent consumer debt allegedly owed for a Synchrony Bank/Sam's Club account, via the same form collection letter that Defendant sent to Plaintiff, from one year before the date of the initial complaint to the present. *Id.* at *3. Defendant argued that Plaintiff lacked Article III standing in light of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Defendant further argued that Plaintiff failed to propose an ascertainable class. Lastly, Defendant argued that Plaintiff could not establish any of the factors listed in Rule 23(a) or (b). As to standing, the Court found that Plaintiff alleged a concrete injury-in-fact sufficient for Article III standing by alleging a violation of the FDCPA. *Id.* at *4-5. As to ascertainability, the Court ruled that Plaintiff's class definition was clear and objective because it was based on the same form debt collection letter received by all putative class members, and therefore the class was ascertainable. *Id.* at *5. Further, the Court determined that Plaintiff met the requirements of Rule 23. The proposed class consisted of 118 individuals, which satisfied numerosity. The Court noted that Plaintiff's FDCPA claims were based on the same form debt collection letter, and therefore whether the letter violated the FDCPA was a common question of law. The Court stated that Plaintiff's injury and the putative class members' injuries arose out of the same violative conduct, and therefore her claims were typical of the class she sought to represent. The Court also found that Plaintiff, who was sent the same form collection letter as the individuals she sought to represent, was an adequate representative for the class. *Id.* at *9. Finally, because the key issue in this case – *i.e.*, whether the subject letter violated the FDCPA – was identical as to each putative class member, the Court concluded that Plaintiff satisfied the requirements of Rule 23(b)(3). Accordingly, the Court granted Plaintiff's motion for class certification.

(xxviii) Family & Medical Leave Act Class Actions

***Antoine, et al. v. Amick Farms, LLC,* 2017 U.S. Dist. LEXIS 1942 (D.Md. Jan. 6, 2017).** Plaintiffs, a group of farm laborers, sued Defendant individually and collectively, alleging termination and violations involving the Family and Medical Leave Act of 1993 ("FMLA"). The Court granted Defendant' s motion to dismiss count III of Plaintiffs' collective action, the only claim brought on behalf of Plaintiffs individually and collectively. The Plaintiffs were not literate in English and count III of their claims arose out of Defendant's failure to post or provide notice of their rights under the FMLA in the language in which they were literate. The FMLA requires that

an employer provide employees general notice of their rights under the FMLA in a language in which the employees are literate where a significant portion of the employer's workforce is composed of workers who are not literate in English. Further, if the U.S. Department of Labor ("DOL") determines that an employer willfully fails to post such a notice, the employer is subject to a fine of up to $100 a day. Defendant moved to dismiss the claim on the grounds that there was no private right of action that arose out of Defendant's failure to provide the general notice in Plaintiffs' language. The Court agreed that the penalty for violation of the general posting requirement is limited to the DOL imposing a civil monetary penalty as provided in the statute and dismissed the Plaintiffs' collective claim under the FMLA.

***Carrel, et al. v. MedPro Group, Inc.*, 2017 U.S. Dist. LEXIS 62969 (N.D. Ind. April 26, 2017).** Plaintiff brought a class action under the Family & Medical Leave Act ("FMLA") alleging that she was docked earned paid time off ("PTO") and that Defendant failed to pay her unused PTO upon the termination of her employment. Specifically, Plaintiff alleged that Defendant's short-term leave policy violated the FMLA because each employee was provided PTO at the beginning of the year according to Defendant's PTO policy, and thus PTO was unlawfully "docked" whenever an employee took FMLA leave. *Id.* at *2. Plaintiff filed a motion for class certification under Rule 23 seeking certification of a class defined as "all current and former [Defendant] employees who took FMLA leave at any point since March 29, 2013[.]" *Id.* at *5. The Court granted Plaintiff's motion. First, the Court rejected Defendant's argument that class certification under Rule 23 was the wrong mechanism for an FMLA class, and that the alleged class-wide violations of the FMLA must be treated as a collective action under the Fair Labor Standards Act instead. *Id.* *6. Although the Seventh Circuit has not weighed in on the applicability of Rule 23 to FMLA actions, the Court noted that other case law authorities have held that "class violations of the FMLA must be treated as opt-out actions pursuant to Rule 23 because the statutory language of the FMLA § 2617(a)(2) does not incorporate the additional language in the FLSA expressly requiring that Plaintiffs affirmatively consent to join the action by opting-in." *Id.* at *7. Accordingly, the Court held that "Rule 23 is the correct mechanism by which to proceed with the analysis" of the Plaintiff's class certification motion. *Id.* at *8. Second, the Court determined that the requirements of Rule 23(a) had been satisfied. Specifically, the Court found that commonality was satisfied because "Plaintiff and the putative class members were all employees who were subject to the same uniformly applied PTO policy." *Id.* at *12. Therefore, "[w]hether the Defendant's PTO policy violated the FMLA presents a common question of law." *Id.* The Court noted that how Defendant's policy individually impacted each member of the class was an issue relating to the merits and did not defeat commonality. *Id.* at *15. Finally, the Court noted that certification under Rule 23(b)(3) was appropriate. In so holding, the Court found that the Rule 23(b)(3)'s predominance factor was satisfied because "causation issues, which here are actually issues concerning what damages, if any, each class member has actually suffered pursuant to the PTO policy applied in his/her own case, will not predominate over common liability issues." *Id.* at *22. Therefore, it did not matter to the Court's inquiry "how much PTO each employee used or would have used." *Id.* at *23. Accordingly, the Court granted Plaintiff's motion for class certification.

***Wilkinson, et al. v. Greater Dayton Regional Transit Authority*, 2017 U.S. Dist. LEXIS 131643 (S.D. Ohio Aug. 17, 2017).** Plaintiffs filed a class action alleging that Defendant violated the Family & Medical Leave Act ("FMLA"). Plaintiffs filed a motion for class certification of current and former employees of Defendant who were "eligible" within the meaning of 29 U.S.C. § 2611(2)(A), and who applied for, and were denied, disciplined, terminated or otherwise had their rights under the FMLA interfered with or who were retaliated against for their exercise of rights under the FMLA. Plaintiff also sought to certify five sub-classes. Plaintiffs alleged that Defendant – in response to what it perceived as "rampant absenteeism" among its employees – implemented more stringent policies regarding appropriate verification for use of sick leave and FMLA leave. *Id.* at *3-4. Plaintiffs claimed that Defendant's requirements were more onerous than what was allowed under the FMLA and its regulations, and were designed to discourage employees from taking lawful, protected FMLA leave. Plaintiffs further alleged that Defendant retaliated against employees who attempt to exercise their rights under the FMLA, by subjecting them to discipline, suspension, and termination, and by harassing and intimidating them. *Id.* at *4. Defendant argued that, as former employees, Plaintiffs lacked standing under Article III to pursue prospective injunctive relief on behalf of the class. The Court agreed and found that Plaintiffs could not seek or obtain prospective injunctive or declaratory relief; however, their claims for money damages and other relief were not moot, and the Court, in the interest of justice, could exercise its discretion to grant leave to substitute current employees as Plaintiffs for the class and sub-classes. *Id.* at *17-18. Accordingly, the Court examined

whether the putative class and sub-classes met the requirements of Rule 23. The Court held that Plaintiffs' proposed class and four of the five proposed sub-classes were impermissible fail-safe classes. *Id.* at *23. The Court explained that the classes were defined by legal conclusions, *i.e.*, the denial and restraint of FMLA rights, which could only be resolved by adjudications on the merits, *i.e.*, whether the putative class members' FMLA rights were actually restrained or violated by Defendant. *Id.* at *23. The Court stated that sub-class three, however, covered current and former employees who "were required to obtain re-certification for intermittent FMLA leave within the 12 month period where the healthcare provider set forth a minimum period of time in the original medical certification and the condition forming the basis of FMLA leave has not changed." *Id.* at *24. The Court noted that members of this class qualified if they meet the factual criteria contained therein, regardless of whether Defendant's alleged conduct actually violated the FMLA. However, the Court determined that the plain language of the proposed sub-class and the governing FMLA regulation compelled it to conclude that common issues did not predominate with respect to the claims of the putative sub-class members. The Court held that since FMLA regulations permit an employer to require re-certification every 30 days unless the initial certification was for a longer duration, even if Defendant required re-certification for all 47 putative sub-class members during a 12-month period, those actions by themselves would not constitute violations of the FMLA. *Id.* at *27. Therefore, only by examining all of the pertinent facts and circumstances involved in each individual Plaintiff's situation could the Court determine whether a violation of the FMLA occurred. *Id.* at *28. Accordingly, the Court found that sub-class three could not meet the requirements of Rule 23 and therefore it denied Plaintiffs' motion for class certification.

(xxix) FCRA Class Actions

***Bultemeyer, et al. v. CenturyLink, Inc.*, 2017 U.S. Dist. LEXIS 25831 (D. Ariz. Feb. 15, 2016).** Plaintiff brought a putative class action alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") by using or obtaining Plaintiff's consumer report. The parties filed cross-motions for summary judgment, and the Court dismissed the case for lack of standing and denied the summary judgment motions as moot. Plaintiff alleged that she visited Defendant's website to determine if she could get a better price for high-speed internet services. As part of the process, Plaintiff clicked on a page indicating that she agreed to Defendant's terms and conditions. When it came to the final step in procuring service from the website for submitting payment information, Plaintiff decided that she did not want to continue and closed out of the webpage. *Id.* at *2-3. Plaintiff argued that, because she did not place the order, she did not initiate a business transaction with Defendant. Plaintiff further alleged that Defendant obtained her credit report without a permissible purpose as described in the FCRA. *Id.* at *3. Defendant asserted that Plaintiff initiated a business transaction and that it had a permissible business purpose to obtain her credit report. *Id.* at *5. The Court stated that Plaintiff did not claim any damages other than the statutory violation, *i.e.*, that Defendant obtained her credit report without a permissible business purpose. *Id.* at *6. The Court further noted that Plaintiff did not allege that the pulling of the credit report injured her credit score or that Defendant disseminated any information in her credit report to a third-party. *Id.* The Court therefore determined that Plaintiff alleged that Defendant violated a substantive privacy right rather than a bare procedural violation, and so the issue was whether the violation of the FCRA is a bare procedural violation that does not rise to the level of a *de facto* injury-in-fact, or whether a violation of § 1681b itself constitutes an injury-in-fact. *Id.* at *6-7. Plaintiff argued that she was not claiming a bare procedural violation, but rather was alleging a violation of a substantive privacy right created by Congress, and the substantive privacy right gave her standing. *Id.* at *7. The Court held that regardless of the harm being procedural or substantive, the violation must be accompanied by an injury-in-fact to create Article III standing. *Id.* at *8. The Court stated that even assuming Defendant violated the FCRA by running her credit report without a permissible business purpose, Defendant did nothing with the information that would harm Plaintiff and therefore no injury occurred. The Court determined that absent disclosure to a third-party or an identifiable harm from the statutory violation, there was no privacy violation. *Id.* at *11. The Court concluded that Plaintiff failed to identify any concrete injury-in-fact and therefore lacked Article III standing. According, the Court dismissed Plaintiff's action.

***Dreher, et al. v. Experian Information Solutions,* 2017 U.S. App. LEXIS 8358 (4th Cir. May 11, 2017).** Plaintiff filed a class action alleging Defendant violated the Fair Credit Reporting Act ("FCRA") when Defendant purposefully listed a defunct credit card company as the source of information on Plaintiff's credit report, rather than the name of credit card company's servicer. *Id.* at *2. The District Court granted Plaintiff's motion for

summary judgment on the basis that Defendant willfully violated the FCRA. *Id.* at *7. The District Court found that the FCRA created a statutory right to receive the sources of information on a credit report and when Defendant failed to accurately report those sources, it violated this right, thereby creating an injury-in-fact. *Id.* Defendant filed an interlocutory appeal and the Fourth Circuit stayed the appeal pending the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016). *Id.* at *8. On further appeal, the Fourth Circuit reversed, ruling that Plaintiff failed to establish an injury-in-fact resulting from the error on his credit report. The Fourth Circuit rejected Plaintiff's argument that any technical violation of the FCRA sufficed as an injury-in-fact. Instead, the Fourth Circuit ruled that Plaintiff lacked Article III standing because Plaintiff failed to allege a concrete injury stemming from the incorrect information listed on his credit report. *Id.* at *16. The Fourth Circuit noted that an informational injury of this type can constitute an Article III injury-in-fact if Plaintiff establishes that he suffered a real harm with an adverse effect. *Id.* at *14. Relying upon *Spokeo*, the Fourth Circuit ruled that a statutory violation without a concrete and adverse effect does not confer standing. *Id.* at *17. Therefore, the Fourth Circuit held that because Plaintiff was not adversely affected by the error on his credit report and suffered no real harm, let alone the harm that Congress sought to prevent in enacting the FCRA, he lacked Article III standing. *Id.* at *19. Accordingly, the Fourth Circuit reversed the District Court's decision and remanded with instructions to dismiss the case.

***Groshek, et al. v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017).** Plaintiff, a job applicant, filed a class action asserting that Defendants obtained credit reports for employment purposes that did not comply with the requirements of the Fair Credit Reporting Act ("FCRA"). Plaintiff submitted 562 job applications to various employers, including Defendants. Defendants' applications allegedly included a disclosure and authorization form informing him that a consumer report may be procured in making the employment decision; the form also contained other information, such as a liability release. After Plaintiff submitted the job application, along with the signed disclosure and authorization form, Defendants requested and obtained a consumer report on him from a third-party. *Id.* at 886. Plaintiff alleged that Defendants' disclosure form did not contain a stand-alone disclosure and therefore violated the FCRA. Defendants moved to dismiss for lack of subject-matter jurisdiction, arguing that Plaintiff lacked Article III standing because he did not suffer a concrete injury. Plaintiff responded that he suffered concrete informational and privacy injuries. *Id.* The District Court granted Defendants' motion. On appeal, the Seventh Circuit affirmed the District Court's ruling. The Seventh Circuit noted that to establish injury-in-fact, pursuant to *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), Plaintiff must show that he "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* The Seventh Circuit noted that Plaintiff did not allege that Defendants failed to provide him with a disclosure that informed him that a consumer report may be obtained for employment purposes. *Id.* at 887. Further, Plaintiff's complaint contained no allegation that any of the additional information caused him to not understand the consent he was giving; no allegation that he would not have provided consent but for the extraneous information on the form; no allegation that additional information caused him to be confused; and no allegation that he was unaware that a consumer report would be procured. *Id.* Instead, the Seventh Circuit explained that Plaintiff simply alleged that Defendant's disclosure form contained extraneous information. The Seventh Circuit stated that Plaintiff's alleged statutory violation was therefore completely removed from any concrete harm or appreciable risk of harm. The Seventh Circuit found that Congress did not enact § 1681b(b)(2)(A)(i) to protect job applicants from disclosures that do not satisfy the requirements of that section; rather, it did so to decrease the risk that a job applicant would unknowingly consent to allowing a prospective employer to procure a consumer report. Accordingly, the Court found that Plaintiff also failed to demonstrate that he suffered a concrete informational injury. *Id.* at 888. Plaintiff further alleged that, as a result of Defendants' failure to provide him with a compliant disclosure, Defendants failed to obtain a valid authorization from him to procure a consumer report in violation of § 1681b(b)(2)(A)(ii). The Seventh Circuit found that Plaintiff's allegations were conclusory, and failed to state a viable claim. *Id.* at 889. Because Plaintiff admitted that he signed the disclosure and authorization form, the Seventh Circuit held that Plaintiff did not suffer a concrete privacy injury. *Id.* The Seventh Circuit concluded that Plaintiff failed to demonstrate that he suffered a concrete injury, and therefore lacked Article III standing. Accordingly, the Seventh Circuit affirmed the District Court's ruling.

***Hargrett, et al. v. Amazon.com,* 235 F. Supp. 3d 1320 (M.D. Fla. 2017).** Plaintiffs, a group of applicants for employment, filed a consolidated class action against Defendant alleging violations of the Fair Credit Reporting

Act ("FCRA"). Plaintiffs alleged that Defendant violated the FCRA because the background disclosure was part of the on-line application form. Second, Plaintiffs alleged that the background check disclosure form violated the FCRA because it contained extraneous information in violation of the statute's stand-alone requirement. Plaintiff alleged that the disclosure contained five pages of "eye-straining, tiny typeface writing" that included a liability release and additional information regarding the rights and laws under different states. *Id.* at 1326. Plaintiffs did not allege that they suffered any actual damages from the forms. However, they asserted that the violation was willful and sought statutory damages. Defendant filed a motion to dismiss on the grounds that the Court lacked subject matter jurisdiction and that Plaintiffs failed to state a claim pursuant to Rules 12(b)(1) and 12(b)(6). Defendant contended that Plaintiffs lacked Article III standing because they did not suffer a concrete injury. The Court disagreed, ruling that an actual or threatened injury may exist when statutes like the FCRA create legal rights. Therefore, Plaintiffs had sufficiently alleged Article III standing. The Court also ruled that Plaintiffs had sufficiently alleged that the violation was willful. The Court noted that Defendant had been engaged in "high-stakes" FCRA class action litigation for nearly a year before this lawsuit was brought and it was illogical for Defendant to argue that it was unaware of its obligations under the FCRA. *Id.* at 1328. Accordingly, the Court denied Defendant's motion to dismiss.

***In Re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625 (3d Cir. 2017).** Plaintiffs, a group of healthcare consumers, filed a putative class action against Defendant when laptops containing personal information regarding Plaintiffs were stolen from Defendant's headquarters. Plaintiffs allege willful and negligent violations of the Fair Credit Reporting Act ("FCRA") as well as violations of state law. Plaintiffs alleged that Defendant inadequately protected their sensitive and personal information. Defendant moved to dismiss Plaintiffs' lawsuit under Rule 12(b)(1) on the basis that Plaintiffs lacked Article III standing because they had not claimed a cognizable injury. The District Court granted Defendant's motion to dismiss. On Plaintiffs' appeal, the Third Circuit vacated and remanded. Defendant asserted that because Plaintiffs failed to allege that any personal information was used to their detriment, the complaint was deficient on its face, since Plaintiffs suffered no injury. Plaintiffs asserted that Defendant violated its responsibilities under the FCRA because Defendant failed in its responsibilities to keep Plaintiffs' personal information confidential. Plaintiffs further alleged that the violation of their statutory rights under the FCRA gave rise to a cognizable injury for purposes of Article III standing. The Third Circuit agreed and concluded that a violation of the FCRA does gives rise to an injury sufficient for purposes of Article III standing. The Third Circuit noted that when it comes to laws that protect privacy, an unlawful disclosure of private information constitutes "a clear *de facto* injury." *Id.* at 640. The Third Circuit held that when Congress enacted the FCRA, it established that the unauthorized dissemination of personal information caused an injury in and of itself, even without evidence that Plaintiffs' private information was used improperly. As such, Plaintiffs had in fact suffered a cognizable injury and the District Court erred when it dismissed the complaint. Accordingly, the Third Circuit reversed and remanded the District Court's decision.

***In Re Michaels Stores, Inc. FCRA Litigation,* 2017 U.S. Dist. LEXIS 9310 (D.N.J. Jan. 24, 2017).** Plaintiffs in three consolidated class actions alleged that Defendants' disclosure of its intent to obtain the background checks was insufficient and therefore violated the Fair Credit Reporting Act ("FCRA"). Plaintiffs applied for employment at Michaels Stores, Inc. ("Michaels") through an on-line employment application. One section of the on-line application form disclosed that Michaels would be obtaining background checks on the applicants and required applicants to authorize and consent to those checks. *Id.* at *3. Michaels obtained background checks, which it used in making hiring decisions. All Plaintiffs were hired by Michaels. *Id.* at *4. Michaels filed motions to dismiss the operative complaints in the three actions for lack of subject-matter jurisdiction. Michaels challenged Plaintiffs' standing, and asserted that the complaints failed to allege an injury-in-fact. *Id.* at *5. As a result, the Court stayed the action pending the U.S. Supreme Court's decision in the then-pending case of *Spokeo, Inc. v. Robins*. The Court found that Plaintiffs here, like *Robins*, had alleged a bare procedural violation of the FCRA. In particular, Plaintiffs alleged a violation of the stand-alone disclosure requirement, which requires that the employer's intent to obtain a background check be disclosed conspicuously in a dedicated, stand-alone document. *Id.* at *11. After the decision came down in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the parties submitted supplemental briefing. Plaintiffs argued that the alleged FCRA violations caused them two types of concrete harm, including: (i) informational injury; and (ii) invasion of privacy. *Id.* at *12-13. Plaintiffs contended that they suffered an informational injury because they were deprived of disclosure "in the manner

prescribed by law," *i.e.*, as a stand-alone document. *Id.* at *14. The Court stated that Plaintiffs did not even allege that they suffered the harm addressed by Congress' promulgation of the stand-alone disclosure rule, *i.e.*, that an applicant's failure to understand that he or she was authorizing an employer background check. The Court found that Plaintiffs did not allege that they did not see the disclosure, or were distracted from it, and therefore the allegations amount to no more than a bare procedural violation of the stand-alone requirement. *Id.* at *22. Plaintiffs also contended that, by violating the stand-alone disclosure requirement, Michaels invaded their privacy when procuring consumer reports, contrary to the FCRA. The Court determined that the procedural/substantive distinction would lose all meaning if the Court were to find that Plaintiffs have a substantive right to be free of every procedural violation. *Id.* at *25. The Court thereby concluded that Plaintiffs failed to allege facts which, if true, would establish that they individually possess Article III standing. *Id.* at *27. Accordingly, the Court dismissed Plaintiffs' complaints with prejudice for lack of subject-matter jurisdiction.

***In Re Michaels Stores, Inc. FCRA Litigation,* 2017 U.S. Dist. LEXIS 105952 (D.N.J. July 7, 2017).** Plaintiffs in three consolidated class actions alleged that Defendants' disclosure of its intent to obtain the background checks was insufficient and therefore violated the Fair Credit Reporting Act ("FCRA"). Plaintiffs applied for employment at Michaels Stores, Inc. ("Michaels") through an on-line employment application. One section of the on-line application form disclosed that Michaels would be obtaining background checks on the applicants and required applicants to authorize and consent to those checks. *Id.* at *3. Michaels obtained background checks, which it used in making hiring decisions. All Plaintiffs were hired by Michaels. *Id.* Michaels filed motions to dismiss, and the Court ultimately granted the motions. Defendant filed a motion for reconsideration in *Bercut v. Michaels Stores, Inc*., Case No. 15-CV-5504 (the "*Bercut* action"), one of the MDL's subsidiary cases. Because the *Bercut* action, unlike the others, was originally filed in state court but removed, the Court ordered that it be remanded to state court. *Id.* The Court also stayed the *Bercut* action pending possible appeal of the decision by either party. Plaintiffs in two other actions then filed appeals with the Third Circuit, which did not encompass the *Bercut* action. Neither party appealed the Court's decision in the *Bercut* action, and thus it was remanded to state court. Defendant subsequently filed a motion for reconsideration of the Court's order vacating the stay, which permitted the earlier-ordered remand of the *Bercut* action to proceed. Defendant argued that the stay should remain in place pending the other cases' appeal to the Third Circuit. The Court noted that it previously stated that if no amended complaint was filed within 30 days, the stay of remand would be dissolved and the case would be remanded. *Id.* at *5. The Court explained that 30 days went by without an amended complaint, and another week went by before it filed the order vacating the stay. The Court then closed the file and mailed a certified copy of the order and docket to the state court. *Id.* at *6. The Court opined that once that had occurred, it did not have jurisdiction and therefore could not vacate a remand order. *Id.* The Court held that, despite fair warning, Defendant failed to seek to forestall remand until it was too late. *Id.* at *7. Further, the Court concluded that Supreme Court authority already established that the Court lacked subject-matter jurisdiction over this case and the related cases. The Court found that if state standing doctrines or state causes of action diverged from federal ones, the case might appropriately proceed in state court on some basis The Court therefore determined that it lacked subject matter jurisdiction and denied Defendant's motion for reconsideration.

***Long, et al. v. Southwestern Pennsylvania Transportation Authority,* 2017 U.S. Dist. LEXIS 51731 (E.D. Pa. April 5, 2017).** Plaintiffs alleged that Defendant used an improper disclosure format to inform them that it planned to run a background check on them in violation of the Fair Credit Reporting Act ("FCRA"). Defendant moved to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), and the Court granted the motion. Defendant is a public transit authority organized under the laws of the Pennsylvania with its headquarters in Philadelphia. Plaintiffs were Philadelphia residents who applied and interviewed for positions with Defendant between 2014 and 2016. Plaintiffs asserted that they completed forms disclosing prior drug-related convictions and authorizing Defendant to conduct background checks. *Id.* at *4. Plaintiffs claimed that the forms did not comply with the FCRA's stand-alone disclosure requirement. Specifically, Plaintiffs alleged that the forms contained extraneous language, including language inquiring about their educational history, employment history, probation or parole status, and job suitability. *Id.* Plaintiffs also alleged that Defendant did not provide Plaintiffs with a copy of their consumer reports or a summary of their rights under the FCRA before revoking or denying their employment offers. *Id.* Defendant moved to dismiss Plaintiffs' FCRA claims for lack of standing on the grounds that Plaintiffs failed to pled facts that demonstrated that Plaintiffs suffered a concrete and particularized injury as a consequence of Defendant's purported FCRA violations. The Court noted that to

establish an injury-in-fact, a Plaintiff must demonstrate that he has suffered harm "which is (a) [particularized and concrete] . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* at *9. The Court found that Plaintiffs' allegations amounted to bare procedural violations without concrete harm. *Id.* at *10. However, the Court opined that Plaintiffs failed to allege any specific, identifiable trifle of injury or allege that they were harmed in any non-abstract way as a consequence of Defendant's purported FCRA violations. Plaintiffs alleged that Defendant denied jobs to Plaintiffs based on their criminal history, which Plaintiffs had disclosed prior to Defendant procuring their background checks. *Id.* at *12. Additionally, the Court noted that Plaintiffs did not allege that their reports were inaccurate in any way. Taking all of Plaintiffs' allegations as true, the Court determined that Defendant's purported FCRA violations did not cause the type of harm to Plaintiffs, or present any material risk of harm, that would give rise to a *de facto* injury. Accordingly, the Court held that Plaintiffs did not met their burden of establishing that they suffered an injury-in-fact that would enable them to assert viable claims under the FCRA. Accordingly, the Court granted Defendant's motion to dismiss.

***Miller, et al. v. TransUnion LLC,* 2017 U.S. Dist. LEXIS 7622 (M.D. Pa. Jan. 18, 2017).** Plaintiff, a consumer, brought a putative class action alleging that Defendants violated § 1681g(a) of the Fair Credit Reporting Act ("FCRA") when it provided him with a misleading and confusing on-line personal credit report that failed to clearly and accurately disclose all information in his file. Specifically, Plaintiff alleged that Defendant provided him with a report that could be read to suggest that his name came up as a possible match on a list maintained by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") of terrorists, drug traffickers, money launderers, and other enemies of the United States. *Id.* at *2. Plaintiff sought to represent a class of more than 13,000 other consumers that had disclosures that were deficient in the same way. Defendant opposed Plaintiff's motion for class certification, and challenged his ability to bring claims at all, arguing that he had not suffered a sufficiently "concrete" injury necessary for standing under Article III. *Id.* at *9-10. The Magistrate Judge first determined that Plaintiff's § 1681g(a) claim stated something more than a "bare procedural violation." *Id.* at *18. The Magistrate Judge found that it was not difficult to appreciate how the dissemination of the confusing OFAC disclosure could be a concrete harm, since it could cause emotional distress for the recipient, particularly as it could be complicated by the uncertainty as to whether Defendant was reporting the recipient as a match to the OFAC database, and because of a perceived inability to dispute the disclosure. *Id.* at *19. The Magistrate Judge thereby recommended that the Court conclude that Plaintiff had standing to sue under Article III. The Magistrate Judge also analyzed Plaintiff's class certification motion. First, with respect to numerosity, the Magistrate Judge stated that it was undisputed that the proposed class exceeded 13,000 individuals. *Id.* at *24. Since there was no real dispute between the parties that the scope of the potential class satisfied the numerosity requirement in Rule 23(a), the Magistrate Judge recommended that the Court find that the class was so numerous that joinder of all members would be impracticable. *Id.* The Magistrate Judge opined that Plaintiff had established commonality, since there were questions of fact and law that were common to the class that would predominate over any questions that affected only individual class members. *Id.* at *24. The Magistrate Judge held that Plaintiff also satisfied the typicality requirement because he made a showing that each member of the putative class was subject to the same improper form disclosure regarding the OFAC list alerts, and Plaintiff's claims and those of the class members thus arose from the same alleged course of conduct and theory of liability. *Id.* at *28. The Magistrate Judge found no issues with respect to the qualifications, experience, and suitability of Plaintiff's counsel, and their past experience in class action litigation, including past certifications and engagements that included trial of class actions through verdict. *Id.* at *30. The Magistrate Judge further stated that a common issue gave rise to the claims of all class members, and recommended that the Court find that common issues predominated over individual issues. *Id.* at *31. The Magistrate Judge also held that class action was a superior method of fairly and efficiently adjudicating the claims because of the large number of Plaintiffs and because the likely recovery on an individual basis may be relatively low, which could have the effect of discouraging scattered individual suits, despite a large number of consumers having potential claims. *Id.* at *32. Accordingly, the Magistrate Judge recommended that the Court grant Plaintiff's motion for class certification.

***Moore, et al. v. Rite Aid HDQTS Corp.*, 2017 U.S. Dist. LEXIS 209908 (E.D. Penn. Dec. 21, 2017).** Plaintiff filed a putative class action alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") in its use of LEXISNexis Screening Solutions, Inc.' ("LEXISNexis") employment screening services. Plaintiff moved for class certification pursuant to Rule 23 and Defendant moved to dismiss pursuant to Rule 12(b)(1). The Court granted

Defendant's motion to dismiss and denied Plaintiff's motion for class certification. Plaintiff was an applicant for employment and Defendant made a conditional offer of employment pending the results of a LEXISNexis' background check. *Id.* at *2. LEXISNexis automatically mailed pre-adverse action notices to applicants who were labeled non-competitive based upon the results of their background check. After Plaintiff was adjudicated non-competitive, LEXISNexis mailed her a pre-adverse action notice and informed her that she had five business days within which to provide mitigating information, or otherwise the offer of employment would be terminated. Plaintiff contacted Defendant and supplied mitigating facts prior to the expiration of the five days. Subsequently, she received a rejection notice dated five business days after the date of the pre-adverse action notice. Plaintiff's first complaint named LEXISNexis as a co-Defendant. Plaintiff settled with LEXISNexis and then dismissed it from the action. Plaintiff subsequently filed an amended class action complaint naming only Defendant and alleged that LEXISNexis was acting on behalf of Defendant as its agent. Plaintiff asserted that LEXISNexis' adjudication of an applicant as non-competitive was an adverse action taken prior to the mailing of the pre-adverse action notices because LEXISNexis uniformly mailed adverse action notices exactly five days after mailing the pre-adverse action notices. Defendant moved to dismiss on the grounds that Plaintiff: (i) lacked standing to challenge Defendant's failure to adhere to the five days referenced in the pre-adverse action notice because she discussed her background report with Defendant; and (ii) released Defendant from any claims that were premised on LEXISNexis' conduct. The Court agreed with the defense arguments and determined that Plaintiff did not suffer a concrete harm because Plaintiff contacted Defendant within the five-day period and took full advantage of her procedural rights under the FCRA and any procedural violation of the FCRA was insufficient to establish a concrete harm. The Court further held that Plaintiff's remaining claims rested on the fact that Defendant acted through its agent LEXISNexis and pursuant to Pennsylvania law, Plaintiff released Defendant as the principal because she released its agent, LEXISNexis for the same conduct. *Id.* at *40. Accordingly, the Court granted Defendant's motion to dismiss and denied Plaintiff's motion for class certification as moot. *Id.* at *47.

***Pedro, et al. v. Equifax,* 2017 U.S. App. LEXIS 16167 (11th Cir. Aug. 24, 2017).** Plaintiff, a consumer, filed a class action alleging that Defendants violated the Fair Credit Reporting Act ("FCRA"). Plaintiff was listed as an authorized user on her parents' credit card account, which later went into default. Defendant TransUnion LLC, a consumer reporting agency, listed the delinquent account on Plaintiff's credit report with a notation that she was an authorized user of the account. TransUnion also included the account when calculating Plaintiff's credit score, which caused her credit score to fall. Plaintiff asserted that Defendant failed to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates" in violation of the FCRA. *Id.* at *2. The District Court granted Defendants' motion to dismiss for failing to allege a plausible claim for relief. On appeal, the Eleventh Circuit affirmed the District Court's decision, finding that was not objectively unreasonable for TransUnion to interpret § 1681e(b) of the FCRA to permit it to report an account for which a consumer is an authorized user. *Id.* at *3. The Eleventh Circuit explained that Plaintiff had standing because she alleged that she suffered an injury-in-fact that was both concrete and particular because the harm caused by the alleged violation affected her personally. *Id.* at *7. To that end, the Eleventh Circuit noted that Plaintiff's credit score dropped 100 points as a result of the challenged conduct. Because Plaintiff alleged that she suffered an injury-in-fact, the Eleventh Circuit stated that she had standing to bring her claims. *Id.* at *8. The Eleventh Circuit opined that to establish that TransUnion willfully failed to comply with § 1681e(b), Plaintiff must establish that TransUnion either knowingly or recklessly violated that section. The Eleventh Circuit explained that an agency recklessly violates the FCRA if it takes an action that "is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at *9. A consumer reporting agency that adopts a reading of the Act that is "not objectively unreasonable" based on the text of the Act, judicial precedent, or guidance from administrative agencies "falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability." *Id.* Relative to the record before it, the Eleventh Circuit held that TransUnion adopted an interpretation of the Act that was objectively reasonable. TransUnion could have reasonably interpreted the Act to permit it to report that Plaintiff was an authorized user on her parents' credit card account because it could have understood the standard of "maximum possible accuracy," 15 U.S.C. § 1681e(b), to require only that TransUnion report information that is technically accurate. *Id.* at *12. The Eleventh Circuit opined that Defendant's interpretation was not objectively unreasonable because it had a "foundation in the statutory text and a sufficiently convincing justification." *Id.* Further, the Eleventh

Circuit found that Plaintiff cited no judicial precedent or agency guidance that stated that reporting information about accounts for which a consumer is an authorized user fails to meet the standard of maximum possible accuracy. Because TransUnion adopted an interpretation of the Act that was not objectively unreasonable, the Eleventh Circuit found that it did not willfully violate the FCRA. Accordingly, the Eleventh Circuit affirmed the District Court's ruling granting Defendants' motion to dismiss.

***Ramirez, et al. v. Trans Union, LLC*, 2017 U.S. Dist. LEXIS 184560 (N.D. Cal. Nov. 7, 2017).** Plaintiff, a consumer, filed a class action alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") through its OFAC name screen alert. The OFAC name screen alert or OFAC alert is a service that Trans Union provides to its customers, which identifies persons whose names match individuals on the United States government's list of terrorists, drug traffickers, and others with whom Americans are prohibited from doing business. *Id.* at *1-2. After a jury returned a verdict in Plaintiff's favor and awarded statutory and punitive damages of more than $60 million, Defendant moved for judgment as matter of law, or in the alternative, for new trial. Defendant also requested the awarded damages be reduced. The Court denied Defendant's motion. The Court found that the jury's verdict was supported by substantial evidence and there was no basis to set aside the award of statutory and punitive damages. *Id.* at *8. The Court stated that the trial record included substantial evidence from which a jury could have reached its verdict, and it therefore denied Defendant's motion for judgment as a matter of law. As to the motion for a new trial, Defendant maintained that Plaintiff's counsel made inflammable statements during trial. The Court noted that to the extent Defendant took exception to the remarks of Plaintiff's counsel, defense counsel should have objected and sought appropriate relief from the Court. Further, in evaluating the likelihood of prejudice from the comments, the Court considered "the totality of circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the Court treated the comments, the strength of the case, and the verdict itself." *Id.* at *9. The Court found that Defendant made no such comparable showing here. Accordingly, the Court also denied Defendant's motion for a new trial. In addition, the Court held that substantial evidence supported the jury's conclusion that Defendant willfully violated 15 U.S.C. §§ 1681e(b), 1681g(a), and 1681g(c), and that the award was proportionate to the harm shown by the trial evidence. Therefore, the Court found no basis to set aside the statutory damages award. The Court noted that the FCRA also allows punitive damages for willful non-compliance with its provisions in such amount "as the Court may allow." Here, the jury awarded punitive damages of $6,353.08 per class member, which amounted to a total award of more than $50 million. *Id.* at *20. The Court opined that Defendant offered no support for the proposition that because the class received statutory damages they should not also receive punitive damages despite the express statutory statement that statutory and punitive damages are available for willful violations. *Id.* at *21. Accordingly, the Court also denied Defendant's request to reduce the damages award.

***Rosario, et al. v. Starbucks Corp.*, 2017 U.S. Dist. LEXIS 177159 (W.D. Wash. Oct. 25, 2017).** Plaintiff, a job applicant, filed a class action alleging that Defendant took adverse employment action against him before providing him with a copy of his background report and a summary of his rights as an applicant in violation of the Fair Credit Reporting Act ("FCRA"). Plaintiff applied and interviewed for a barista position and received a conditional offer of employment, pending the results of a background check completed by Accurate Background ("Accurate"), a third-party screening service. *Id.* at *2. Defendant received Plaintiff's background report from Accurate, which included inaccurate criminal record information that had been attributed to Plaintiff's adoptive brother. Defendant then removed Plaintiff from hiring consideration based on the background report. Accurate sent Plaintiff a letter on behalf of Defendant, informing him that his background check did not meet Defendant's requirements and that he could appeal the decision. The letter also stated that if Plaintiff's appeal was successful, his offer of employment would be reinstituted. *Id.* at *3. Plaintiff called Accurate and disputed the results of his background check, and the report was corrected shortly after. *Id.* However, Defendant did not reinstitute Plaintiff's job offer. Defendant filed a motion to dismiss for lack of standing and failure to state a claim. The Court denied the motion. Defendant argued that Plaintiff lacked Article III standing because he failed to allege facts demonstrating that he suffered an injury. Plaintiff asserted that he lost his job opportunity when Defendant adopted Accurate's adjudication of his job application before he was able to obtain a correction of his background report. The Court found that assuming the truth of the complaint's factual allegations and crediting all reasonable inferences arising from those allegations, it was plausible that Plaintiff did not have an opportunity to contest Accurate's adjudication before he was removed from hiring consideration. The Court reasoned that

this was not a "mere procedural violation" as Defendant contended, but a concrete injury sufficient to establish Article III standing. *Id.* at *8. Accordingly, the Court denied Defendant's motion to dismiss to the extent that it requested that the Court dismiss Plaintiff's claims due to lack of standing. Defendant also argued that Plaintiff has not sufficiently pled that it took adverse action against him prior to when Accurate sent Plaintiff a letter indicating that his background check did not meet Defendant's requirements for hiring. *Id.* at *9. However, Plaintiff contended that adverse action actually occurred when Accurate adjudicated his application for employment based on Defendant's hiring requirements and when Defendant "adopted" that adjudication. *Id.* at *10. The Court ruled that adoption of an adjudication that Plaintiff was ineligible for employment was a decision for employment purposes that adversely affected Plaintiff. Accordingly, the Court also denied Defendant's motion to dismiss for failure to state a claim.

Saltzberg, et al. v. Home Depot, USA, Inc., **Case No. 17-CV-5798 (C.D. Cal. Oct. 18, 2017).** Plaintiff, a job applicant, filed a class action on behalf of herself and all those similarly-situated, alleging that Defendant violated the Fair Credit Reporting Act ("FCRA") by failing to make proper disclosures and failing to obtain proper authorization when running a background check. Plaintiff sought employment with Lifetime Solutions, a service provider for Defendant. In connection with her employment application, Plaintiff completed Defendant's standard background check forms. Defendant conducted a background check and Plaintiff was subsequently hired. Plaintiff asserted that although Defendant's background check was two pages long, it constituted one document, and therefore the inclusion of the liability release provision on the page with the disclosure violated the FCRA's requirement that the disclosures be on a separate document. *Id.* at 2. Defendant filed a motion to dismiss, arguing that Plaintiff failed to sufficiently allege Article III standing. *Id.* at 3. The Court found that Plaintiff failed to plead even general allegations of an injury in her complaint. The Court explained that merely asserting a violation of the FCRA was insufficient to confer standing without connecting it to a concrete injury. Accordingly, the Court granted Defendant's motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1).

Stephens, et al. v. Wal-Mart Stores, Inc**., Case No. 16-CV-62723 (S.D. Fla. Oct. 23, 2017).** Plaintiff, a job applicant, filed a class action alleging that Defendant's background check process violated the Fair Credit Reporting Act ("FCRA"). Plaintiff applied for a job with Defendant and received a conditional offer of employment, pending the results of a successful background check. Defendant sent Plaintiff's application to Sterling Infosystems, a credit reporting service, which ran the background check and found two prior felony convictions. Sterling sent Plaintiff a letter advising him that his report likely would have an adverse impact on Plaintiff's ability to obtain employment with Defendant, included a copy of the report, and instructed Plaintiff to contact Sterling if the report was inaccurate. *Id.* at 2. Plaintiff did not contact Sterling because the report was accurate. *Id.* Defendant subsequently sent Plaintiff an adverse-action letter. *Id.* at 3. Plaintiff argued that Defendant violated the FCRA when it failed to provide him with a pre-adverse-action notice of his unfavorable consumer report and failed to provide him with an opportunity to challenge the report. *Id.* Defendant filed a motion to dismiss, arguing that Plaintiff lacked standing because he failed to establish a concrete injury. The Court agreed, and determined that Plaintiff failed to allege a sufficient degree of risk to satisfy the concreteness requirement of standing. *Id.* at 5. The Court held that Plaintiff only identified bare procedural violations of the FCRA – delayed notice and opportunity to challenge – that carried no material risk of harm because Plaintiff ultimately received both notice of the unfavorable consumer report and an opportunity to challenge the report. *Id.* at 7. Accordingly, the Court found that the alleged procedural violations posed no threat to the FCRA's purpose of ensuring fair and accurate consumer reporting. *Id.* As a result, the Court granted Defendant's motion to dismiss for lack of subject-matter jurisdiction.

Syed, et al. v. M-1, LLC, **846 F.3d 1034 (9th Cir. 2017).** Plaintiff brought a class action on behalf of himself and similarly-situated individuals alleging that Defendant violated the Fair Credit Reporting Act ("FCRA"). *Id.* at 1037. Plaintiff applied for a job with Defendant in 2011. Defendant provided Syed with a document labeled "Pre-Employment Disclosure Release." *Id.* at 1038. The release informed Plaintiff that his credit history and other information could be collected and used as a basis for the employment decision, authorized Defendant to procure Plaintiff's consumer report, and stipulated that, by signing the document, Plaintiff was waiving his rights to sue Defendant and its agents for violations of the FCRA. *Id.* at 1039. Plaintiff alleged that Defendant's inclusion of the liability waiver violated the FCRA's requirement that the disclosure document consist "solely" of the disclosure. *Id.* Plaintiff sought statutory damages pursuant to § 1681n(a)(1)(A), punitive damages pursuant

to § 1681n(a)(2), and attorneys' fees and costs pursuant to § 1681n(a)(3). The District Court dismissed Plaintiff's complaint for failure to state a claim, reasoning that Plaintiff had not sufficiently plead willfulness. At the outset, the Ninth Circuit found that Plaintiff established Article III standing because he alleged more than a "bare procedural violation." *Id.* The Ninth Circuit then stated that neither the Supreme Court nor any other circuits had previously addressed whether a prospective employer could satisfy § 1681b(b)(2)(A) by providing a disclosure on a document that also includes a liability waiver. *Id.* The Ninth Circuit explained that the District Court also avoided the interpretive question, holding only that Defendant's view that it had not violated the FCRA, whether correct or not, was "not objectively unreasonable," and that Defendant therefore could not be held liable for statutory or punitive damages. *Id.* at 1040. The Ninth Circuit concluded that Defendant's inclusion of the liability waiver violated the plain text of the FCRA. *Id.* In considering whether that violation was willful, the Ninth Circuit held that § 1681b(b)(2)(A) unambiguously requires that a document consists "solely of the disclosure." *Id.* at 1041. The Ninth Circuit found that the statute's explicit language could not be interpreted as permitting the inclusion of a liability waiver. *Id.* at 1043. The Ninth Circuit opined that Defendant's inclusion of a liability waiver in the statutorily mandated disclosure document did not comply with any reasonable interpretation of § 1681b(b)(2)(A), and therefore Defendant's interpretation was "objectively unreasonable." *Id.* at 1045. The Ninth Circuit reasoned that 15 U.S.C. § 1681b(b)(2)(A)(i) creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process. Further, the authorization requirement within § 1681b(b)(2)(A)(ii) creates a right to privacy by enabling applicants to withhold permission to obtain the report from the prospective employer, and thereby causing a concrete injury when applicants are deprived of their ability to meaningfully authorize the credit check. The Ninth Circuit concluded that by providing a private cause of action for violations of § 1681b(b)(2)(A), Congress recognized the harm such violations cause, and thus articulating a "chain[ ] of causation that will give rise to a case or controversy." *Id.* at 1047. The Ninth Circuit ruled that Defendant willfully violated the FCRA by procuring Plaintiff's consumer report without providing a disclosure "in a document that consist[ed] solely of the disclosure." *Id.* at 1048. Therefore, the Ninth Circuit held that the District Court erred in dismissing Plaintiff's complaint, and reversed and remanded the decision for further proceedings.

***Tyus, et al. v. United States Postal Service,* 2017 U.S. Dist. LEXIS 94665 (E.D. Wis. June 20, 2017).** Plaintiff, an employee, filed a class action asserting that Defendant performed a criminal background check that violated the Fair Credit Reporting Act ("FCRA"). Plaintiff applied for security clearance to work at Defendant, which contracted with General Information Services Inc. ("GIS") to perform criminal background checks on job seekers. Defendant procured Plaintiff's criminal background report from GIS and provided Plaintiff with a copy, telling him that if "you believe the report to be inaccurate or incomplete, please fax the completed disclosure/ dispute form to GIS within five (5) business days from the date of this letter." *Id.* at *2. Plaintiff alleged that the report contained several inaccuracies, but before the five days to address the inaccuracies expired, Defendant informed Plaintiff that, based on the GIS report, it had denied Plaintiff's request for a security clearance. Defendant moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) for failure to state a claim upon which relief can be granted. The Court denied the motion. The Court found that Plaintiff alleged more than a mere procedural violation. Plaintiff's complaint asserted a number of inaccuracies in the GIS report that collectively portrayed Plaintiff in a negative light. *Id.* at *9. The Court noted that it was fair to infer that the inaccuracies increased the chances that Plaintiff would be denied a security clearance. The Court held that had Plaintiff been given a reasonable opportunity to address those inaccuracies, it might have resulted in a different decision by Defendant as to whether to grant Plaintiff security clearance. The Court concluded that Plaintiff alleged a plausible claim that he suffered an injury-in-fact that was fairly traceable to Defendant's alleged violation of the FCRA. *Id.* at *11. Accordingly, the Court denied Defendant's motion to dismiss.

***Vera, et al. v. Mondelez Global LLC,* 2017 U.S. Dist. LEXIS 38328 (N.D. Ill. Mar 17, 2017).** Plaintiff alleged that Defendant used an improper disclosure format to inform him that it planned to run a background check on his personal history before hiring him in violation of the Fair Credit Reporting Act ("FCRA"). Defendant moved to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), and the Court granted the motion. Plaintiff applied on-line for a job with Defendant. As part of the application process, the website displayed a statement related to the general topic of background checks (the "Statement"). *Id.* at *2. Plaintiff alleged that the Statement misstated his rights under the FCRA, and included various other information about his rights and Defendant's obligations should he be hired. *Id.* at *3. Plaintiff alleged that Defendant's Statement violated the

FCRA's stand-alone disclosure requirement. *Id.* Defendant argued that the Court did not have subject-matter jurisdiction over Plaintiff's claim because he failed to allege an injury-in-fact. Defendant asserted that even if Plaintiff alleged that Defendant failed to comply with the stand-alone disclosure requirement in § 1681b, Plaintiff failed to allege that he was harmed by that failure. *Id.* at *3-4. The Court found that Plaintiff did not allege that Defendant's Statement failed to disclose the fact that it sought to procure a background check report about him as part of his employment application, nor did Plaintiff allege that he denied Defendant the opportunity to conduct an investigation. *Id.* at *5-6. The Court determined that the question was whether a violation of the stand-alone aspect of the disclosure requirement was sufficient on its own to establish constitutional harm for Article III standing purposes. *Id.* at *6. Defendant contended that the stand-alone requirement is a bare procedural requirement akin to the FCRA procedural violation at issue in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), which the Supreme Court held did not establish constitutional harm in and of itself. *Id.* In *Spokeo*, the Supreme Court addressed § 1681e of the FCRA, which requires "[e]very consumer reporting agency [to] maintain reasonable procedures designed to avoid [improper or incorrect disclosure of personal information] and to limit the furnishing of consumer reports to [certain permitted circumstances]." *Id.* at *9. The Court reasoned that Congress imposed the stand-alone obligation on employers to decrease the risk that prospective employees would be unaware that they were granting prospective employers access to their private information, and to increase their opportunity to challenge any errors in the report. *Id.* The Court explained that a failure to comply with the procedures might cause the statutorily identified harm, *i.e.,* inaccurate and unauthorized reporting, but a procedural violation would not necessarily cause that harm, so the procedural violation by itself was not an injury-in-fact. *Id.* Moreover, the Court found that Plaintiff did not allege that he suffered the harm Congress intended the FCRA to prevent, as Plaintiff did not allege that Defendant failed to disclose that it intended to run a background check nor did he allege that he denied Defendant permission to do so. *Id.* at *10-11. The Court held that Plaintiff failed to demonstrate that he suffered an injury-in-fact, and it therefore it did not have subject-matter jurisdiction. Accordingly, the Court granted Defendant's motion to dismiss.

***Wilson, et al. v. CoreLogic Saferent,* LLC, 2017 U.S. Dist. LEXIS 162928 (S.D.N.Y. Sept. 29, 2017).** Plaintiff filed a class action alleging Defendant violated the Fair Credit Reporting Act ("FCRA") when it providing his prospective landlord with a background report including a previous conviction that had been vacated. *Id.* at *1. Defendant moved for partial summary judgment on two of Plaintiff's claims, and Plaintiff moved for class certification. The Court denied both motions. The FCRA provides that "whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *Id.* at *7. The Court noted that the elements of a negligence claim under this provision are: "(i) inaccuracy; (ii) failure to follow reasonable procedures; (iii) actual damages and (iv) causation." *Id.* Defendant contended that it was entitled to summary judgment on the question of whether it followed "reasonable procedures." *Id.* The Court concluded, however, that summary judgment was not appropriate because a genuine factual dispute existed as to the reasonableness of Defendant's procedures. *Id.* at *7-8. Defendant asserted that its procedures were reasonable as a matter of law because it relied on records obtained from the New York Department of Corrections ("NYDOC"), a governmental agency tasked with collecting, maintaining, and analyzing the "criminal history" data of incarcerated persons. *Id.* at *8. In response, Plaintiff pointed to evidence of the NYDOC's unreliability, which he claimed was sufficient to permit a jury to conclude that Defendant's reliance on the agency was unreasonable. *Id.* at *9. Plaintiff offered evidence that the NYDOC generally updated its database only quarterly, and sometimes only every six months. *Id.* Finally, Plaintiff maintained that the NYDOC was responsible for statistical data relating only to individuals under its jurisdiction –*i.e.,* incarcerated individuals – while the statutory authority to maintain criminal history record information, *i.e.*, information relating to "arrest and disposition data," was vested in the New York State Division of Criminal Justice Service. *Id.* at *9. The Court concluded that the reasonableness of Defendant's procedures was not "beyond question." *Id.* Further, the Court noted that to accept Defendant's argument – that reliance on information obtained from a governmental agency, regardless of context, categorically insulates a credit reporting agency from liability – would severely undermine the FCRA's remedial purpose. *Id.* The Court found that a fact-finder should decide whether Defendant failed to employ reasonable procedures to ensure maximum possible accuracy when it reported inaccurate criminal history information about Plaintiff without consulting any judicial records. Accordingly, the Court denied Defendant's motion for partial summary judgment. Plaintiff sought to certify a class of consumers who were the subject of a consumer report prepared by Defendant who subsequently disputed that the report contained one or more items

of criminal or public record information that had been expunged, vacated, sealed, dismissed, or otherwise removed from the public record. *Id.* at *15. The Court found that Plaintiff failed to establish by a preponderance of the evidence that the proposed class would meet the numerosity requirement of Rule 23(a)(1). *Id.* at *16-17. Accordingly, the Court denied Plaintiff's motion for class certification.

(xxx) Federal Tort Claims Act Class Actions

***Pieper, et al. v. United States*, 2017 U.S. App. LEXIS 20796 (4th Cir. Oct. 20, 2017).** Plaintiffs, a group of current and former residents of Frederick, filed a lawsuit contending that the United States Army was negligent both in its initial disposal of toxic materials and in its failure to fully correct the resulting contamination in violation of the Federal Tort Claims Act ("FTCA"). Plaintiffs alleged that they and their family members had contracted (or feared contracting) cancer, autoimmune disorders, and other diseases from exposure to this waste. *Id.* at *4. Defendant moved to dismiss pursuant to Rule 12(b)(1), arguing that the District Court lacked subject-matter jurisdiction to hear the case because the suit was barred under the discretionary function exception to the FTCA. The District Court concluded that the Plaintiffs could not meet their burden to prove that the District Court had subject-matter jurisdiction. *Id.* On appeal, the Fourth Circuit affirmed the District Court's ruling. The District Court explained that the FTCA effects only a "limited waiver" of the federal government's sovereign immunity from suit. *Id.* Through the FTCA, the government has allowed itself to be sued for some tort claims, but not all, and the statute identifies several exceptions to its waiver of immunity. *Id.* Specifically, under 28 U.S.C. § 2680(a), the United States retains its immunity from suit as to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.* at *5. The District Court recognized, because waivers of sovereign immunity must be strictly construed, an FTCA Plaintiff bears the burden of proving that the government conduct in question does not fall within the discretionary function exception. The District Court considered Plaintiffs' documents, and determined that the direction they provided was neither mandatory nor specific enough to bind the Army. Regarding the Executive Orders issued by President Richard Nixon, the District Court held that any duties imposed by the orders were pitched at a high level of generality and gave the Army no "specified instructions that it was compelled to follow." *Id.* at *9. As to the Fort Detrick Regulation 385-1, the District Court found that it too was neither "mandatory nor sufficiently specific to bind the Army," and also noted that the very conduct Plaintiffs challenged – the disposal of potentially contaminated materials in Area B – was expressly contemplated by the regulation itself. *Id.* On appeal, the Fourth Circuit agreed with the District Court that the Army's waste disposal and remediation practices at Fort Detrick fell squarely within the discretionary function exception to the FTCA. *Id.* at *10. Accordingly, the Fourth Circuit affirmed the District Court's ruling dismissing Plaintiffs' claims.

(xxxi) Foreign Worker And Labor Issues Class Actions

***Trickey, et al. v. Brolick*, 2017 U.S. Dist. LEXIS 107951 (S.D.N.Y. July 11, 2017).** Plaintiff, a shareholder of Wendy's, brought a derivative action on behalf of Wendy's against 10 of the company's 11 members of the Board of Directors (the "Board"). Plaintiff alleged that the Board breached its fiduciary duty to the company by declining to cause Wendy's to join an industry alliance between farms and food retailers called the Fair Food Program ("FFP"). Defendant filed a motion to dismiss, which the Court granted. The FFP is an "alliance among farmers, farm workers, major restaurant chains, and retail food companies that ensures humane wages and working conditions" for farm workers. *Id.* at *2-3. Defendants sought dismissal on the ground that Plaintiff to plead either that he made a pre-suit demand on Wendy's Board that it file a breach of fiduciary duty lawsuit based on Wendy's failure to join the FFP, or the futility of such a demand, as required by Rule 23.1. *Id.* at *5. Plaintiff conceded that he never made a demand upon the Board. However, Plaintiff argued that a demand would have been futile, as revealed by the fact that he did not receive documents in response to his books and records request The Court found that Plaintiff failed to make any factual allegations shedding light on the Board's ostensible decision not to participate in the FFP. *Id.* at *11. Further, the Court held that Plaintiff's complaint was devoid of particularized factual allegations that any Defendants "acted in bad faith or were not adequately informed" when making that decision. *Id.* at *12. Given its threadbare pleadings as to these ingredients, the Court stated that the complaint effectively disabled it from finding that the Board's decision not to participate in the program was reached through an irrational process or one employed other than in a "good faith effort to advance corporate interests." *Id.* at *17. The Court also determined that the complaint was silent as

to the data before the Board or the Board's reasons for not deciding to decline participation in the FFP program. With such centrally relevant information missing, the Court found it impossible to conclude that the Board's decision was outside the wide bounds of defensible business judgment. To the contrary, the Court noted that Plaintiff provided facially defensible justification for Wendy's not to participate because doing so imposed a price premium. *Id.* at *17-18. Accordingly, the Court granted Defendant's motion to dismiss for failure to state a claim.

***Zuniga, et al. v. Masse Contracting,* 2017 U.S. Dist. LEXIS 191376 (E.D. La. Nov. 20, 2017).** Plaintiffs, two workers from Honduras, brought claims under the Trafficking Victims Protection Act ("TVPA"), the Louisiana Victims of Human Trafficking Act ("LVHTA"), and the FLSA. Plaintiffs also brought claims for a civil rights conspiracy under 42 U.S.C. § 1985(3), race discrimination under 42 U.S.C. § 1981, and state law tort claims. Plaintiffs alleged that Defendants recruited them in Honduras under a visa program to be welders in the United States and after paying for the visa and arriving in the United States, they were trafficked to work as general laborers. Plaintiffs alleged that Defendants deducted housing and transportation costs from their pay, which brought their pay below minimum wage and that they were paid separately by sub-contractors to avoid overtime pay. Defendants moved to dismiss pursuant to Rule 12(b)(6). The Court dismissed Plaintiffs' state law tort claims. *Id.* at *7. Defendants asserted that Plaintiffs' claims of workplace injury were barred because the Louisiana Worker's Compensation Law ("LWCL") was their exclusive remedy for workplace injuries. The Court agreed and ruled that Plaintiffs' claims for physical injuries and fear of contracting mesothelioma did not fall within the intentional tort exception of the LWCL and were therefore barred by the LWCL's exclusivity provision. *Id.* Second, the Court dismissed Plaintiffs' FLSA claims because Plaintiffs did not allege: (i) a date range for which worked; (ii) an approximation of the hours for which they were not compensated: or (iii) any instance in which they were not paid overtime. Plaintiffs' complaint alleged that they were paid minimum wage and failed to allege which Defendant they considered to be their employer and whether that entity was subject to the provisions of the FLSA. The Court held that these allegations were insufficient to put Defendants on notice regarding Plaintiffs' FLSA claims, and therefore it dismissed the claims. *Id.* at *9. Third, the Court dismissed Plaintiffs' claims for a civil rights conspiracy under 42 U.S.C. § 1985 because conclusory allegations of conspiracy, absent any reference to material facts, failed to state a substantial claim of federal conspiracy. The Court opined that the essence of a conspiracy is an understanding or agreement between the conspirators, and Plaintiffs' complaint did not include any allegations regarding any agreement between Defendants to join in a conspiracy. Plaintiffs' conclusory allegations that Defendants formed a conspiracy to solicit individuals of Hispanic descent to use them in an illegal forced labor scheme lacked the requisite specificity to support a conspiracy claim. *Id.* at *11. Fourth, the Court dismissed Plaintiffs' claim under 42 U.S.C. § 1981 as to their national origin discrimination claim and determined that this was not a cognizable claim under § 1981. However, the Court ruled that Plaintiffs' allegations that they were targeted because of their Hispanic descent were sufficient to state a claim for racial discrimination under § 1981, and it denied Defendants' motion as to those claims. *Id.* at *12. Fifth, the Court dismissed Plaintiffs' TVPA claims because Plaintiffs' complaint did not contain any allegations of force, threats, restraint, or fear that they believed they would suffer retribution of any kind for their failure to perform labor, as such was a necessary element of the TVPA. *Id.* at *13. Sixth, the Court dismissed the Plaintiffs' claims under the LVHTA and concluded that Plaintiffs' claims that they were solicited as part of a legal work program under false pretenses did not rise to the level of "fraud, force, or coercion" as defined in the LVHTA. *Id.* at *15. Finally, the Court dismissed Plaintiffs' claims against Defendant Craig Masse as Plaintiffs did not allege any acts taken personally by him or that he was affiliated with any of the Defendant entities. Accordingly, the Court dismissed all of Plaintiffs' claims against all Defendants with prejudice, except Plaintiffs' claim for race discrimination under 42 U.S.C. § 1981. *Id.* at *16.

(xxxii) Government Enforcement Litigation

***AARP v. EEOC*, 2017 U.S. Dist. LEXIS 208965 (D.D.C. Dec. 20, 2017).** Plaintiff, the American Association for Retired Persons ("AARP"), filed an action alleging that the U.S. Equal Employment Opportunity Commission's ("EEOC") decision to promulgate regulations for wellness plans went against Congressional intent by forcing employees to disclose personal information under the Americans With Disabilities Act ("ADA") and spousal information under the Genetic Information Non-Discrimination Act ("GINA"). The Court found that the EEOC failed to adequately explain its decision to construe the term "voluntary" in the ADA and the GINA to permit the 30% incentive level adopted in both the ADA rule and the GINA rule on wellness plans. *Id.* at *2. However, in light of the potential for disruption if the Court vacated the challenged rules in the middle of a plan year, the

Court remanded without vacatur "for the present." *Id.* Plaintiff subsequently filed a motion to reconsider, and requested that the Court vacate the rules or issue an order barring enforcement of the rules. Alternatively, Plaintiff requested the Court to vacate the rules, but only apply the order to health plans that start at least six months after the order is issued. While the Court agreed with the EEOC that vacating the rules in 2018 would be too disruptive for employers and employees, it held that vacatur was the usual solution when an agency fails to provide a reasoned explanation for its regulations . Accordingly, the Court vacated the challenged portions of the rules, with an effective date of January 1, 2019. The Court found that there was significant evidence in the record that employers need to know the regulatory incentive structure for the following year by June or July at the latest, so as to have enough time to develop their wellness plans. *Id.* at *7. The Court reasoned that it could not simply assume that employers would be able to justify their wellness plans "on the fly" or that employees would be able to handle a shift in their health care plans on such short notice. *Id.* at *8. However, the Court noted that moving further into the future the balancing test begins to shift toward vacatur. *Id.* at *9. The Court found that the EEOC's arguments against Plaintiff's motion revolve around the harm that employers and employees would face if the Court were to vacate the rules weeks before the 2018 wellness plans came into effect. The Court therefore found that given that the EEOC had suggested that businesses need six months' lead time to adjust to a change in the regulatory scheme, and longest lead time for which any commenter asked during the EEOC's notice-and-comment process was 12 months, the Court reasoned that vacating the order as of January 1, 2019 would avoid any substantial disruptive effect; in effect, this would give the EEOC over a year "to come up with interim or new permanent rules by the time" that the vacatur would become effective. *Id.* at *12. Accordingly, the Court granted Plaintiff's motion to alter or amend judgment.

***National Federation Of Independent Businesses, et al. v. U.S. Department Of Labor,* Case No. 16-CV-066 (N.D. Tex. Jan. 18, 2017).** In this Department of Labor dispute, the Court granted Plaintiff and Intervener-Plaintiffs' motion for summary judgment and denied the motion for summary judgment of the U.S. Department of Labor (DOL), holding that the regulation at issue – as to changes to the DOL overtime rules – was unlawful and issued a nationwide injunction preventing the implementation of the rule. The Court ordered the parties to file additional briefing concerning their entitlement to attorneys' fees. *Id.* at 2. Intervener-Plaintiffs filed a response indicating that they sought reimbursement only for expenses in the amount of $3,457,25. Plaintiffs sought reimbursements as prevailing parties under the Equal Access to Justice Act ("EAJA"). Plaintiffs contended that they engaged in 1,800.8 hours of reimbursable work and proposed three different fee amounts to determine their recovery. *Id.* Plaintiffs further sought to recover $12,133.69 in costs and $5,727.31 in expert fees. *Id.* at 2-3. The Court found that Plaintiffs' claimed time should be reduced by 175 hours for work done by paralegals and law students. The Court concluded that Plaintiffs should be awarded attorneys' fees for 1,625.8 hours of compensable work with a rate of $193.01 per hour. *Id.* at 3. Accordingly, the Court granted Plaintiffs' motion for attorneys' fees and costs.

***United States v. Pennsylvania,* 2017 U.S. Dist. LEXIS 163484 (M.D. Pa. Oct. 2, 2017).** The U.S. Department of Justice ("DOJ") alleged that Defendant engaged in a pattern or practice of unlawful discrimination because its use of physical fitness tests to screen and select applicants for entry- level trooper positions had an unlawful disparate impact on female applicants who were hired at significantly lower rates than male applicants. *Id.* at *8. Specifically, the DOJ challenged Defendant's use of the 2003 and 2009 Physical Readiness Tests ("PRT") to screen and select applicants for trooper positions. The Court granted the DOJ's motion for summary judgment and denied Defendant's motion. Defendant moved for summary judgment on the grounds that: (1) disparate impact claims are not cognizable under 42 U.S.C. § 2000e-6(a); (2) Title VII on its face prohibits different employment standards based on sex; and (3) the DOJ failed to establish the last element of its burden by suggesting the adoption of gender-based fitness tests as an alternative selection device to the PRT. *Id.* at *14. The DOJ moved for partial summary judgment and asserted that it had satisfied the first prong of the Title VII burden-shifting framework by showing that women passed the 2003 PRT and 2009 PRT at statistically significant lower rates than men. Defendant's principal argument was that Title VII disparate impact claims were not within the jurisdiction of the Court under § 707(a) because of the U.S. Supreme Court's recent opinion in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015), which, according to Defendant, set forth the proper analysis to interpret statutes that purported to create a cause of action for disparate impact. The Court rejected Defendant's argument and concluded that *Inclusive Communities* was not supervening new law that affected the Court's jurisdiction over Title VII disparate impact

cases. *Id.* at *17. As such, the Court denied Defendant's motion for summary judgment. The DOJ argued that it was entitled to partial summary judgment because it established prong one of Title VII's three-prong burden shifting test. *Id.* at *18. Specifically, the DOJ asserted that it proved through statistical evidence that Defendant's use of the 2003 PRT and 2009 PRT had a disparate impact on women. The Court agreed that there was no genuine issue of material fact regarding the first prong of the disparate impact analysis. *Id.* at *33. The DOJ's expert provided a comprehensive analysis of data showing that women passed the 2003 PRT and 2009 PRT at statistically significantly lower rates than men. *Id.* The Court ruled that, because the DOJ met its *prima facie* burden, Defendant could only defend this showing of disparate impact if it demonstrated actual reasons that the 2003 PRT and 2009 PRT were important to the trooper position. *Id.* at *35. The Court ruled that Defendant presented no compelling evidence or argument regarding the business necessity of the 2003 PRT and 2009 PRT. *Id.* at *36. Accordingly, the Court granted the DOJ's motion for partial summary judgment and denied Defendant's motion for summary judgment.

(xxxiii) Immigration Class Actions

***Macy, et al. v. U.S. Citizenship & Immigration Services,* 2017 U.S. Dist. LEXIS 386672 (D. Ore. Mar. 17, 2017).** Plaintiffs brought a putative class action pursuant to the Administrative Procedure Act ("APA") against Defendant alleging that Defendant improperly administered its H-1B specialty occupation non-immigrant, visa-worker program in violation of federal law. The parties cross-moved for summary judgment. The Court denied Plaintiffs' motion for summary judgment and granted Defendants' motion for summary judgment. Under the APA, an agency action must be upheld on review unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at *2. Plaintiffs alleged that Defendants failed to process H-1B visa petitions in the manner that Congress required. Defendants' regulation – 8 C.F.R. § 214.2(h)(8)(ii)(B) – permitted a random computer-generated selection process for H-1B petitions and required that petitions not processed within a given year's statutory cap be returned. Plaintiffs asserted that this procedure conflicted with the unambiguous command of Congress in 8 U.S.C. § 1184(g)(3) that H-1B visas be issued in the order in which the petitions were filed. Plaintiffs challenged two aspects of the procedure used by Defendants in processing H-1B visas. Plaintiffs first disputed the practice that Defendants rejected and returned petitions after enough petitions had been received to meet the statutory cap, and asserted that Defendants should have created an on-going waiting list and processed all petitions in order when the next visa opportunity became available, even if that meant waiting until the next fiscal year. Second, Plaintiffs disputed Defendants' practice of using a random computer-generated selection process, instead of processing all petitions in the order in which they were filed. *Id.* at *18. The Court rejected Plaintiffs argument and ruled that § 1184(g)(3) did not unambiguously require a waiting list for H-1B petitions. Accordingly, Defendants' interpretation was entitled to deference and must be upheld unless it was unreasonable. *Id.* at *29. The Court ruled that given the significant deference owed to an agency's interpretation when a statute was silent or ambiguous, Defendants' refusal to implement a waiting list in the H-1B visa context was not unreasonable. *Id.* at *35. Thus, the Court ruled that the practice was valid. Plaintiffs also argued that the random computer-generated selection process permitted in 8 C.F.R. § 214.2(h)(8)(ii)(B) violated the requirement in § 1184(g)(3) that petitions be processed in the order in which they were filed. Plaintiffs noted that § 1184(g) did not contain any provision allowing for random processing, in contrast to § 1153(e)(2), which provided that those visas shall be issued "strictly in a random order." *Id.* at *38. Plaintiffs argued that this process was arbitrary and unfair because it could result in some persons never receiving a visa, while other persons might receive a visa in the first year that their petition was filed. The Court also rejected this argument because Plaintiffs' assertion relied upon their contention that Defendant must implement a waiting list, since the Court determined that Defendant's decision not to implement a waiting list was reasonable. Accordingly, the Court denied Plaintiffs' motion for summary judgment and granted Defendants' motion for summary judgment. *Id.* at *45.

***Nio, et al. v. Department Of Homeland Security,* 2017 U.S. Dist. LEXIS 178200 (D.D.C. Oct. 27, 2017).** Plaintiffs, a group of non-citizens serving in the U.S. Army's Selected Reserve, filed a putative class action challenging the U.S. Department of Homeland Security's ("DHS") decision to: (i) await the Department of Defense's ("DOD's) completion of the enhanced security screening of Military Accessions Vital to the National Interest ("MAVNI") enlistees prior to their shipment to basic training or active-duty service; and (ii) the Department of Defense's ("DOD's") October 13, 2017 guidance that required the recall and decertification of U.S. Citizen and Immigration Service ("USCIS") Form N-426, necessary for a MAVNI's naturalization

application. Plaintiffs sought to enjoin the DOD and the DHS from invalidating Plaintiffs' existing N-426s based upon the October 13, 2017 guidance that revoked form N-426, which certified a member's honorable service and was necessary for a MAVNI naturalization application, an expedited path to citizenship. Plaintiffs also sought to certify a class, under Rule 23(b)(1) or (2), consisting of all persons who: (i) enlisted in the selected reserve; (ii) had served honorably in the military through participation in at least one selected reserve drill period or in an active-duty status; (iii) had received a Form N-426 certifying their honorable service; (iv) had submitted N-400 applications for Naturalization to USCIS, and (v)were subjected to the DHS/USCIS security screening requirement and Section III of DOD's recent guidance regarding N-426s. The Court granted a preliminary injunction and Plaintiffs' motion to certify the class with a modified class definition. The Court ruled that Plaintiffs' proposed class satisfied Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy. The Court rejected Defendant's argument that commonality was not satisfied because of numerous individual circumstances of the service members. The Court reasoned that it was not adjudicating naturalization applications or making individual N-426 determinations, but rather merely deciding whether DHS could postpone naturalization applications and whether the DOD could apply the October 13 guidance. The Court concluded that factual variations among the class did not defeat the commonality requirement, so long as a single aspect or feature of the claim was common to all proposed class members. The Court ruled that class certification was appropriate under Rule 23(b)(1)(A). It held that because Defendants failed to respond to Plaintiffs' argument that the Court should certify the proposed class under Rule 23(b)(1)(A), Defendants had conceded that class certification was appropriate under Rule 23(b)(1)(A). The Court was also satisfied that Plaintiffs' proposed class met the requirements of Rule 23(b)(2). Defendants objected to certification under Rule 23(b)(2) because of the individualized determinations about an enlistee's fitness. The Court rejected this argument because Plaintiffs only challenged the application of standardized policies that generally applied to the class. The Court held that enjoining these broad policies or declaring them unlawful was appropriate relief under Rule 23(b)(2). In sum, the Court preliminarily enjoined Defendants from implementing the DOD's October 13 guidance. However, the Court limited the class to those who enlisted before October 13, 2017. *Id.* at *16.

***Rojas, et al. v. Johnson, et al.,* Case No. 16-CV-1024 (W.D. Wash. Jan. 10, 2017).** Plaintiffs, a group of asylum-seekers, filed a putative class action against Defendants seeking declaratory and injunctive relief alleging violations of their statutory and due process rights under 8 U.S.C. § 1158(a)(2)(B) and the Fifth Amendment to the U.S. Constitution. Plaintiffs alleged that Defendants failed to provide them with notice of the statutory requirement that an asylum-seeker must apply for asylum within one year of arrival in the United States. Plaintiffs further claimed that Defendants failed to provide a mechanism that ensured that Plaintiffs were able to comply with the statute. The Court granted Plaintiffs' motion for class certification over Defendants' objection. Defendants asserted that the numerosity requirement was not satisfied because Plaintiffs lacked standing. Defendants asserted that because Plaintiffs could not demonstrate an actual injury, they lacked standing. Defendant maintained that Plaintiffs' alleged injuries were speculative as their asylum applications might not be denied. The Court disagreed and found that the Plaintiffs had sufficiently alleged an injury as they were challenging their statutory right to notice and to apply for asylum, as opposed to any past or future denial. The Court noted that because Plaintiffs missed the one-year filing deadline, they were now prejudiced as they had to rely upon the discretion of an immigration judge to find that their late filings were justified. The Court rejected Defendants' arguments as to commonality, typicality and adequacy, noting that Plaintiffs were challenging their right to notice and a procedure to ensure they were afforded the opportunity to comply with a statutory right. Plaintiffs also argued that their putative class satisfied Rule 23(b)(2) because Defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.* at 8. Defendants asserted that Plaintiffs failed to meet the Rule 23(b)(2) standards because Defendants had not failed or refused to act. The Court disagreed because Defendants had not presented a system where the putative class members were guaranteed notice of the filing deadline or a mechanism to ensure an opportunity to file timely applications. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Saravia, et al. v. Sessions,* 2017 U.S. Dist. LEXIS 192905 (N.D. Cal. Nov. 20, 2017).** Plaintiffs, three unaccompanied minors who were alleged to have entered the United States without authorization, filed a complaint and petition for a writ of habeas corpus seeking declaratory and injunctive relief. *Id.* at *19. One of the minors, A.H., moved to provisionally certify a class of similarly-situated minors in conjunction with his motion for

a preliminary injunction. The Court granted Defendants' motion to dismiss as to minors F.E. and J.G. based on improper venue. As to A.H., the Court exercised its discretion to adjudicate the declaratory and injunctive relief claims under the doctrine of pendent venue. *Id.* at *21. The Court provisionally certified, for the limited purpose of issuing a preliminary injunction, a class of non-citizen minors who: (1) came to the country as unaccompanied minors; (2) were previously detained in the custody of the Office of Refugee Resettlement ("ORR") and then released to a sponsor; and (3) had been or would be rearrested by the U.S. Department of Homeland Security ("DHS") based on a removability warrant on or after April 1, 2017, on allegations of gang affiliation. *Id.* at *67. The Court determined that numerosity was satisfied because the evidence suggested that at least 15 sponsored minors had been detained based on gang affiliation. The Court noted that although this was not an especially large number of undocumented minors, there was evidence that more class members would be added. *Id.* at *68. Further, given the characteristics of the members of the proposed class, joinder of all class members was impracticable. The Court ruled that commonality was satisfied because the procedural due process claims for which A.H. sought class-wide preliminary injunctive relief were amenable to common answers. A.H. had shown that there was a common policy or practice of rearresting sponsored minors using removability warrants, on the basis of suspected gang affiliation, and then transferring the minors to ORR custody. *Id.* at *71. The question of whether the DHS and ORR policies violated class members' rights in a systematic way was common to all class members, and the answer would be the same for all class members. As such, commonality was satisfied. The government did not dispute that A.H.'s claims were typical of the class because, like all of the proposed class members, A.H. was rearrested by Immigration and Customs Enforcement after he was placed in a secure facility by the ORR based on alleged gang affiliation. The Court ruled that adequacy was satisfied. The government did not dispute that A.H. and his counsel adequately represented the class members' interests and there was no reason to believe that A.H.'s interests, or those of his counsel, conflicted with those of proposed class members. The Court also ruled that the requirements of Rule 23(b)(2) were satisfied because A.H. demonstrated that the government acted or refused to act on grounds that applied generally to the class such that preliminary injunctive relief was appropriate as to the class. *Id.* at *74. Accordingly, the Court granted the motion for a preliminary injunction on behalf of a class of non-citizen minors to remedy the government's likely violation of the class members' procedural due process rights. The government was ordered to provide A.H. and all other non-citizen minors previously released to a sponsor who were rearrested and were currently in federal custody based on allegations of gang affiliation with a hearing before an immigration judge within nine days. *Id.* at *76.

***Sultaliev, et al. v. Rodriguez*, 2017 U.S. Dist. LEXIS 106670 (D. Mass. July 10, 2017).** Plaintiffs, a group of conditional permanent residents who filed Form I-751 petitions for permanent resident status, filed a class action alleging that Defendants – officials of the U.S. Citizenship and Immigration Services ("USCIS") – unlawfully failed to process and decide their I-751 petitions within a reasonable time period in violation of agency regulations, 8 C.F.R. 216.4(b)(1), and the Administrative Procedure Act. *Id.* at *2. Plaintiffs were conditional permanent residents who resided in Massachusetts. Pursuant to the Immigration and Nationality Act ("INA"), a foreign national married to a United States citizen for less than two years can apply for status as a conditional lawful permanent resident. *Id.* In order to remove the conditional status, the married foreign national must file an I-751 petition 90 days before the two-year anniversary of the granting of such conditional status and have personal interviews with an officer of the Department of Homeland Security within 90 days. *Id.* at *2-3. Plaintiffs filed I-751 petitions with the Vermont Service Center, but did not have personal interviews scheduled even though their applications had been pending for more than 90 days. *Id.* at *3. Defendants moved to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief could be granted. Defendants argued that the Court lacked subject-matter jurisdiction. Defendants pointed to the fact that 8 U.S.C. § 1186a(d)(3) gives the Secretary of Homeland Security (the "Secretary") discretion to "waive the deadline for . . . an interview or the requirement for . . . an interview" when appropriate. *Id.* at *6. Thus, according to Defendants, because it is within the Secretary's discretion to waive the 90-day window, the Court lacked subject-matter jurisdiction over the suit pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii). *Id.* The Court agreed that, if the Secretary made such a determination, the Court would not have jurisdiction over Plaintiffs' claims, but here the Secretary had taken no action whatsoever on Plaintiffs' applications. The Court found that inaction was not within the Secretary's discretion and, therefore, it concluded that it had subject-matter jurisdiction. The Court further explained that, to have standing, Plaintiffs must allege an injury-in-fact that is "concrete and particularized." *Id.* at *7. Plaintiffs alleged that, without valid permanent resident status, foreign nationals are often denied employment, student loans, and other benefits, and refused permission to board planes to the

United States. *Id.* The Court stated that Plaintiffs had not provided any facts suggesting that they had suffered such harms. The Court determined that Plaintiffs' conclusory assertion that they had been "adversely affected or aggrieved" was insufficient to show a concrete and particularized injury necessary to establish standing. *Id.* Because the Court concluded that Plaintiffs lacked standing, it declined to consider whether Plaintiffs stated a claim upon which relief could be granted. Accordingly, the Court granted Defendants' motion to dismiss for lack of standing.

(xxxiv) Industrial Injury Class Actions

***Aregood, Jr., et al. v. Givaudan Flavors Corp.,* 2017 U.S. Dist. LEXIS 173045 (S.D. Ind. Oct. 18, 2017).** Plaintiffs filed a class action alleging that they were injured because of Defendant's defective design of butter flavors sold to Plaintiffs' employer ConAgra Snack Foods Group ("ConAgra"). Plaintiffs worked in various capacities at a ConAgra microwave popcorn packaging facility. Plaintiffs alleged that their exposure to butter flavors that contained diacetyl – which were sold to ConAgra by Defendant – caused them to develop respiratory injuries. The Court had previously granted Defendant's motion for summary judgment as to the majority of Plaintiffs' claims, and the only remaining claim was brought under the Indiana Products Liability Act ("IPLA"). The Court noted that claims under the IPLA have five elements, including: (i) harm; (ii) to a foreseeable user or consumer; (iii) by a product that was sold "in a defective condition unreasonably dangerous to any user or consumer;" (iv) by a Defendant that was in the business of selling the product; and (v) the product reached the user or consumer without alteration. *Id.* at *9-10. A Plaintiff may satisfy the third element by showing a design defect, a manufacturing defect, or a failure to warn. With respect to a design defect claim, a Plaintiff must also show a breach of the duty of care or negligence. *Id.* at *10. Plaintiffs argued that there was a question of fact as to whether or not Defendants' butter flavors were defectively designed because Plaintiffs' experts opined that butter flavors that contained diacetyl caused lung diseases, and Defendants' expert testified that diacetyl-free butter flavors were available and used by some popcorn makers as early since 1989. *Id.* However, the Court held that under Indiana law, to show a defective design, Plaintiffs '"must compare the costs and benefits of alternative designs' and 'show that another design not only could have prevented the injury but also was cost-effective under general negligence principles.'" *Id.* at *10-11. The Court determined that Plaintiffs provided no expert testimony on the costs and benefits of a diacetyl-free butter flavor or that the diacetyl-free butter flavors that existed prior to 2007 were cost-effective alternatives under general negligence principles. *Id.* at *11. The Court further stated that costs and benefits of diacetyl-free butter flavors, or their cost effectiveness, is not common knowledge. Further, the Court opined that the fact that a diacetyl-free alternative existed was not enough; Plaintiffs must also present evidence that the diacetyl-free butter flavors' risks, benefits, and costs were favorable. *Id.* In the absence of such evidence, the Court held that Plaintiffs failed to meet their burden to prove that Defendant failed to exercise reasonable care under the circumstances as required by the IPLA. *Id.* at *12. Accordingly, the Court granted Defendants' motion for summary judgment.

(xxxv) Injunctions In Class Actions

***Bahamas Surgery Center, et al. v. Kimberly-Clark Corp.,* 2017 U.S. Dist. LEXIS 73778 (C.D. Cal. May 15, 2017).** Plaintiffs, a group of consumers of medical gowns, alleged that Defendants concealed material information relating to a defect in their MicroCool Gowns and that, as a result, Plaintiffs and the class overpaid for the gowns. The jury returned a verdict in favor of Plaintiffs against Defendants Kimberly-Clark Corp. and Halyard Health, Inc. based on the claim of concealment. The jury awarded Plaintiffs and the class $3,889,327 in compensatory damages, pre-judgment interest, and $350 million in punitive damages against Kimberly-Clark. The jury also awarded Plaintiffs and the class $261,445 in compensatory damages, pre-judgment interest, and $100 million in punitive damages against Halyard Health. Plaintiff also brought an equitable claim against Defendants under California's Unfair Competition Law ("UCL"). Having found for Plaintiffs, the Court stated that the jury must have implicitly found that Plaintiffs proved by a preponderance of the evidence that Defendants intentionally failed to disclose material facts to Plaintiffs and/or actively concealed material facts from Plaintiffs relating to the MicroCool Gowns of which Plaintiffs were unaware, and which led them to suffer harm. *Id.* at *4. Given the sheer size of the jury's verdict and the evidence presented at trial, one of the implicit findings of the jury also included, at the very least, a determination that Defendants concealed information regarding a defect in the MicroCool Gown, and that the defect was material to whether the MicroCool Gown deserved the rating that Defendants used to market the gown. *Id.* at *5. In light of the evidence presented by the parties at trial and the

jury's implicit findings, the Court found that Plaintiffs proved by a preponderance of the evidence that Defendants' failure to disclose material information to, or active concealment of such information from, Plaintiffs relating to the MicroCool Gown's defective sleeve seam constituted a fraudulent business practice that was likely to deceive the reasonable consumer. *Id.* at *6. Since Plaintiffs' UCL claim was based on the same underlying facts as the legal claim decided by the jury, the Court determined that it followed from the jury's implicit determinations on the legal claim that Plaintiffs satisfied their burden of establishing by a preponderance of the evidence that Defendants engaged in a fraudulent business practice (*i.e.*, concealment of material information pertaining to the MicroCool Gown) likely to deceive the public and reasonable consumers. Plaintiffs contended that monetary damages would not adequately notify class members regarding the material information that Defendants concealed. *Id.* at *10. However, the Court stated the Plaintiffs failed to satisfy their burden to show that class members would likely suffer irreparable harm. The Court found because there was no evidence that anyone had suffered physical harm while wearing a MicroCool Gown as a result of a strikethrough or a torn sleeve, the Court could not presume that class members likely would suffer such harm due to future MicroCool Gown use. *Id.* at *11. Plaintiffs also requested that Defendants be enjoined from issuing statements seeking to "contradict, undercut, or otherwise minimize the findings of the Court or the injunctive relief awarded." *Id.* The Court found this relief was not necessary to address the class members' harm, which was economic in nature. Therefore, although the Court determined that Plaintiffs satisfied the elements for a UCL claim based on fraudulent concealment, Plaintiffs' request for restitution and injunctive relief should be denied.

***Edge, et al. v. City Of Everett*, 2017 U.S. Dist. LEXIS 199181 (W.D. Wash. Dec. 4, 2017).** Plaintiffs, the owner and employees of "bikini barista stands" – drive-through stands where baristas serve coffee to customers while wearing bikinis – challenged the constitutionality of two ordinances enacted by Defendant. *Id.* at *1. The ordinance restricted dress city-wide, and prohibited exposure of "more than one-half of the part of the female breast located below the top of the areola," "the genitals, anus, bottom one-half of the anal cleft, or any portion of the areola or nipple of the female breast." *Id.* at *2. The dress code ordinance required "bikini baristas" and employees of similar facilities to wear clothing that covers "the upper and lower body (breast/pectorals, stomach, back below the shoulder blades, buttocks, top three inches of the legs below the buttocks, pubic area and genitals)." *Id.* Plaintiffs claimed they wore bikinis to express personal and political messages, including messages of "freedom, empowerment, openness, acceptance, approachability, vulnerability, and individuality." *Id.* at *5. Plaintiffs moved for a preliminary injunction to prevent Defendant from enforcing the city ordinances, which the Court granted. Defendant contended the ordinances were needed to "prevent dangerous and unlawful conduct" inherent to bikini barista stands, including "flashing, explicit shows, sexual contact in exchange for money and public masturbation," as well as "prostitution, lewd conduct, drug use, sexual exploitation and sexual assault." *Id.* Defendant further contended that "the minimalistic nature of the clothing" worn by bikini baristas lent itself to this conduct because baristas could quickly and easily remove or adjust their bikinis to engage in sexual contact with customers. *Id.* at *5-6. Defendant argued that its existing laws were insufficient, and that the ordinances would allow it to more readily impose penalties on stand owners who permit employees to engage in such conduct. *Id.* at *6. The Court found that the city-wide ordinance and the dress code ordinance were void for vagueness under the Fourteenth Amendment. The Court stated that the term "bottom one-half of the anal cleft" was not well-defined or reasonably understandable, and the ordinances otherwise failed to provide clear guidance and raise risks of arbitrary enforcement. *Id.* The Court opined that the ordinances created dangers of arbitrary enforcement, because they would require law enforcement to engage in a "highly fact-specific analysis" and leave determinations of compliance "to the subjective judgment of the officer." *Id.* at *8. For example, the Court opined that to determine whether the "top three inches of legs below the buttocks" are exposed in violation of the dress code ordinance, an officer must identify precisely where the buttocks end and the legs begin. *Id.* at *9. Therefore, the Court held that Plaintiffs were likely to prevail on their claims that the ordinances were void for vagueness in violation of the Fourteenth Amendment. *Id.* at *10. The Court also held that the dress code ordinance violated Plaintiffs' right to free expression under the First Amendment. *Id.* at *2-3. The Court noted that while some customers viewed the bikinis as "sexualized," to others they conveyed particularized values, beliefs, ideas, and opinions as to body confidence and freedom of choice. *Id.* at *10-11. Moreover, the Court reasoned that, in certain scenarios, bikinis could convey the very type of political speech that lies at the core of the First Amendment. *Id.* at *11. Therefore, the Court found that Plaintiffs had demonstrated that they were entitled to a preliminary injunction based upon their claims that the city-wide ordinance and the dress code

ordinance were unconstitutional under the Fourteenth and First Amendments. Accordingly, the Court granted Plaintiffs' motion for a preliminary injunction.

***International Union, et al. v. Consol Energy,* 2017 *U.S. Dist. LEXIS* 38698 (S.D. W. Va. Mar. 17, 2017).** Plaintiffs, a group of retired coal miners and their union, filed a motion for preliminary injunction to prevent Defendant from unilaterally terminating Plaintiffs' health insurance plan. *Id.* at *2. The Court granted several of Defendants' motions to dismiss, ruling that there was no personal jurisdiction over Defendants Helvetia, Island Creek, Laurel Run, and CONSOL Amonate. However, the Court ruled that Defendant Consul Energy waived its personal jurisdiction and venue defenses, and it was the agent of Defendants' subsidiaries and the real party in interest that was subject to the Court's power to issue an injunction. *Id.* at *9. At the same time, the Court granted Plaintiffs' motion for a preliminary injunction. *Id.* at *27. At the outset, the Court noted that in the case of a preliminary injunction, the evidentiary standard applied in determining whether a Plaintiff has established all four necessary elements is substantially relaxed, given that the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a determination on the merits can be held. *Id.* at *16. The Court concluded that Plaintiffs satisfied each of the necessary factors to obtain a preliminary injunction. *Id.* at *26. First, Plaintiffs would suffer irreparable harm in the absence of an injunction. The Court opined that the nature of the harm at issue in this case was of critical importance. Defendants were threatening to terminate employer plan group insurance benefits and if they succeeded, then retirees may be left without health coverage. The Court concluded that Plaintiffs would be irreparably harmed if the Court refused to preserve the status quo with a preliminary injunction. Second, because of the policy favoring arbitration in labor disputes and the longstanding obligation of coal companies to provide medical care for the union's members, Plaintiffs were likely to succeed on the merits. *Id.* Third, the balance of equities clearly tipped in favor of Plaintiffs because in the absence of an injunction, their medical benefits might be lost. The Court reasoned that even if Defendant ultimately prevailed and was entitled to cancel or change benefits, it could still do so after the matter was concluded. Fourth, an injunction was in the public interest because of the desire throughout society to provide medical benefits for the sick and the injured. Accordingly, the Court granted Plaintiffs' motion for a preliminary injunction. *Id.* at *27.

***Puente Arizona, et al. v. Arpaio,* 2017 U.S. Dist. LEXIS 44517 (D. Ariz. Mar. 27, 2017).** Plaintiffs filed a class action challenging Defendants' application of Arizona's identity theft and forgery statutes to unauthorized aliens who committed fraud in obtaining employment. Plaintiffs sought declaratory relief and/or permanent injunctions against the Maricopa County Sheriff's Office ("MCSO") and Maricopa County Attorney Office ("MCAO"). The Court concluded that federal law preempted the state government's practices and Congress clearly and manifestly intended to prohibit the use of the Form I-9 and documents submitted as part of the I-9 employment verification process for state law enforcement purposes. *Id.* at *26. The Court issued a permanent injunction against the MCSO and declaratory relief as to the MCAO. The Court found that Plaintiffs met their burden for a permanent injunction against the MCSO and satisfied the required factors: (i) that they had suffered an irreparable injury; (ii) that remedies available at law, such as monetary damages, were inadequate to compensate for that injury; (iii) that, considering the balance of hardships between the Plaintiffs and Defendant, a remedy in equity was warranted; and (iv) that the public interest was not disserved by a permanent injunction. The Court granted Plaintiffs' request for a permanent injunction against the MCSO, as the office had engaged in the practice for over seven years, and it ruled that the Sheriff was permanently enjoined from employing or relying on the Form I-9 and any other documents or information submitted to an employer solely as part of the federal employment verification process for purposes of investigating or prosecuting violations of Arizona identity theft and forgery statutes. The Court further granted Plaintiffs' request for declaratory relief as to the MCAO and denied its request for injunction against the MCAO. The Court ruled that an injunction against the MCAO was not necessary and Plaintiffs failed to establish that Plaintiffs faced a present or imminent risk of likely irreparable harm from I-9 related investigations or prosecutions by the MCAO because the MCAO had made a good faith attempt to comply with the law. *Id.* at *29. The Court entered declaratory relief as to the MCAO and opined that declaratory relief would eliminate any risk of irreparable harm to Plaintiffs. The Court declared that under the supremacy clause of the U.S. Constitution and the Immigration Reform and Control Act, Defendants were preempted from employing or relying on the Form I-9 and any other documents or information submitted to an employer solely as part of the federal employment verification process for purposes of investigating or prosecuting violations of Arizona forgery or identity theft statutes. *Id.* at *51.

(xxxvi) Intervention Issues In Class Actions

***Harrington, et al. v. Sessions*, 863 F.3d 861 (D.C. Cir. 2017).** In 2008, U.S. Marshal David Grogan filed a putative class action in the U.S. District Court for the District of Columbia against the U.S. Marshals Service (the "Marshals") alleging racial discrimination under Title VII of the Civil Rights Act of 1964. By 2013, Plaintiff Herman Brewer ("Plaintiff") was the sole Plaintiff representing the putative class. *Id.* at 865. Plaintiff retired from the Marshals a few months before discovery closed. *Id.* After discovery closed, Plaintiff filed: (i) a motion to amend the complaint to substitute four additional Plaintiffs as class representatives; and (ii) a Rule 23 motion for class certification. *Id.* at 866. The District Court denied Plaintiff's motion to substitute new Plaintiffs, finding that Plaintiff had not diligently pursued the substitution. *Id.* The District Court also denied Plaintiff's motion for class certification. *Id.* The District Court found that, because Plaintiff had retired and was no longer an employee of the Marshals, Plaintiff could not adequately represent a class predominantly seeking injunctive relief. *Id.* The District Court also held that Plaintiff's individual claims for monetary relief were not typical of the class-wide claims for injunctive relief and, as such, did not provide a basis to certify a class either. *Id.* Finally, the District Court refused to certify a narrower class seeking damages only, since doing so constituted "claim splitting" and jeopardized class members' ability to subsequently pursue other claims in the face of potential *res judicata* arguments. *Id.* Plaintiff appealed under Rule 23(f) for interlocutory review of the denial of class certification. *Id.* However, during the pendency of the petition, Plaintiff settled his individual claims and filed a stipulation of dismissal under Rule 41(a)(1)(A)(ii). *Id.* at 867. On the same day Plaintiff filed the stipulated dismissal, three current and one former African-American employee of the Marshals (the "Interveners") moved to intervene in District Court to appeal its denial of class certification and moved to intervene in the D.C. Circuit to pursue the Rule 23(f) petition filed by Plaintiff. *Id.* While their motion to intervene in the District Court was still pending, the Interveners filed a notice of appeal from: (i) Plaintiff's stipulated dismissal; (ii) the order denying class certification; and (iii) the "effective" denial of their motion to intervene insofar as the District Court had not decided their motion to intervene within the time Interveners believed they had to file a notice of appeal (*i.e.*, within 60 days of Plaintiff's stipulated dismissal). *Id.* Thereafter, the District Court dismissed the Interveners' motion to intervene based on the rationale that the Interveners' notice of appeal stripped the District Court of jurisdiction to rule on the motion. *Id.* On the Interveners' motion, Plaintiff's Rule 23(f) petition and the Interveners' appeal were consolidated before the D.C. Circuit. *Id.* The D.C. Circuit first addressed whether it had jurisdiction. *Id.* at 868. The stipulated dismissal of Plaintiff's claims removed any live Article III case or controversy from the District Court and the D.C. Circuit. The D.C. Circuit found that it had jurisdiction over the Interveners' motion to intervene in the Rule 23(f) petition. *Id.* The D.C. Circuit explained that a stipulated dismissal and a Court-ordered dismissal are no different in their jurisdictional effect, for both eliminate a live case or controversy. *Id.* at 869. As such, the D.C. Circuit found that it had jurisdiction to entertain any motion after a stipulated dismissal that it could entertain after a dismissal. The D.C. Circuit explained that it is well-established that, even in the absence of a live controversy, jurisdiction is retained to hear motions to intervene for purposes of appealing dismissed claims, as long as the Intervener has an Article III interest sufficient to pursue the appeal. *Id.* at 870. Moreover, the D.C. Circuit asserted that it is similarly well-established that absent class members may have a sufficient Article III interest to appeal the denial of class certification even if the named Plaintiff does not appeal. *Id.* The D.C. Circuit reasoned that, because the absence of an Article III controversy did not preclude it from hearing a motion to intervene for purposes of appealing and because an appellate court has jurisdiction to hear an absent Plaintiff's appeal from the denial of class certification, it had jurisdiction under Rule 23(f) to hear the Interveners' motion to intervene. *Id.* at 871. In finding such jurisdiction, the D.C. Circuit distinguished the recent U.S. Supreme Court decision of *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712-13 (2017), wherein the Supreme Court held that a Plaintiff's voluntary dismissal of his claims, subsequent to an appellate court's denial of his Rule 23(f) petition, did not create a final, appealable order. *Id.* The D.C. Circuit explained that, unlike *Baker*, the issue here involved only a petition for review under Rule 23(f), not an appeal from a final order. *Id.* Furthermore, equitable considerations present in *Baker*, where the Plaintiff had orchestrated guaranteed appellate review of his Rule 23 claims through voluntary dismissal, were not present here. *Id.* As to the motion to intervene, the D.C. Circuit stated that it could address the motion to intervene in the first instance on appeal primarily for purposes of judicial economy. *Id.* The D.C. Circuit found that the Interveners easily met the criteria for intervention as a matter of right under Rule 24(a)(2). *Id.* at 872. Nonetheless, the D.C. Circuit rejected the Interveners' Rule 23(f) request and declined to review the District Court's denial of class certification. *Id.* at 874. It found that the Interveners failed to show that any special circumstances warranted such review. *Id.* Finally, the D.C. Circuit dismissed the Interveners' appeal from final judgment in the case below, restoring the District Court's jurisdiction

over the case. *Id.* at 875. It ordered that, on remand, the District Court should allow reasonable time for the Interveners to file both a motion to substitute a new class representative and a renewed motion for class certification. *Id.*

***Smith, et al. v. Seeco, Inc.*, Case No. 14-CV-435 (E.D. Ark. June 23, 2017).** Plaintiffs, a group of royalty owners, filed a class action alleging that Defendants under-paid royalties due to them. Plaintiffs filed a motion for class certification, which the Court granted. Intervener Charter Land Co. LLC ("Charter") subsequently filed an emergency motion to intervene for purposes of decertifying the class. *Id.* at 1. The Court found that Charter's motion was untimely. The Court stated that certification was granted over a year prior and the same argument Charter brought to the Court was already made by other Intervener, and already rejected by a jury. The Court noted that Charter's position on decertification focused on a preliminarily approved settlement and the adequacy of class counsel. *Id.* at 3. The Court found that Charter's argument was not persuasive, as class counsel's adequacy has been repeatedly affirmed in pre-trial motions filed before and during trial. *Id.* Accordingly, the Court denied Charter's motion to intervene.

***Technology Training Associates, et al. v. Buccaneers Limited Partnership*, 2017 U.S. App. LEXIS 21205 (11th Cir. Oct. 26, 2017).** Plaintiffs filed a complaint on behalf of a putative class, alleging that Defendant was responsible for unsolicited faxes that violated the Telephone Consumer Protection Act. *Id.* at *1-2. In 2009 and 2010 Defendant, through a fax broadcaster, sent out three sets of faxes advertising tickets to see Tampa Bay Buccaneers football games. *Cin-Q*, which had received at least one of those faxes, brought suit on behalf of a putative class alleging that Defendant had sent unsolicited faxes to more than 180,000 recipients and that the class was entitled to $500 per violation in statutory damages. *Id.* at *2-3. Plaintiffs in the *Cin-Q* matter were represented by the law firm of Anderson & Wanca. While the class certification motion was pending, an attorney at that firm, David Oppenheim, left and joined another firm called Bock Hatch. There Oppenheim took part in an email discussion with partner Phil Bock about the *Cin-Q* case. Oppenheim told Bock that Plaintiffs' counsel wanted to get a record breaking settlement in that matter of over $75 million. *Id.* at *3. Bock then filed the instant matter, and the parties filed an unopposed motion for preliminary approval of class action settlement of up to $19.5 million in damages. *Id.* at *4-5. After the complaint and the motion for preliminary approval of the settlement were filed, the Court in the *Cin-Q* matter stayed consideration of the class certification motion in that case. In the wake of those developments, Plaintiffs moved to intervene in this case under Rule 24(a)(2), for intervention as of right, and Rule 24(b)(2), for permissive intervention. *Id.* at *5. Plaintiffs in *Cin-Q* contended that this case was an example of a "reverse auction," in which a Defendant picked out a Plaintiff with weaker claims and weaker counsel in an effort to negotiate a more favorable class settlement. *Id.* at *6. The District Court denied Plaintiffs' motion to intervene. On appeal, the Eleventh Circuit reversed and remanded. The Eleventh Circuit explained that District Courts should granted a motion to intervene when: (i) the application to intervene is timely; (ii) there is an interest relating to the property or transaction that is the subject of the action; (iii) disposition of the action, as a practical matter, may impede or impair their ability to protect that interest; and (iv) their interest is represented inadequately by the existing parties to the suit. The District Court concluded that Plaintiffs did not satisfy the third prong. The District Court explained that Rule 23 already provides procedural protections, such as the right to object at a "fairness hearing," and it noted that it could award attorneys' fees out of the settlement fund to the movants' counsel. In light of those facts, the District Court concluded that the movants' ability to protect their interests would not be "impeded or impaired" if intervention were denied. *Id.* The Eleventh Circuit found that under that logic class members could never intervene in a class action because they would always have recourse to Rule 23 procedural protections and therefore would always fail to satisfy the third prong. The Eleventh Circuit held that the risk that movants would be bound by an unsatisfactory class action settlement satisfied Rule 24(a)(2)'s third prong. The Eleventh Circuit ruled that it was clear from the record that during the negotiations the interests of the named Plaintiffs and of Bock Hatch were aligned with those of Defendant and adverse to the movants' interests. Accordingly, the Eleventh Circuit found that Plaintiffs met the Rule 24(a)(2)'s requirements, and therefore remanded the case with instructions for the District Court to grant the movants' motion to intervene.

(xxxvii) Issue Certification Under Rule 23

***In Re Simply Orange Juice Marketing And Sales,* 2017 U.S. Dist. LEXIS 114805 (W.D. Mo. July 24, 2017).** Plaintiffs, a group of orange juice consumers, filed a multi-state putative class action alleging that Defendants

failed to disclose its use of added flavors in its products, which was inconsistent with federal labeling regulations, and that consumers were deceived into paying a price premium for these products. *Id.* at *7. Plaintiffs moved to certify classes of purchasers of the orange juice products under: (i) Rule 23(b)(3) for damages and relief; and (ii) Rule 23(b)(2) for injunctive relief. Plaintiffs alternatively sought certification under Rule 23(c)(4) on the issue of whether the added flavoring substances were flavors that required disclosure and whether Defendant's omissions were unlawful. Defendant denied that it added flavoring that must be disclosed under the federal regulations, and claimed that the add-backs it used were 100% made from orange products. Defendant further argued that it did not consistently use add-backs all year round with respect to one of its product at issue, and because it did not always use add backs, tens of thousands of consumers suffered no injury and therefore lacked Article III standing. The Court rejected Defendant's standing argument and found that the purchasers all had standing to sue, as every container of one type of Defendants' orange juices contained the add-back. Further, the discovery established that most of the time, purchasers of both types of juices would be received drinks that included add-backs because for certain years, nearly every container sold included the flavoring. *Id.* at *14. Defendant argued that the proposed classes were not ascertainable because the inconsistent use of add-back defeated ascertainability. However, the Court found that Plaintiffs had sufficiently asserted that they were injured through a price premium charged by Defendant, and moreover, the odds were that most class members had purchased an orange juice product containing add-backs. Accordingly, the Court found that the proposed classes were ascertainable. *Id.* at *17. The Court likewise ruled that Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements were met. The Court denied Plaintiffs' motion to certify the class under Rule 23(b)(2), as the named Plaintiffs lacked Article III standing to pursue claims for injunctive relief, because none of the Plaintiffs alleged that they intended to purchase Defendant's orange juice in the future. *Id.* at *25. The Court found that with respect to Rule 23(b)(3)'s predominance requirement, there were central issues in the action that were common to the class, such as: (i) whether the orange juice products contained added flavors not permitted by federal law; (ii) whether the orange juice products omitted disclosure of added flavors as required by federal labeling laws; (iii) whether the orange juice products conformed to the representations on the labels of the products; (iv) whether the orange juice products omitted material information from the products' labels; (v) whether Defendants warranted that the orange juice products conformed to the label representations; and (vi) whether Defendant breached these warranties. The Court, however, was not convinced that Plaintiffs established that common issues predominated with respect to certain elements of Plaintiffs' underlying state law claims, such as requirements relative to proof on the elements of reliance, materiality, and/or causation. *Id.* at *28. Accordingly, the Court certified an issues class under Rule 23(c)(4), so as to determine the common questions that predominated that issues class. The Court found that Plaintiffs demonstrated superiority under Rule 23(b)(3) and 23(c)(4). Accordingly, the Court found that three classes should be certified and for each of these classes, the Court certified an issues class under Rule 23(c)(4) to determine the questions that were common to the class. *Id.* at *34.

***Mednick, et al. v. Precor, Inc.,* 320 F.R.D. 140 (N.D. Ill. Mar. 16, 2017).** Plaintiffs, a group of exercise equipment consumers, filed a putative class action alleging violations of the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA") and the equivalent consumer protection laws of California, Missouri, New Jersey, and New York. *Id.* at *143. Plaintiffs alleged that Defendant deceptively marketed and sold treadmills with a heart rate technology that Defendant knew did not accurately measure the heart rates of users. *Id.* After the Court denied Plaintiffs' motion for class certification, Plaintiffs renewed their motion to certify and narrowed the proposed class to include consumers who purchased the treadmills and were residents of California, Illinois, Missouri, New Jersey, and New York. *Id.* at *142. The Court certified the class for the purposes of determining liability, and reserved issues related to damages for individual hearings. *Id.* The Court ruled that Plaintiffs satisfied the numerosity and superiority requirements. *Id.* at *147. Defendant did not object to the adequacy of Plaintiffs' attorneys to act as class counsel. The Court also concluded that typicality was satisfied because, even if some consumers did not run on their treadmills, they still paid for treadmills that incorporated heart rate monitors that had been advertised to work. With respect to commonality, the Court ruled that the common question of whether Defendant engaged in representations or omissions that were likely to deceive a reasonable consumer was a question capable of class-wide proof, since the reasonable person standard called for an objective analysis. Defendant objected and asserted that the question could not establish commonality for two reasons, including: (i) Plaintiffs did not view any of Defendant's promotional materials before making their treadmill purchases; and (ii) Defendant published disclaimers regarding the touch sensor's performance. *Id.* at

*148-49. The Court rejected both arguments. The Court concluded that Plaintiffs' injuries could be proximately caused by the graphics on the treadmills themselves and Defendant's material omissions. The Court also concluded that the effect of the disclaimers was properly left to the merits stage of the case and the disclaimers did not resolve the common question of whether Defendant engaged in representations or omissions that were likely to deceive a reasonable consumer. *Id.* at *152. Defendant argued that individual issues predominated because the consumer fraud statutes varied materially from state to state. The Court held that certification of a single class was inappropriate as to the issue of damages because the states differed in what they allowed an individual to recover under their consumer fraud statutes and the Court reserved damages issues for individualized hearings. *Id.* at *153. The Court rejected Defendant's argument as to predominance and held that the consumer protection statutes of California, Illinois, Missouri, New York, and New Jersey shared sufficient common characteristics that class certification as to the issue of liability was appropriate. The Court concluded that even though allowable recoveries differed across the states, the Court would manage the variations as it confined the issue of damages to individualized hearings. *Id.* at *157. The Court was persuaded that the differences among the states were manageable. Accordingly, the Court granted in part and denied in part Plaintiffs' renewed motion for class certification. *Id.*

***Navelski, et al. v. International Paper Co.*, 2017 U.S. Dist. LEXIS 77509 (N.D. Fla. May 21, 2017).** Plaintiffs, a group of property owners, filed a putative class action alleging that a dam on Defendant's paper mill property collapsed during a heavy thunderstorm, causing flooding and damage to their properties. Plaintiffs filed a motion for issue certification, and the Court granted class certification of a liability-only class. Defendant then filed a motion for reconsideration of the Court's previous order. The Court stated that Defendant's arguments against the certification of a liability-only class either could have been presented earlier or were insufficient to establish that the Court's decision on class certification was clearly erroneous or manifestly unjust. *Id.* at *3. The Court explained that there are three major grounds that justify reconsideration, including: (i) an intervening change in the controlling law; (ii) the discovery of new evidence that was not available when the original motion was decided; or (iii) the need to correct clear error or prevent manifest injustice. *Id.* Defendant argued that the class certification decision should be reconsidered because the Court erred in failing to take a position on the relative merits of the parties' conflicting expert testimony on causation. *Id.* at *4. The Court found Defendant's argument flawed because it misapprehended the extent to which the Court may evaluate the merits of Plaintiffs' claims in deciding whether the requirements for class certification have been met. *Id.* at *4-5. The Court stated that neither the substantive merits of Plaintiffs' claims nor the conflicting expert conclusions about whether the dam failure caused the flooding were material to the question of whether the Rule 23 prerequisite of predominance was satisfied. *Id.* at *5. The Court held that the conflict between the experts' conclusions related exclusively to the merits of Plaintiffs' claims, and not to whether common questions predominated. *Id.* at *7. Therefore, the Court opined that it should not resolve the dispute in order to certify a class with respect to causation. *Id.* at *8. The Court determined that if the evidence presented at the liability trial leads the jury to conclude that the dam failure did not cause any of the flooding in the neighborhoods, or that it caused some but not all of the flooding, then Plaintiffs will have failed to carry their burden. *Id.* at *13-14. The Court therefore concluded that Plaintiffs had shown that Rule 23 was satisfied and that certification of a liability-only class was appropriate. The Court further noted that a bifurcated class action was superior to other available methods for the fair and effective adjudication of this matter as separate trials would reduce jury confusion, avoid undue prejudice to both sides, expedite the date of the liability trial and possibly avoid additional expenses if damages discovery and trials become unnecessary. *Id.* at *14. Accordingly, the Court denied Defendant's motion for reconsideration of its class certification order.

***Rahman, et al. v. Mott's LLP*, 2017 U.S. App. LEXIS 11965 (9th Cir. July 5, 2017).** Plaintiff, a consumer, alleged that use of the statement "No Sugar Added" on Mott's 100% Apple Juice did not comply with applicable Food and Drug Administration regulations and, by extension, California's Sherman Law and Unfair Competition Law. Plaintiff asserted that he met the requirements for both an injunction class under Rule 23(b)(2) and a damages class under Rule 23(b)(3); he sought certification under Rule 23(c)(4) with respect to liability issues only. *Id.* at *2. The District Court was unconvinced that Plaintiff met that burden through his motion for class certification and stated that certification of an issues class must materially advance resolution of the entire case. Accordingly, the District Court requested that Plaintiff provide supplemental briefing as to how damages would be resolved if the liability issues were certified and why certifying a liability-only class would materially advance

the litigation. *Id.* Plaintiff supplied the supplemental briefing, and the District Court found that Plaintiff "failed to articulate why a bifurcated proceeding would be more efficient or desirable" and was "vague as to whether he intends to later certify a damages class, allow class members to individually pursue damages, or ha[d] some other undisclosed plan for resolving this case." *Id.* The District Court therefore denied Plaintiff's motion to certify a Rule 23(c)(4) class. *Id.* at *3. On appeal, the Ninth Circuit affirmed the District Court's ruling. The Ninth Circuit noted that after providing ample opportunity to Plaintiff to establish that certification of a liability-only class would materially advance the litigation, the District Court concluded that Plaintiff failed to show that certification of a liability-only class was "appropriate" under Rule 23(c)(4). *Id.* at *4. The Ninth Circuit found that the District Court did not abuse its discretion in denying Plaintiff motion to certify a liability-only class. Accordingly, the Ninth Circuit affirmed the District Court's ruling.

***Valenzuela, et al. v. Union Pacific Railroad Co.*, 2017 U.S. Dist. LEXIS 59605 (D. Ariz. April 19, 2017).** Plaintiffs, owners of real property adjacent to a railroad right-of-way operated by Defendant, brought this trespass action claiming the land under the right-of-way was not Defendant's property. Plaintiffs sought to certify a class of "all landowners who . . . own or have owned land in fee adjoining and underlying the railroad easement granted under the General Right of Way Act of 1875 under which the pipeline is located within the State of Arizona." *Id.* at *5. The Court denied the motion, concluding that "the property-specific issues in this case prevent the named Plaintiffs from being typical or adequate, and will result in individual issues predominating." *Id.* The Court found several issues to be common to all alleged class members, including: (i) whether the railroad lacked sufficient property interests in the subsurface of its right-of-way under the 1875 Act to convey property rights in the subsurface to the pipeline; (ii) whether the commercial pipeline underneath the railroad's right-of-way was a railroad purpose; and (iii) whether Defendant knew or had reason to know that the railroad did not possess a sufficient ownership interest in the subsurface underneath its right-of-way to grant easements or other property rights to the pipeline. *Id.* at *5-6. Although these issues were not sufficiently predominant to certify the class under Rule 23(b)(2) or (3), Plaintiffs argued that the Court should resolve these questions in an issue class under Rule 23(c)(4). The Court found that Plaintiffs failed to show that the three common issues were "the centerpiece of this case," and that their resolution would "materially advance the litigation." *Id.* at *9. The Court explained that issue classes are most often used to "accurately and efficiently resolve the question of liability, while leaving the potentially difficult issue of individualized damage assessments for a later day." *Id.* at *10. The Court held that every claim Plaintiffs asserted would require proof that an individual Plaintiff owns or owned the land beneath the railroad right-of-way, which would require a detailed examination of the title and ownership history of each class member's property back to 1875. *Id.* at *12. The Court found that these types of issues would need to be resolved in every individual case, even if the three common issues had been decided class-wide. *Id.* at *15. The Court concluded that although certification of an issue class could resolve three common issues, resolution of those issues would not materially advance the resolution of the overall dispute between the parties. *Id.* at *17. The Court determined that a party seeking certification of an issue class under Rule 23(c)(4) has the burden of demonstrating why the issue class is "appropriate," *i.e.,* how litigating certain issues on a class-wide basis rather than individually will move the litigation forward in a significant and efficient manner. *Id.* at *21. Because Plaintiffs had not done so, the Court denied certification of an issue class pursuant to Rule 23(c)(4).

(xxxviii) Issues With The Judicial Panel On Multi-District Litigation In Class Actions

***In Re Frye Festival Litigation,* 2017 U.S. Dist. LEXIS 121973 (JPML Aug. 2, 2017).** In this multi-district class action litigation, Plaintiffs in one action – the *Herlihy* case – moved under 28 U.S.C. § 1407 to centralize the litigation in the U.S. District Court for the Southern District of New York. The litigation currently consisted of six actions pending in four districts, arising from the cancellation of a music festival originally scheduled to take place in the Bahamas in the spring of 2017. *Id.* at *1. Defendants in this litigation were entities and individuals allegedly responsible for organizing and promoting the Festival. Plaintiffs in four actions supported centralization, and variously suggested the Southern District of New York, the Southern District of Florida, and the District of New Jersey. Plaintiff in the Central District of California action opposed centralization, but requested his district if centralization was granted. *Id.* One Defendant, Matte Projects, LLC, responded and supported centralization in the Southern District of New York. *Id.* at *1-2. The Court concluded that centralization was not necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of the litigation. *Id.* at *2. The Court noted that there were only six actions pending in four districts and a

correspondingly limited number of involved Plaintiffs' counsel. Additionally, the Court found that the common Defendants had not entered an appearance in any action or in the Panel proceedings, and default proceedings against them had commenced in two actions Moreover, the Court stated that the only Defendants that have appeared to date were sued solely in the *Reel* action, and thus required little, if any, coordination with the other actions. *Id.* at *3. In these circumstances, the Court held that informal cooperation among the parties should be sufficient to minimize duplicative pre-trial proceedings and the risk of inconsistent pre-trial rulings. Accordingly, the Court denied the motions for consolidation.

***In Re National Prescription Opiate Litigation,* 2017 U.S. Dist. LEXIS 200501 (JPML Dec. 6, 2017).** Plaintiffs in 46 actions concerning the alleged improper marketing of and distribution of various opiate medications moved under 28 U.S.C. § 1407 to centralize pre-trial proceedings in the Southern District of Ohio or in the Southern District of Illinois. The Judicial Panel on Multi-District Litigation (the "Panel") granted Plaintiffs motion to centralize pre-trial proceedings in the Southern District of Ohio. Since Plaintiffs had filed their motion, the parties notified the Panel of 115 potentially related actions. Plaintiffs had varying different opinions on transfer. Plaintiffs in over 40 actions or potential tag-along actions supported centralization. *Id.* at *1. Plaintiffs in 15 actions or potential tag-along actions opposed centralization altogether or opposed transfer of their action. Third-party payor Plaintiffs in an Eastern District of Pennsylvania potential tag-along action (the *Philadelphia Teachers Health and Welfare Fund* case) opposed centralization of third-party payor actions. *Id.* at *2. Plaintiff City of Everett – with a case in the Western District of Washington – opposed centralization and, alternatively, requested exclusion of its case. *Id.* Tag-along Plaintiff City of Chicago from the Northern District of Illinois asked the Panel to defer transfer of its action until document discovery was completed. *Id.* Defendants' positions on centralization also varied considerably, as the major distributor Defendants, which reportedly distributed over 80% of the drugs at issue and who were Defendants in most cases, supported centralization in the Southern District of West Virginia and requested that the Panel either delay issuing its transfer order or delay transfer of their cases until their motions to dismiss were decided. *Id.* Defendant distributor Miami-Luken also supported centralization in the Southern District of West Virginia. Multiple manufacturer Defendants support centralization in the Southern District of New York or the Northern District of Illinois; Defendant Malinckrodt, LLC, took no position on centralization but supported the same districts. *Id.* at *3. The Teva Defendants suggest centralization in the Eastern District of Pennsylvania or the manufacturers' preferred districts. The physician Defendants in three Ohio actions, who were alleged to be "key opinion leaders" paid by the manufacturing Defendants, did not oppose centralization in the Southern District of Ohio. *Id.* Defendants in several other Southern District of West Virginia cases opposed centralization, and many requested exclusion of the claims against them from the MDL. Further, Defendant Pfizer, Inc., opposed centralization and requested that the Panel exclude any claims against it from the MDL. The Panel reasoned that the parties acknowledged that any number of the proposed transferee districts would be suitable for this nationwide litigation. *Id.* at *7. The Panel found that that the actions all involved common questions of fact, and that centralization in the Northern District of Ohio would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. *Id.* The Court noted that Ohio had a strong factual connection to this litigation, given that it experienced a significant rise in the number of opioid-related overdoses in the past several years and expended significant sums in dealing with the effects of the opioid epidemic. *Id.* at *8. The Northern District of Ohio also presented a geographically central and accessible forum that was relatively close to Defendants' various headquarters in New York, Connecticut, New Jersey and Pennsylvania. *Id.* Accordingly, the Court transferred the actions to the Northern District of Ohio for pre-trial proceedings.

***In Re Uber Technologies, Inc. Wage & Hour Litigation*, 2017 NLRB LEXIS 314 (NLRB June 13, 2017).** The National Labor Relations Board ("Board") brought an action alleging that Defendant's maintenance and enforcement of its Dispute Resolution Agreement ("Agreement") violated § 8(a)(1) of the National Labor Relations Act by: (i) requiring employees to waive their right to pursue employment-related claims through class or collective actions; and (ii) because employees would reasonably understand it to prohibit them from filing unfair labor practice charges and/or otherwise access the Board. *Id.* at *2. Since January 29, 2016, Defendant had required its software engineers to execute the Agreement as a condition of their employment. The parties stipulated that the sole issue before the Administrative Law Judge ("ALJ") was whether the Agreement violated § 8(a)(1) because employees would reasonably believe that it would prohibit them from filing Board charges. The ALJ found that Defendant's Agreement was ambiguous when read as a whole from the perspective of an

employee attempting to discern whether, by signing it, he was waiving his right to filing a charge. The ALJ stated that essentially, the Agreement played "cat-and-mouse" with the reasonable employee-reader by referencing filing Board charges and accessing the Board without asserting, in plain and understandable language, that the Agreement does not impede on those § 7 rights. *Id.* at *12-13. The ALJ found that the Agreement's language on its face extended protection from retaliation only to those who file group or collective charges, leaving the reader to ponder what repercussions might befall an individual charge filer. *Id.* at *18. Secondly, the language stated in no uncertain terms that filing charges would be futile in any event, because Defendant may "lawfully" enforce the Agreement to seek dismissal of any claim filed. *Id.* at *20. The ALJ found that the language effectively nullified whatever limited comfort the anti-retaliation might provide. Accordingly, considering the Agreement as a whole, the ALJ concluded that the Agreement was not written in a manner reasonably calculated to assure employees that their right to file Board charges was unaffected. Accordingly, the ALJ found that the Agreement violated § 8(a)(1) because employees would reasonably believe that it interfered with this right.

(xxxix) Jurisdiction Issues In Class Action Litigation

***Ali, et al. v. DLG Development Corp*., 2017 U.S. Dist. LEXIS 174813 (E.D. Pa. Oct. 23, 2017).** Plaintiff filed a class action in state court alleging state law claims against Defendants Dale Construction, DLG Development Corp., Evette Smith, David Gross, and Eric Smith. Plaintiff later joined the Philadelphia Housing Authority ("PHA") as a Defendant. Plaintiff subsequently filed a motion for class certification alleging for the first time that his prior state law claims relied on the Davis-Bacon Act. *Id.* at *3. Defendants removed the action based on federal question jurisdiction. Plaintiff filed a motion to remand, which the Court granted. Plaintiff argued that his state law claims, which are premised on a violation of the Davis-Bacon Act, did not confer federal question jurisdiction. The Court explained that federal jurisdiction will lie over a state law claim if the federal issue is: (i) necessarily raised; (ii) actually disputed; (iii) substantial; and (iv) capable of resolution without disrupting the federal-state balance approved by Congress. *Id.* at *8. The Court found that based on Plaintiff's motion for class certification, it was apparent that the main allegation was that Defendants did not play Plaintiff the prevailing wage that he was owed under the Davis-Bacon Act. Defendants argued that the Davis-Bacon Act violation was properly remediated, thereby eliminating its liability. Thus, the Court found that the federal issue was disputed. The Court noted that Supreme Court case law suggested three factors to consider to determine if a federal issue is substantial, including: (i) whether the issue will have broad impact on the federal government; (ii) whether the issue presents a pure legal question; and (iii) whether federal law underlying the issue provides for a federal cause of action. *Id.* at *9. The Court held that there was no broad impact on the federal government because the Davis-Bacon issue did not directly affect actions taken by federal actors. The resolution of the question at issue would impact Defendants, but nothing about the decision would have a direct impact on prior actions taken by federal actors. Further, the Court stated that the determination of a Davis-Bacon Act violation is fact-bound and situation-specific, providing a strong argument against federal jurisdiction. Lastly, the Court reasoned that a lack of a private right of action under federal law is further evidence against federal jurisdiction. *Id.* at *14. Since the Davis-Bacon Act does not provide for a private right of action, the Court noted that the absence of that right provides evidence that Congress did not intend to grant federal jurisdiction to state law claims that include a Davis-Bacon issue. *Id.* at *15. The Court therefore found that since the federal issue was not substantial, it was unnecessary to consider the fourth prong of the analysis to determine federal jurisdiction. Accordingly, the Court granted Plaintiff's motion to remand.

***Bristol-Myers Squibb Co., et al. v. Superior Court Of California*, 137 S. Ct. 1773 (2017).** In this action, 86 California residents and 592 non-residents from 33 other states sued Bristol-Myers in California state court, asserting California state law claims for product liability, negligent representation, and misleading advertising. *Id.* at 1778. Plaintiffs alleged that the company's drug, Plavix, damaged their health. *Id.* In contrast to the California residents, the non-resident Plaintiffs did not allege that they obtained Plavix in California, nor did they claim that they were injured by Plavix or treated for their injuries in California. *Id.* After Bristol-Myers challenged personal jurisdiction with respect to the non-residents' claims in the trial court and the California Court of Appeal, the California Supreme Court held that specific jurisdiction existed. *Id.* Although the California Supreme Court determined that general jurisdiction was lacking, it nonetheless found that specific jurisdiction existed under its "sliding scale" approach. *Id.* Under this approach, the more wide-ranging Defendants' forum contacts, the greater the connection between the forum contacts and the claim. *Id.* Because of Bristol-Myers' extensive contacts with California, the California Supreme Court required less direct connection between the company's

forum activities and the non-residents' claims than otherwise might be required. Particularly important to the California Supreme Court's determination that specific jurisdiction existed was that the claims of the California residents and the claims of the non-residents were similar. Bristol-Myers then secured review by the U.S. Supreme Court on a petition for *certiorari*. The U.S. Supreme Court reversed, and held that the California Supreme Court failed to identify an adequate link between the State of California and the 592 non-resident Plaintiffs to support specific jurisdiction. After explaining that specific jurisdiction requires an "affiliation between the forum and the underlying controversy," the U.S. Supreme Court noted that the "sliding scale" approach relaxes this requirement and "resembles a loose and spurious form of general jurisdiction." *Id.* at 1781. The U.S. Supreme Court further explained that "[t]he mere fact that other Plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the non-residents – does not allow the State to assert specific jurisdiction over the non-residents' claims." *Id.* Importantly, the U.S. Supreme Court emphasized "what is needed – and what is missing here – is a connection between the forum and the specific claims (*i.e.*, the non-residents' claims) at issue." *Id.* Accordingly, the U.S. Supreme Court reversed and remanded the California Supreme Court's ruling.

Jordan, et al. v. Bayer Corp., 2017 U.S. Dist. LEXIS 109206 (E.D. Mo. July 14, 2017). Plaintiffs, a group of users of the medical device Essure, brought an action asserting that they sustained injuries as a result of using Essure, which is manufactured and sold by Defendants. Plaintiffs asserted various claims for Missouri products liability violations under Mo. Rev. Stat. § 537.760 and violation of the Missouri Merchandising Practices Act. Defendants filed a motion to dismiss, arguing lack of personal jurisdiction over the out-of-state Plaintiffs' claims. *Id.* at *3. Defendants jointly removed the action to District Court on the basis of diversity jurisdiction and federal question jurisdiction. Plaintiffs filed a motion to remand. Defendant Bayer Corp. was a citizen of New Jersey and Indiana; Bayer Healthcare LLC was a citizen of Delaware, Pennsylvania, New Jersey, Germany, and the Netherlands; Bayer Essure, Inc. and Bayer Healthcare Pharmaceuticals, Inc., were citizens of Delaware and New Jersey; and Bayer A.G. was a German corporation. Despite the lack of complete diversity on the face of the complaint, Defendants argued that they properly removed this case. Specifically, Defendants contended that removal was proper because the diversity-destroying Plaintiffs were misjoined, jurisdiction was proper under the CAFA, and Plaintiffs pled violations of federal law, thus invoking federal question jurisdiction. *Id.* at *4. Plaintiffs countered that all of the claims were properly joined, and the Court lacked subject-matter jurisdiction over this action in the absence of complete diversity of the parties. *Id.* at *5. Plaintiffs also contested Defendants' assertion that federal question jurisdiction existed. Plaintiffs urged the Court to refrain from ruling on Defendants' motions and rule on the remand motion first. *Id.* at *6. The Court noted that with one exception in this case, the non-Missouri Plaintiffs did not allege that they acquired the Essure device from a Missouri source or that they were injured or treated in Missouri; thus, all the conduct giving rise to the non-residents' claims occurred elsewhere. *Id.* at *10. Moreover, Defendants did not develop, manufacture, label, package, or create a marketing strategy for Essure in Missouri. The Court held that the general exercise of business activities in the state cannot create an adequate link between the claims and the Missouri forum. *Id.* With respect to non-Missouri Plaintiffs, the Court reasoned that there could be no personal jurisdiction as to their claims because there was no "connection between the forum and the specific claims at issue." *Id.* at *11. The Court therefore determined that there was no personal jurisdiction as to the claims of the non-Missouri Plaintiffs. As a result, the Court denied Plaintiffs' motion for remand. The Court also denied Defendants' motion to dismiss, and ordered the remaining Plaintiffs to file an amended complaint.

(xl) Litigation Over Class Action Settlement Agreements And Consent Decrees

***Doe, et al. v. Briley*, 2017 U.S. App. LEXIS 26795 (6th Cir. Dec. 27, 2017).** In 1973, the District Court entered a consent decree ("the 1973 Decree") to resolve a class action filed by Plaintiff limiting the state of Tennessee, the Metropolitan Government of Nashville and Davidson County, and various city and county officials ("Metro") from using information about arrests not resulting in a trial or conviction when considering applications for employment. *Id.* at *1. In 2016, the District Court vacated the 1973 Decree, decertified the class action, and dismissed the case. Plaintiff appealed and Metro moved to dismiss the appeal because there was no class representative or other party with standing to pursue the appeal. *Id.* The District Court determined that Doe, the named Plaintiff and class representative in this action, did not have standing to pursue an appeal because Doe's whereabouts were unknown, his counsel had no way to contact him, and Plaintiff's counsel had been litigating the action for more than a decade without a class representative. *Id.* at *2. The District Court concluded that

given Doe's complete absence, he did not have a personal stake in the outcome sufficient to establish standing to pursue an appeal. *Id.* at *2-3. The Sixth Circuit agreed with the District Court. The Sixth Circuit determined that counsel for the class lacked standing to pursue an appeal because counsel failed to cite any authority supporting continued litigation of a class action in the absence of a class representative. *Id.* at *3. The Sixth Circuit also found that Jane Roe, an individual who moved the District Court to be added as a named Plaintiff and class representative and to individually enforce the 1973 Decree, lacked standing because she did not have a personal stake in the outcome of the appeal. The Sixth Circuit explained that the 1973 Decree prohibited Metro from using any information regarding any arrests which did not result in a trial or conviction when considering applicants for employment. *Id.* Although Roe was arrested on qualifying charges that were dismissed without a trial or conviction, her arrest was expunged. As a result, the Sixth Circuit reasoned that even if she applied for Metro employment and her records were requested, her arrest would not be revealed. The Sixth Circuit further opined that a class representatives could not acquire standing through unnamed class members. *Id.* Thus, the Sixth Circuit concluded that Roe could not confer that standing on Doe. *Id.* at *3-4. Accordingly, the Sixth Circuit affirmed the District Court's ruling granting Defendant's motion to dismiss.

***Ligas, et al. v. Norwood,* Case No. 05-CV-4331 (N.D. Ill. Aug. 11, 2017).** Plaintiffs, a group of individuals with developmental disabilities living in intermediate care facilities ("ICF-DDs") who want to live in community integration living arrangements ("CILAs"), alleged that Defendants, the Illinois Department of Healthcare and Family Service and the Illinois Department of Human Services, were in violation of a consent decree by failing to providing resources of sufficient quality, scope, and variety to provide community-integrated care to the highest degree. *Id.* at 1. In support of their contentions, Plaintiff presented a report by an expert economist, Dr. Powers, declarations from ICF-DD and CILA providers, and representatives of developmentally disabled individuals. *Id.* at 2. The evidence demonstrated that the actual costs of operating CILA and ICF-DD facilities had increased substantially since the entry of the consent decree and that the wages of direct support professionals ("DSPs") had stagnated, thereby causing a staffing crisis that was inhibiting care and negatively impacting the individuals protected by the consent decree. *Id.* Dr. Powers estimated that a 25% wage increase for DSPs would reduce turnover by one-third. *Id.* Defendants asserted that the provision of service had not been reduced and that it remained in substantial compliance. Further, Defendants contended that the state budget allocated an additional $53.4 million to services for the following year. *Id.* Defendants asserted that a 25% increase was not feasible given the State's $14 billion budget deficit due to two years of being in a budget impasse. *Id.* At the hearing on the motion, the Court monitor reported that Defendants were not in compliance with the consent decree. *Id.* The Monitor stated that the budget impasse of the previous two years resulted in a reduction of services to Plaintiffs due to rising costs and frozen funding. Further, the Monitor referred to a State working group that had been established in 2014 to address this issue. *Id.* at 3. The Court stated that reaching a mutual agreeable, long-term place accounting for resources of the State and needs of those with development disabilities would benefit from a revival of the State working group to devise a creative solutions. *Id.* Accordingly, the Court found that Defendants were not in compliance with the consent decree, and directed the State to devise a place to address the issues causing the reduction in services and to bring the State into substantial compliance.

***Memisovski, et al. v. Maram*, 2017 U.S. Dist. LEXIS 124843 (N.D. Ill. June 30, 2017).** The parties were signatories to a consent decree that resolved prior litigation over access to healthcare benefits. The Court previously granted Plaintiffs' motion for relief to enforce the Court's order requiring payment of Medicaid, finding that "minimally funding the obligations of the decrees while fully funding other obligations fails to comply not only with the consent decrees, but also with this Court's previous orders." *Id.* at *5. The Court therefore directed the parties to negotiate to achieve substantial compliance with the consent decree and previous orders in this case. *Id.* at *6. In light of the urgency of Plaintiff class members' needs on one hand and, on the other hand, the continuing financial distress of Illinois arising from the failure of the executive and legislative branches of its constitutional government to enact a budget and appropriation that matches revenue with expenditures and, in order to enforce substantial compliance with the consent decrees, the Court concluded that the state failed to fund the Medicaid programs in a manner sufficient to meet the federal mandates embodied in the consent decree and previous orders. *Id.* at *7. The Court stated that the failure to adequately fund the Medicaid program and timely pay its healthcare providers resulted in deprivation of access to healthcare for the Medicaid beneficiaries, in violation of the consent decree and federal law. The Court ordered that to rectify the funding failures and the problems they have created and to restore sufficient, federally-mandated access to health care,

the state must fully to fund the Medicaid program and timely pay claims submitted in the ordinary course of business. *Id.* at *16. In addition, the state must pay a significant portion of the backlog of bills over a reasonable period of time. The Court therefore held that Defendants shall fund payments in the amount of $586 million dollars each month on behalf of providers of services in the Medicaid-funded programs involved in these cases. *Id.* at *17. Additionally, in 2018 Defendants shall cause to be paid an additional $2 billion toward reducing the backlog of unpaid vouchers that have been submitted for Medicaid services in these cases. The Court further required Defendants to file a monthly report with the Court reflecting payments made in compliance with this order.

(xli) Medical Monitoring Class Actions

***Blanyar, et al. v. Genova Products*, 861 F.3d 426 (3d Cir. 2017).** Plaintiffs, a group of former employees, challenged the District Court's decision to dismiss their putative class action for medical monitoring as barred by the applicable two year statute of limitations. While acknowledging that their exposure to the alleged toxic substances upon which they based their medical monitoring claims ended more than two years before commencing this litigation, Plaintiffs contended that the limitations period should have been tolled by the discovery rule and should not have begun to run until they discovered the toxicity of the substances present in the workplace, a discovery they claimed was first made less than two years before they filed their action. *Id.* at *429. Plaintiffs claimed to have discovered previously unavailable material safety and data sheets ("MSDSs") that revealed that, while working for Defendant, they were exposed to carcinogens and other toxic chemicals linked to various diseases or conditions. *Id.* While none of the members of the putative class suffered an injury or illness linked to the substances used at Defendant's plant, Plaintiffs asserted that they were entitled to medical monitoring because they are at increased risk of illness. *Id.* The District Court concluded that the discovery rule did not apply to Plaintiffs' action because information concerning the dangers of the chemicals to which Plaintiffs were exposed had been widely available for decades before they filed their complaint. *Id.* On appeal, the Third Circuit affirmed the District Court's ruling. The Third Circuit explained that in medical monitoring cases, injury occurs when a Plaintiff is "placed at a significantly increased risk of contracting a serious latent disease." *Id.* at *431. Because Defendant's facility closed in 2012, no member of the putative class could have been exposed to any chemical as a result of Defendant's alleged negligence within two years of the filing of their complaint. Plaintiffs therefore argued that the statute was tolled because they were unable to discover the existence of their claim until they received the MSDSs. *Id.* The Third Circuit stated that the discovery rule tolls the statute of limitations during the period of a Plaintiff's complete inability, due to facts and circumstances not within his control, to discover an injury despite the exercise of due diligence. *Id.* at *432. Thus, for the discovery rule to apply, Plaintiffs must not have known, and reasonably could not have discovered, the dangers of exposure prior to May 2013, or two years before the filing of their complaint. *Id.* The Third Circuit found that Plaintiffs own complaint recognized the extent to which the substances they identify had been "well-studied and well-documented in medical literature from around the world." *Id.* The Third Circuit reasoned that Plaintiffs thereby knew, or in the exercise of reasonable diligence should have known, that they worked with and were being exposed to potentially dangerous chemicals. *Id.* Considering the wide availability of information documenting the risks of exposure to these substances in medical literature, the Third Circuit agreed with the District Court that Plaintiffs were on inquiry notice well before May 2013 that their work at Defendant's facility may have placed them at a significantly increased risk of contracting a serious latent disease. *Id.* at *433. The Third Circuit therefore found that Plaintiffs exercised no reasonable due diligence with regard to their claims, and the discovery rule therefore did not apply. Accordingly, because the statute of limitations for a medical monitoring claim was clearly passed, the Third Circuit affirmed the District Court's ruling dismissing Plaintiffs' complaint.

(xlii) Mootness Issues In Class Action Litigation

***Conrad, et al. v. Boiron, Inc.*, 2017 U.S. App. LEXIS 16180 (7th Cir. Aug. 24, 2017).** Plaintiff filed a class action against Defendant for deceptive marketing. Defendant made homeopathic products, including an over-the-counter flu remedy called Oscillococcinum ("Oscillo") that retailed for between $12 and $20, which Plaintiff purchased. Purchasers of Oscillo and other products previously filed a class action against Defendant in California over its deceptive marketing and the parties agreed to a broad settlement that covered over 200 products (including Oscillo) purchased between January 1, 2000 and July 27, 2012. *Id.* at *2. The settlement

required Defendant to: (i) pay refunds to past buyers; (ii) revise its labels to make them accurate; and (iii) let future unhappy customers request refunds within 14 days of purchase. *Id.* at *3. Plaintiff opted-out of the settlement and ultimately filed the instant action. Defendant filed a motion to dismiss, which the District Court granted, finding that Plaintiff was an inadequate class representative because his suit would provide little benefit beyond Defendant's existing refund guarantee. *Id.* at *4-5. The District Court further denied class certification, leaving Plaintiff with only his individual claim. The District Court then granted Defendant's Rule 67 motion to deposit $5,025, more than Plaintiff could recover at trial, with the Court in order to moot his claim. *Id.* at *5. Defendant deposited the funds, and the District Court dismissed the case as moot. On appeal, the Seventh Circuit reversed, and found that an unaccepted offer could not moot a claim. The Seventh Circuit opined that although Defendant requested the District Court to hold the funds, at some point a Plaintiff's stubborn refusal to accept a generous settlement offer could not be taken as the legal equivalent of acceptance; further, it was aware of no such doctrine, and it would not adopt such an ill-defined rule. *Id.* at *7. The Seventh Circuit noted that the U.S. Supreme Court has recognized "the deep-rooted historic tradition that everyone should have his own day in court." *Id.* at *11. The Seventh Circuit reasoned that the this did not mean that every person will use that day in court in a way that is economically rational, and some will invoke the aid of the courts for impermissible purposes. The Seventh Circuit noted that sometime negative-value cases are rational, if the party hopes to establish an important principle through the case. *Id.* at *12. Accordingly, the Seventh Circuit reversed and remanded the District Court's ruling.

***Fulton Dental, LLC, et al. v. Bisco, Inc.*, 2017 U.S. App. LEXIS 10839 (7th Cir. June 20, 2017).** Plaintiff brought a putative class action alleging Defendant violated the Telephone Consumer Protection Act ("TCPA") by sending an unsolicited facsimile. Defendant presented Plaintiff with a Rule 68 offer of judgment, which it refused. Defendant then tendered an offer pursuant to Rule 67, which allows a party to submit payment to the District Court, and which it claimed provided all of the individual relief Plaintiff could expect. The District Court concluded that Defendant's offer was enough to moot Plaintiff's individual claim and to disqualify it from serving as a class representative, and dismissed the action. On appeal, the Seventh Circuit found that this order was premature and it remanded back to the District Court for further proceedings. Violations of the TCPA can be redressed with statutory damages of $500 per negligent violation, or $1,500 per willful violation. Plaintiff sought statutory damages for two alleged TCPA violations, injunctive relief banning future violations, and certification of a class of all those who had similarly received faxes from Defendant. *Id.* at *3. After Plaintiff declined Defendant's Rule 68 offer of judgment, Defendant moved for leave to deposit $3,600 with the District Court under Rule 67. This sum represented what Defendant regarded as the maximum possible damages Plaintiff could receive, plus $595 for fees and costs. *Id.* Plaintiff opposed the motion on the ground that this was not a proper use of Rule 67 and that the simple deposit of funds could not moot the case. *Id.* at *4. The District Court granted the motion, and treated the Rule 67 deposit of funds as the equivalent of giving the money directly to Plaintiff, and treated Defendant's offer to submit to the injunction as the equivalent of a commitment that it already had stopped sending the offending faxes. *Id.* The Seventh Circuit stated that a decision that a certain amount of damages should be paid and that an injunction should be entered is quintessentially a ruling on the merits of a case. The Seventh Circuit found that Defendant's contention that depositing the funds to the District Court would moot the case, overlooked the fact that once the case was moot, the District Court lacked power to enter any judgment on the merits. *Id.* at *5. The Seventh Circuit determined that mootness was therefore not the correct legal concept for the course of events in this matter. The Seventh Circuit opined that on its face, Rule 67 is a procedural mechanism that allows a party to use the District Court as an escrow agent. Further, from a broader perspective, the Seventh Circuit stated that it saw no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, and attempting to force a settlement on an unwilling party through Rule 67. *Id.* at *9. In either case, all that exists is an unaccepted contract offer, and as the U.S. Supreme Court has previously recognized, an unaccepted offer is not binding on the offeree. *Id.* at *10. The Seventh Circuit concluded that an unaccepted offer to settle a case, accompanied by a payment intended to provide full compensation into the registry of the court under Rule 67, is no different in principle from an offer of settlement made under Rule 68. *Id.* at *13. The Seventh Circuit also stated that it could not determine as a matter of law that the unaccepted offer was sufficient to compensate Plaintiff for its loss of the opportunity to represent the putative class. *Id.* at *14. Accordingly, the Seventh Circuit reversed and remanded the District Court's ruling for further proceedings.

***Geismann, et al. v. ZocDoc, Inc.*, 2017 U.S. App. LEXIS 4150 (2d Cir. Mar. 9, 2017).** Plaintiff, a Missouri corporation, alleged that Defendant violated the Telephone Consumer Protection Act ("TCPA") when it sent Plaintiff two unsolicited facsimiles. Plaintiff requested between $500.00 and $1,500.00 in damages for each TCPA violation, an injunction prohibiting Defendant from sending similar faxes in the future, and costs. Defendant made Plaintiff a Rule 68 offer of judgment for: (i) $6,000, plus reasonable attorneys' fees, in satisfaction of Plaintiff's individual claims; and (ii) an injunction prohibiting Defendant from engaging in the alleged statutory violations in the future. Plaintiff rejected the offer but indicated that it would be willing to accept it if Defendant would extend the same offer to all members of the putative class action. Defendant declined. Defendant requested leave to deposit a check in the amount of $6,100 payable to the clerk of the District Court in satisfaction of judgment. The District Court granted the request, and reasoned that the U.S. Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), favored "deposit of judgments with the Court" in these circumstances. *Id.* at *5. Defendant subsequently moved to dismiss the complaint, primarily on the ground that its offer of judgment mooted the action. *Id.* at *5-6. The District Court granted Defendant's motion. On appeal, the Second Circuit reversed and remanded. Plaintiff argued that the District Court erred in dismissing its complaint for lack of subject-matter jurisdiction because Defendant's offer of monetary damages did not provide complete relief as to Plaintiff's individual claims and the individual and putative class claims were therefore not moot. Alternatively, Plaintiff asserted that even if the offer was complete as to its individual claims, an individual judgment did not render moot a putative class claim, at least when a class-certification motion was pending. The Second Circuit held that in light of *Campbell-Ewald*, Plaintiff's claims were not moot. *Campbell-Ewald* held that an "unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect." *Id.* at *9. Defendant attempted to distinguish *Campbell-Ewald* by arguing that the District Court entered judgment in this case, giving effect to the unaccepted offer. *Id.* at *13. The Second Circuit was unpersuaded by Defendant's argument, and stated that the judgment should not have been entered in the first place. Defendant also argued that *Campbell-Ewald* was distinguishable because Plaintiff was not left "empty-handed." *Id.* The Second Circuit again disagreed and found that Plaintiff was not compensated in satisfaction of its claim, which would require, at a minimum, its acceptance of a valid offer. *Id.* at *13-14. The Second Circuit concluded that the District Court should not have entered judgment on the basis of Defendant's offer, nor should it have dismissed Plaintiff's action. The Second Circuit therefore ruled that Defendant's Rule 68 offer of judgement did not moot Plaintiff's claims, and it reversed and remanded the case to the District Court for further proceedings.

***Laurens, et al. v. Volvo Cars Of North America, LLC*, 868 F.3d 622 (7th Cir. 2017).** Plaintiffs, a married couple purchasing a car, filed a class action alleging that Defendant misled them into purchasing a hybrid vehicle for a premium price. Plaintiffs learned after purchasing the vehicle that Defendant's representation that the car would go 25 miles without being charged was inaccurate, and in actuality the car battery would run out after only eight miles. Plaintiffs sought damages equal to the premium paid for the hybrid model ($20,000), the cost of the charging station ($2,700), injunctive relief, punitive damages, and attorneys' fees. *Id.* at 624. Defendant sent named Plaintiff Xavier's wife Khadija, the titleholder on the car, a letter that offered "immediately" to give Khadija "a full refund upon return of the vehicle if you are not satisfied with it for any reason" and to "arrange to pick up your vehicle at your home." *Id.* Defendant then moved to dismiss Plaintiff Xavier's lawsuit on the theory that he lacked standing; arguing that Khadija, as the titleholder, was the only person with any possible injury, and she was not at that moment a party to the lawsuit. Before the District Court ruled on the motion, Plaintiffs added Khadija to the complaint. Defendant responded with a motion to dismiss under Rule 12(b)(1) and contended that Khadija also lacked standing because its letter had offered complete relief for her before she filed suit. *Id.* The District Court agreed with Defendant, finding that Xavier had never suffered an Article III injury, and that Defendant's offer had redressed Khadija's injury before she became a party. On appeal, the Seventh Circuit reversed the District Court's ruling and remanded for further proceedings. The Seventh Circuit opined that if forcing a contract on an unwilling party was unacceptable under the judicially supervised procedures of Rule 68 and Rule 67, it saw no reason why an impersonal note offering a refund should have such a powerful effect. *Id.* at *627. The Seventh Circuit further stated that it made no difference if Defendant's offer preceded Khadija's joining the lawsuit. The Seventh Circuit held that that unaccepted contract offers are nullities; and as settlement proposals are contract offers, unaccepted settlement proposals are nullities, regardless of whether or not a lawsuit was filed. *Id.* at *628. The Seventh Circuit reasoned that since Khadija did not accept Defendant's offer, her injury-in-fact from Defendant's alleged misrepresentations

remained unredressed. Accordingly, the Seventh Circuit reversed the District Court's ruling granting Defendant's motion to dismiss, and remanded the case.

***Medici, et al. v. City Of Chicago,* 856 F.3d 530 (7th Cir. 2017).** 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 532. Plaintiff sought a declaratory judgment that the Tattoo Policy violated the First Amendment. The City moved to dismiss the complaint, which the District Court granted on two grounds, including: (i) that the wearing of the tattoos was a "personal expression" rather than an effort at communicating with the public on matters of public concern, and hence was not protected by the First Amendment; and (ii) that the challenged order would promote uniformity and professionalism. Plaintiffs appealed the District Court's ruling. *Id.* However, the police union then filed a grievance against the City claiming that the tattoo order violated the union's collective bargaining agreement with the City, which had issued the order without bargaining over the issue with the union as it should have done because the order affected the police officers' working conditions. *Id.* The grievance was referred to arbitration and the arbitrator ruled that the tattoo order violated the collective bargaining agreement because of the absence of any bargaining over the order, and the City would therefore have to revoke the order and compensate the officers for any costs incurred by them in complying with it. *Id.* The City revoked the order and moved to dismiss the Plaintiffs' appeal as moot on the ground that as a result of the arbitration Plaintiffs had obtained the relief they had sought. After the arbitration, the City agreed to reimburse its police officers for money they had spent to comply with the now-invalidated policy, so any direct financial loss Plaintiffs suffered had been remedied. *Id.* The Seventh Circuit stated that vacatur is in order when mootness occurs through the unilateral action of the party who prevailed in the District Court. *Id.* at 533. The Seventh Circuit found that was the case here as the unilateral action of the City, which prevailed in the District Court, decided not to appeal the arbitration award obtained by Plaintiffs. Vacating a judgment when the appeal from it is moot (*i.e.*, moot here because Plaintiffs prevailed as a result of the arbitration) would save Plaintiffs from having a binding judgment against them on an issue they can no longer appeal because of mootness. *Id.* The City contended that the mootness came about through Plaintiffs' act of filing the grievance, and was therefore not their own unilateral act. *Id.* The Seventh Circuit determined that the City elected not to appeal the arbitration award, and therefore remanded the decision to the District Court with instructions to vacate its judgment as moot.

***Wright, et al. v. Calumet City, Illinois*, 2017 U.S. App. LEXIS 2823 (7th Cir. Feb. 17, 2017).** Plaintiff, an arrested and incarcerated individual, brought a class action alleging that Defendant violated his Fourth and Fourteenth Amendment rights by failing to provide him with a judicial determination of probable cause within 48 hours of his arrest. The day after Plaintiff filed the complaint, after being detained approximately 72 hours, Plaintiff was presented for a bond hearing and a judge made a finding of probable cause to detain him. Plaintiff asserted that Defendant had a policy or practice authorizing its officers to detain persons arrested without a warrant for up to 72 hours before permitting the arrestee to appear before a judge, and sought to pursue both an individual claim and class claims. *Id.* at *2. Plaintiff sought certification of two classes pursuant to Rule 23(b)(2) and Rule 23(b)(3). *Id.* at *2-3. The District Court determined that Plaintiff failed to demonstrate that the classes were sufficiently numerous to satisfy Rule 23(a)(1). *Id.* at *3. Defendant then made a Rule 68 offer of judgment, which Plaintiff accepted. Plaintiff subsequently appealed the District Court's denial of the class certification. The Seventh Circuit found that Plaintiff was not an aggrieved person with a personal stake in the case or controversy as is required under Article III of the Constitution, and therefore dismissed the appeal for lack of jurisdiction. The Seventh Circuit held that the language of the Rule 68 offer that Plaintiff accepted provided $5,000 to Plaintiff to resolve "all claims brought under this lawsuit." *Id.* at *5. The Seventh Circuit found that a plain reading of that language instructed that the settlement involved Plaintiff's individual and class claims. Moreover, the Seventh Circuit stated that the Rule 68 offer that distinguished between the individual and class claims in the ensuing sentence, determining that attorneys' fees would be included only for the individual claim and not for the class claim upon which Plaintiff had received no measure of success. *Id.* at *13. The Seventh Circuit opined that the distinction for purposes of ascertaining attorneys' fees, but not for identifying the claims that are included in the judgment, further affirmed that the offer of judgment resolved both the individual and the class claims. *Id.* at *14.

Plaintiff argued that he had an on-going interest because he did not obtain attorneys' fees for the class claim. The Seventh Circuit disagreed and determined that in accepting without qualification the Rule 68 offer, Plaintiff accepted the offer as satisfaction of all of the relief that he sought in the District Court. *Id.* at *17. The Seventh Circuit therefore ruled that Plaintiff lacked a personal stake in the claim as required under Article III. Accordingly, the Seventh Circuit dismissed Plaintiff's appeal for lack of jurisdiction.

(xliii) Multi-Party Litigation Over Modification Of Employee/Retirement Benefits

***Board Of Trustees Of The Bay Area Roofers, et al. v. Gudgel Roofing*, 2017 U.S. Dist. LEXIS 40833 (N.D. Cal. Mar. 21, 2017).** Plaintiffs, a group of multi-employer employee benefits plans, brought a putative class action alleging that Defendant violated the Labor-Management Relations Act and the ERISA when it failed to pay employer contributions as required. Plaintiffs received contributions from individuals who are parties to a collective bargaining agreement ("CBA") that existed between Local 81 of the United Union of Roofers, Waterproofers, and Allied Workers, AFL-CIO ("Local 81"), and the Associated Roofing Contractors of the Bay Area Counties, Inc. *Id.* at *2. Under the CBA, employers were bound to certain trust agreements (hereinafter, "Trust Agreements") which obligated employers "to make timely contributions" to certain trust funds. Under the Trust Agreements and applicable collection policies, "payments received later than the last day of the month following the month in which the hours were worked are delinquent and liquidated damages shall be assessed on all delinquent contributions to the Trust Funds along with interest." *Id.* at *3. Since approximately 2004, Defendant had requested apprentices from Local 81. Plaintiffs alleged that Defendant failed to make contributions for certain months. Defendant filed a motion to dismiss, and the Court denied the motion. Defendant argued that Plaintiffs' complaint did not state a claim because the complaint failed to allege sufficient facts to establish that Defendant was bound to the CBA between Local 81 and the Associated Roofing Contractors such that Defendant owed contributions to Plaintiffs under the CBA and Trust Agreements. *Id.* at *6-7. Plaintiffs argued that Defendant had bound itself to the CBA by its conduct. Plaintiffs attached to their opposition a declaration and several exhibits, which Plaintiffs stated showed that Defendant's intent to be bound by the CBA and Trust Agreements. *Id.* at *7-8. The Court stated that the Ninth Circuit has recognized that a party who is not a signatory to a CBA "can adopt a labor agreement by their conduct." *Id.* at *12. In determining whether an employer had bound itself to a CBA by its conduct, case law authorities have considered a variety of factors, including the payment of union wages, the remission of union dues, the payment of fringe benefit contributions, the existence of other agreements evidencing assent, and the submission of the employer to union jurisdiction, such as that created by grievance procedures. *Id.* at *13. The Court determined that Plaintiffs alleged that Defendant requested and received apprentices from Local 81, that Defendant paid union wages and fringe benefit contributions for those apprentices, that Defendant "accepted" language purporting to bind Defendant to the CBA, and that Defendant regularly submitted monthly employer reports to Plaintiffs that contained language that "all contributions due under the Trust Agreement have been included." *Id.* at *18. Thus, the Court found that Plaintiff alleged facts that plausibly suggested that Defendant manifested an intent to be bound by the CBA and Trust Agreements. Defendant also asserted that dismissal was proper because Plaintiffs had not adequately alleged that Defendant was bound by the CBA during the time periods for which Plaintiffs sought relief. The Court stated that Plaintiffs attached specific monthly transmittals submitted by Defendant and specific apprentice referral forms that Defendant allegedly accepted on specific dates. The Court held that these facts suggested that Defendant was bound to the CBA for the months in question. *Id.* at *19. Accordingly, the Court concluded that Plaintiffs had stated valid claims for relief based on Defendant's failure to comply with the CBA's and Trust Agreements' contribution requirements for apprentices dispatched to Defendant from Local 81. The Court therefore denied Defendant's motion to dismiss.

***Cole, et al. v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017).** Plaintiffs asserted claims under § 301 of the Labor-Management Relations Act and the Employee Retirement Income Security Act ("ERISA") based on Defendant's alleged unilateral reduction of benefits and increase in out-of-pocket expenses for retirees in 2003. Defendant subsequently made an announcement that would have eliminated all healthcare benefits for the affected groups. Plaintiffs filed a motion for a preliminary injunction to force Defendant to continue providing those benefits, and the District Court granted the motion. *Id.* at *697. The District Court found that "the contracting parties' intention to provide lifetime retiree health coverage" was expressed in the "explicit language" of the parties' collective bargaining agreements ("CBAs") and confirmed by prior precedent and a multitude of extrinsic evidence. *Id.* at *697-698. As a result, the District Court permanently enjoined Defendant from altering or canceling retiree

healthcare benefits. The Sixth Circuit affirmed, citing then-binding precedent for the proposition that "general durational provisions only refer to the length of the CBAs and not the period of time contemplated for retiree benefits. Absent specific durational language referring to retiree benefits themselves, … the general durational language says nothing about those retiree benefits." *Id.* at *698. Defendant filed a motion for rehearing, which was held in abeyance for eight years while the parties attempted to settle their dispute. During the intervening eight years, a sea change in the applicable law occurred, and various U.S. Supreme Court decisions held that a series of CBAs materially indistinguishable from the CBA in the instant action did not provide the retirees with lifetime healthcare benefits. The Sixth Circuit subsequently granted Defendant's motion for rehearing, and reversed and remanded the District Court's ruling. The Sixth Circuit found that Defendant guaranteed healthcare benefits only until the expiration of the final CBA, and nothing more. The Sixth Circuit noted that this result was in line with the ordinary principles of contract law, which dictate that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement." *Id.* at *698. The Sixth Circuit explained that the 1968 CBA and every subsequent CBA provided that retiree healthcare benefits "shall be continued." *Id.* at *700. All of the CBAs included a general durational clause that terminated the agreement after three years. The Sixth Circuit reasoned that it must "assume that the explicit guarantee of lifetime benefits in some provisions and not others means something." *Id.* at 701. The Sixth Circuit determined that the "shall be continued" language was not sufficient to vest the retirees with healthcare benefits for life. The Sixth Circuit held that the language in the 2000 CBA, as interpreted by the ordinary principles of contract law, was unambiguous and that the CBAs between the parties made commitments for the three-year terms of the CBAs, and not commitments for life. Accordingly, the Sixth Circuit granted Defendant's petition for rehearing, reversed the District Court's ruling, and remanded for further proceedings.

***Di Biase, et al. v. SPX Corp.*, 872 F.3d 224 (4th Cir. 2017).** Plaintiffs brought a class action for declaratory relief against Defendant alleging violation of 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 *227. 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 in the HRA to pay for that individual's health and prescribing drug coverage. *Id.* at *228. Each individual would then use his or her HRA to buy his or her own insurance policy in the individual Medicare market. *Id.* Plaintiffs sought a preliminary injunction restraining Defendant from terminating the group plan and instituting the HRA structure, which the District Court denied. The District Court observed that the changeover to the HRA structure took effect on January 1, 2015; therefore, the change that Plaintiffs sought to prohibit had already occurred. *Id.* 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 *229. On appeal, the Fourth Circuit affirmed the District Court's ruling. Plaintiffs maintained that the District Court abused its discretion by failing to grant the preliminary injunction. Defendant countered that the motion was moot and that Plaintiffs had not established any of the four criteria necessary to grant a preliminary injunction. *Id.* The Fourth Circuit found that Plaintiffs' motion was not mooted by implementation of the HRA, and that a motion for a preliminary injunction filed before the act to be enjoined had occurred, and subsequently intended to restore the status quo once it had been disturbed, was not moot. *Id.* at *230. The Fourth Circuit further considered whether the District Court properly found that Plaintiffs had not established a likelihood of success on the merits of the underlying healthcare coverage dispute. The outcome of the underlying case turned on whether the creation of the HRA accounts satisfied the "substantially equivalent" provisions of each of the settlement agreements. The Fourth Circuit agreed with the District Court's conclusion that the evidentiary record was not sufficiently developed to make such a fact-sensitive inquiry. *Id.* Plaintiffs asserted that the record established that making a sum of money available through an HRA to use for reimbursement of certain expenses was not "coverage" and, therefore, implementation of the HRA approach to providing healthcare benefits constituted a breach of the settlement agreement. *Id.* at *234. Although the settlement agreements did not require that coverage be provided through a group health plan, Plaintiffs asserted that "coverage" and "plan" had specific meanings that were inconsistent with the structure of an HRA. However, the Fourth Circuit held that the terms "coverage" and "plan" were not defined in the settlement agreements, and Plaintiffs cited only non-binding case law from other circuits to suggest that the meaning of "coverage" did not include HRA plans. *Id.* The Fourth Circuit therefore ruled that more facts were needed to determine whether

HRAs in general, based upon their structure, as well as the specific terms of the HRAs that Defendant established for its retirees, provided substantially equivalent healthcare benefits in accordance with terms of the settlement agreements. *Id.* at *235. Further, the Fourth Circuit considered whether Plaintiffs demonstrated that they were likely to suffer irreparable harm without a preliminary injunction. The Fourth Circuit concluded that Plaintiffs failed to provide evidence that anyone suffered any potential irreparable harm or that any such harm was imminent. The Fourth Circuit looked to whether Plaintiffs demonstrated that an injunction was in the public interest. The Fourth Circuit stated that, given the administrative challenges and confusion for the retirees, the fact that Plaintiffs had not demonstrated a likelihood of success on the merits or irreparable harm, the balance of equities and the public interest were better served by allowing the underlying litigation to proceed to a decision on the merits. *Id.* at *235-236. Accordingly, the Fourth Circuit affirmed the District Court's ruling denying Plaintiffs' motion for a preliminary injunction.

***Fletcher, et al. v. Honeywell International*, 2017 U.S. Dist. LEXIS 28324 (S.D. Ohio Feb. 28, 2017).** Plaintiffs, a group of retirees and their spouses, filed suit against Defendant alleging that Defendant promised to provide Plaintiffs lifetime healthcare benefits and that the proposed termination of those benefits violated the terms of a long series of collective bargaining agreements ("CBA"). Defendant did not contest that it promised to provide lifetime healthcare benefits to surviving spouses and dependents, but denied that it promised lifetime healthcare benefits to the retirees themselves. Plaintiffs sought injunctive relief to enforce Defendant's alleged promises under the Labor-Management Relations Act ("LMRA") and the Employee Retirement Income Security Act ("ERISA"). The Court held that Plaintiffs satisfied their burden of proving that Defendant agreed to provide lifetime healthcare benefits to its retirees. Defendant asserted that it did not agree to provide lifetime retiree healthcare benefits and, because the right to retiree healthcare benefits was not vested, any obligation to provide such benefits ended when the last CBA expired. Plaintiffs argued that Defendant could not unilaterally terminate benefits because they had vested. There was no specific language in the CBA stating that Defendant agreed to provide lifetime healthcare benefits to its retirees, but Plaintiffs maintained that Defendant's promise to provide lifetime retiree healthcare benefits was implicit in the retiree healthcare provisions of the 2000-2003 CBA. Defendant maintained that the Court could not infer such a promise from the language of the CBA and should limit Defendant's obligations to the precise terms of the agreement because the absence of specific language providing for lifetime healthcare benefits for retirees was determinative. The Court ruled that it was not required to find a "clear statement" that Defendant agreed to provide lifetime retiree healthcare benefits because it could draw implications and inferences from language contained in the CBA. Moreover, because the Court found the contract language to be ambiguous, it looked to extrinsic evidence to determine what the parties' intent was when they drafted the agreement. The union negotiators did not submit any proposal asking Defendant to provide healthcare benefits for the lifetime of the retirees. Defendant argued that the union negotiators did not make such a request because they knew that any such request would be rejected. Conversely, Plaintiffs argued that the union negotiators did not ask for lifetime healthcare benefits for retirees at the CBA because that benefit had already vested. The Court found the fact that Defendant continued to provide coverage to retirees after the CBA had expired provided strong support for the finding that Defendant had agreed to provide lifetime retiree healthcare benefits. The Court noted that numerous case law authorities have held that, when a company continued to pay for healthcare benefits after it was no longer obligated to do so, this suggested that the parties intended the benefits to be vested. Defendant offered no explanation as to why it continued to provide retiree healthcare benefits after the CBA expired. Accordingly, the Court ruled in favor of Plaintiffs and permanently enjoined Defendant from terminating healthcare benefits of Plaintiffs.

***IUE-CWA, et al. v. General Electric Co.,* 2017 U.S. Dist. LEXIS 118846 (N.D. Ohio July 28, 2017).** Plaintiffs, a group of unions and retirees, filed a putative class action arising out of Defendant's changes to retirees' benefits plans. Plaintiffs claimed that union-represented employees who retired prior to the 2015 collective bargaining agreement ("CBA") had a vested, post-collective CBA right to unalterable, lifetime post-65 health benefits under the benefit plans and the CBA in effect at the time of their respective retirements. Plaintiffs also claimed that Defendant's decision to replace the benefit plans with an alternative set of health benefits for post-65 retirees was a breach of fiduciary duty. Further, independent of the change in benefits, Plaintiffs claimed that Defendant acted unlawfully when it changed the organizational structure of the Medicare A Plan and the drug plan while those plans were still in effect. The Court granted Defendant's motion to dismiss pursuant to Rule 12(b)(6). As part of the CBAs, Defendant reserved its right to amend, suspend, or terminate each of the benefit

plans in whole or in part, at any time without limitation, except for certain specified restrictions. Defendant and the unions entered a new CBA every three or four years from 1973 to 2015. At issue was Defendant's decision to replace the one-size-fits-all benefit plans with an alternative arrangement that provided retirees with access to the same types of coverage in a manner that could be more tailored to retirees' individualized preferences. Plaintiffs asserted that in its pre-2015 CBAs, Defendant contractually committed to provide unalterable medical benefits for life to union retirees and Defendant unambiguously promised to continue the benefit plans. However, the Court determined that each of the benefit plans clearly and expressly reserved Defendant's right to amend or terminate the plans at any time for any reason, subject only to the limited restrictions on amendment imposed by the CBA. The Court reasoned that unless restricted from doing so by the CBAs, Defendant had the right to amend or terminate the plans as it deemed appropriate. The Court concluded that because the benefit plans at issue were subject to express reservation of rights provisions that authorized Defendant to amend or terminate the plan at any time, Plaintiffs' benefits were not vested. Accordingly, the Court dismissed this claim. Second, Plaintiffs alleged that Defendant's plan to terminate the retiree benefit plans constituted a breach of fiduciary duty in violation of § 404 of the ERISA, 29 U.S.C. § 1104. However, the Court reasoned that Plaintiffs offered no opposition to Defendant's argument that it did not breach a fiduciary duty by replacing the benefit plans with an alternative set of post-65 health benefits. The Court concluded that because Plaintiffs failed to meet their burden in opposing dismissal on their breach of fiduciary duty claim, Plaintiffs had abandoned this claim and waived any argument concerning dismissal of such claim. Accordingly, the Court dismissed this claim. Finally, Plaintiffs claimed that Defendant acted unlawfully when it unilaterally transferred the drug plan and the Medicare A Plan to a separate retiree-only plan. Defendant argued without opposition that this ancillary claim was moot if the Court dismissed Plaintiffs' primary claims challenging the termination of the post-65 benefit plans at issue**.** ***Id.*** at *37**.** The Court ruled that Plaintiffs also did not identify any possible injury that would warrant monetary or equitable relief for this claim as the restructuring did not affect substantive benefits. Accordingly, the Court dismissed this claim. In sum, the Court granted Defendant's motion to dismiss Plaintiffs' complaint in its entirety. *Id*.

Kirkendall, et al. v. Halliburton, Inc.**, 2017 U.S. Dist. LEXIS 161257 (W.D.N.Y. Sept. 29, 2017).** Plaintiffs, a group of employees, alleged that Defendants improperly denied them early retirement benefits and breached their fiduciary duties. In Count I of the complaint, Plaintiffs sought a declaratory judgment as to whether they are entitled to early retirement benefits; in Count II, Plaintiffs alleged that they were entitled to have their employment benefits correctly determined; and in Count IV, Plaintiffs alleged that Defendant Halliburton, Inc. breached its fiduciary duties of loyalty and prudence by choosing the incorrect date to determine benefits for Plaintiffs. *Id.* at *2. Defendants filed a motion for summary judgment on Counts I, II, and IV, which the Court granted. Plaintiffs filed a motion for summary judgement on Counts I and II, which the Court denied. Dresser Industries, Inc. ("Dresser") established Defendant Dresser Industries, Inc. Consolidated Salaried Retirement Plan ("DICON"). Plaintiffs were Dresser employees and enrolled in DICON. DICON participants had to satisfy the several requirements to qualify for early retirement benefits, including: (i) the participant's severance from service date ("SSD"), or the date they quit, retired, or were discharged, must occur after they turn 55-years-old but before age 65; and (ii) the participant had to a participate in DICON on May 1, 1986, and have 10 years or more of vesting service. *Id.* at *2-3. Defendant Halliburton, Inc. ("Halliburton") acquired Dresser. Dresser was thus a wholly-owned subsidiary of Halliburton and remained a partner in the Dresser Rand Co. ("DR"). After Defendant Halliburton acquired Dresser, Halliburton adopted DICON and unanimously ratified a decision to deny employees the ability to "grow in" to early retirement benefits under DICON after the sale. HBC subsequently interpreted DICON to define "DR" as the partnership between Dresser and Ingersoll as long as Dresser had an interest in DR. Under that interpretation, once Dresser no longer had an interest in DR, "DR" no longer existed for purposes of DICON and Plaintiffs could not "grow in" to their early retirement benefits after Halliburton sold Dresser's interest. *Id.* at *5. Accordingly, Defendant deemed that Plaintiffs and similarly-situated DR employees ceased service with DR as of December 30, 1999. Therefore, any DR employees who did not meet the requirements for early retirement benefits as of December 30, 1999, could not "grow in" to early retirement benefits even though their employment with DR continued under Ingersoll's ownership. *Id.* The Court found that both Defendants and Plaintiffs offered rational, conflicting interpretations of the DICON provisions, and therefore Defendants' interpretation must control. Plaintiffs' benefit claim hinged on whether Defendants correctly interpreted DICON to disallow Plaintiffs to "grow in" to their early retirement benefits after Halliburton sold Dresser's interest in DR to Ingersoll in 1999. Under Plaintiffs' interpretation, DICON declared DR to be a

partnership under New York law. Under New York law, a partnership "continues until the winding up of partnership affairs is completed." *Id.* at *14. Thus, until DR completed the winding up of its affairs, DR continued and its employees participating in DICON were able to "grow in" to their early retirement benefits. *Id.* Defendant's interpretation was that participants in DICON may "grow in" to early retirement rights by accruing vesting service, including by working for a "related entity." *Id.* at *15. Once Halliburton sold Dresser's interest in DR to Ingersoll in 1999, in Defendant's version, Dresser no longer had a substantial ownership interest – either direct or indirect – in DR. Accordingly, both Defendants and Plaintiffs offered rational, conflicting interpretations of the DICON's provisions, and so Defendants' interpretation must control. The Court also found that Defendant Halliburton was entitled to summary judgment on Plaintiffs' breach of fiduciary duty claim because it was undisputed that Halliburton did not act as a fiduciary when it allegedly caused DICON to determine Plaintiffs' early retirement benefits based on the wrong termination date. *Id.* at *15-16. The Court stated that Plaintiffs failed to provide specific facts or evidence "showing that there is a genuine issue for trial" that would prevent Halliburton from being entitled to summary judgment. *Id.* at *16. Finally, the Court found that Defendants were entitled to summary judgment on Plaintiffs' declaratory judgment claim. The Court stated that Plaintiffs sought monetary damages, attempting to work around the ERISA's express remedies and should therefore be dismissed. *Id.* at *17.

***Reese, et al. v. CNH Industries N.V.*, 854 F.3d 877 (6th Cir. 2017).** Plaintiffs, a group of former employees of Defendant who retired between 1994 and 2004, filed a class action seeking a declaration that they were entitled to lifetime healthcare benefits, an injunction requiring Defendant to "maintain the level of retiree health care benefits currently in effect," and damages for injuries the retirees might sustain if the benefits were terminated. *Id.* at 879. This matter was complicated by a change in the law, and in light of *M & G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926 (2015), which abrogated the Sixth Circuit's *Yard Man* line of cases (stemming from *International Union v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), and its progeny), the District Court had to revisit the question of whether Plaintiffs had a vested right to lifetime healthcare benefits. *Id.* The District Court ultimately found that they did. On appeal, the Sixth Circuit found that the parties collective bargaining agreement ("CBA") was ambiguous, and because the extrinsic evidence indicated that parties intended for the healthcare benefits to vest for life, it affirmed the District Court's vesting determination. The Sixth Circuit, however, remanded to the District Court because it failed to properly weigh the costs and the benefits of the proposed plan. *Id.* Ultimately, the Sixth Circuit faced two questions: "Did [CNH] in the 1998 CBA agree to provide healthcare benefits to retirees and their spouses for life? And, if so, does the scope of this promise permit CNH to alter these benefits in the future?" *Id.* In *Reese, et al. v. CNH Industries, N.V.*, 574 F.3d 315 (6th Cir. 2009) ("*Reese I*"), the Sixth Circuit answered both questions in the affirmative, but remanded to the District Court so that it could determine "how and in what circumstances CNH may alter [the healthcare benefits] . . . ." *Id.* at 880. The District Court found that Defendant could not unilaterally make changes to the scope of Plaintiffs' healthcare benefits, which was in conflict with the Sixth Circuit's commands in *Reese I*. In another appeal in *Reese, et al. v. CNH Industries, N.V.*, 694 F.3d 681 (6th Cir. 2012) ("*Reese II*"), the Sixth Circuit remanded to the District Court again, this time with a list of seven factors to consider when making its reasonableness-of-the-proposed-plan determination and with clear instructions that Defendant could make unilateral changes to the plan. *Id.* While on the second remand, the Supreme Court decided *Tackett,* and the District Court was required to reconsider whether Plaintiffs had a vested right to lifetime healthcare benefits. Initially, the District Court found that Plaintiffs did not. However, on Plaintiffs' motion for reconsideration, the District Court reversed and found not only that Plaintiffs' rights were vested even after *Tackett*, but also that Defendant's proposed changes were unreasonable. *Id.* Defendant appealed yet again, and the Sixth Circuit affirmed the District Court's ruling, but remanded for further consideration. The Sixth Circuit noted that the District Court focused heavily on cost-shifting provided in the proposed plan, as many of the *Reese II* factors dealt with changes in costs for the parties. However, the Sixth Circuit opined that the District Court made several mistakes when focusing on the costs. The Sixth Circuit therefore found that on remand, the District Court should reconsider the factors presented in *Reese II*, with special attention on the increased benefits to Plaintiffs, including benefits created by progress in medical procedures and prescriptions. *Id.* at 886. The Sixth Circuit stated that the District Court should also consider how much of the cost to Medicare-eligible retirees will be borne by the federal government or others. *Id.* at 887. Finally, the Sixth Circuit directed the District Court to reconsider whether the proposed plan was reasonable in light of the plans offered at similar companies, *i.e.*, large manufacturing corporations with union representation. *Id.* at 888. The Sixth Circuit held that the District Court also should look to the individual

terms proposed and determine, if not reasonable on the whole, whether individual pieces of the plan were reasonable. Accordingly, the Sixth Circuit affirmed the District Court's finding that Plaintiffs' right to lifetime healthcare benefits vested, but it remanded so that the District Court could reconsider the reasonableness of Defendant's proposed plan in light of *Reese I* and *Reese II*.

***Thompson, et al. v. American Airlines, Inc.*, 2017 U.S. Dist. LEXIS 130377 (N.D. Ill. Aug. 16, 2017).** Plaintiffs, a group of retired flight attendants, filed suit alleging breach of contract, promissory estoppel, negligent misrepresentation, and intentional misrepresentation against Defendant for altering their priority boarding status following retirement. Defendant filed a motion to dismiss, and the Court granted the motion in part. Plaintiffs claimed that, through Defendant's company policy, it promised that retirees, and certain qualifying employees, who left the company would receive the same travel benefits they had enjoyed immediately prior to separation from the company. *Id.* at *2. Following a merger between Defendant and US Airways, Plaintiffs alleged that their priority boarding status changed and that the change was contrary to many statements that Defendant made reaffirming that the merger would not affect Plaintiffs' travel benefits, including their boarding priority status. *Id.* at *4. The Court addressed each of Plaintiffs' claims, beginning with the assertion that Defendant breached a contract with them to provide the same flight priority benefits for life. The Court noted that, in order to state a clam for breach of contract in Illinois, Plaintiffs must allege: (i) the existence of a valid and enforceable contract; (ii) substantial performance by Plaintiff; (iii) a breach by Defendant; and (iv) resulting damages. *Id.* at *5-6. The Court held that Defendant's policy contained clear enough language that employees and retirees meeting certain eligibility requirements would have believed that an offer had been made for them to receive specific travel benefits. The policy stated that these benefits would be made "for . . . life." *Id.* at *7. Therefore, the Court held that Plaintiffs sufficiently alleged the existence of a contract to meet the first element of their breach of contract claim. The Court then considered whether Plaintiffs sufficiently alleged a breach of the travel promises. Defendant argued that the policy contained unambiguous language that allowed Defendant to change Plaintiffs' travel privileges at any time. *Id.* at *9. The Court rejected Defendant's position because the language to which Defendant pointed would render the words "for . . . life" meaningless. *Id.* at *10. Because the doctrine of illusory promises provides that Courts should avoid construing contracts to render promises illusory, the Court opined that it should give the words "for . . . life" meaning. *Id.* at *11. Accordingly, the Court held that Plaintiffs adequately stated a claim for breach of contract. The Court also considered whether Plaintiffs stated a claim for promissory estoppel. The Court noted that Plaintiffs must allege that: (i) Defendant made an unambiguous promise to Plaintiffs; (ii) Plaintiffs relied the promise; (ii) Plaintiffs' reliance was expected and foreseeable by Defendant; and (iv) Plaintiffs relied on the promise to their detriment. *Id.* at *12-13. The Court found that Plaintiffs' complaint contained sufficient facts to state a claim for promissory estoppel because Plaintiffs asserted that Plaintiffs relied on Defendant's promise of lifetime travel benefits when they took early retirement or separation packages. *Id.* at *13. Further, Plaintiffs alleged that Defendant intended Plaintiffs to rely on the promise, or it was at least foreseeable that Plaintiffs would rely on it. The Court then turned to Plaintiffs' misrepresentation claims. To state a claim of intentional misrepresentation, Plaintiffs must allege: (i) a false statement of material fact; (ii) known or believed to be false by the person making it; (iii) an intent to induce Plaintiffs to act; (iv) action by Plaintiffs in justifiable reliance on the truth of the statement; and (v) damage to Plaintiffs resulting from such reliance. *Id.* at *14. The Court ruled that Plaintiffs failed to meet the level of specificity required by Rule 9(b). Plaintiffs alleged that Defendant promised Plaintiffs that they would receive in retirement D2 travel benefits for life; however, Plaintiffs did not identify who made the representations or when precisely they were made, which failed to satisfy the heightened standard of Rule 9(b). *Id.* at *15. The Court, therefore, concluded that Plaintiffs failed to state a claim for intentional misrepresentation. Negligent misrepresentation has similar elements except that Defendant need not know that the statement was false. *Id.* at *16. Defendant argued for dismissal of this claim based on the policy's language that demonstrated that reliance on the "for life" provision was not reasonable or justifiable. *Id.* However, the Court explained that reasonable reliance was usually a question of fact, and therefore not appropriate for resolution on a motion to dismiss. *Id.* at *17. Accordingly, the Court concluded that Plaintiffs sufficiently alleged negligent misrepresentation. The Court granted Defendant's motion to dismiss in part and denied it in part.

***Watkins, et al. v. Honeywell International, Inc.*, 2017 U.S. App. LEXIS 22359 (6th Cir. Nov. 8, 2017).** Plaintiffs filed a class action on behalf of nearly 1,000 retirees and their spouses and dependents alleging that Defendant violated the Labor-Management Relations Act and the Employee Retirement Income Security Act

when Defendant notified them that it was terminating their healthcare benefits. *Id.* at *2-3. Defendant's employees were part of the United Automobile, Aerospace, and Agricultural Implement Workers of America (the "UAW"). Defendant and the UAW engaged in collective bargaining and came to an arrangement that expired in 2011 where Defendant agreed to pay for healthcare benefits for employees and retirees. *Id.* at *2. Plaintiffs asserted that Defendants wrote to retirees (or their surviving spouses) that their healthcare "will continue during your retirement" and is "for your lifetime." *Id.* at *3. In actuality, the collective bargaining agreement stated that " this Agreement shall continue in full force and effect until 11:59 PM, October 31, 2011." *Id.* Plaintiffs asserted that Defendant "promised lifetime healthcare coverage and benefits for retirees and their spouses, eligible dependents, and surviving spouses," and Defendant had breached this agreement by ending its healthcare contributions. Defendant moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6). The District Court granted Defendant's motion to dismiss. The District Court found that the text of the final collective bargaining agreement was clear and expressed an unambiguous intent and agreement that the benefits were not for life. *Id.* at *8. Finding the contract unambiguous, the District Court did not consider any of Plaintiffs' extrinsic evidence. On appeal, the Sixth Circuit reviewed Plaintiffs' evidence and found that it did not show that "for the duration of this Agreement" contained a patent ambiguity that "clearly appears on the face of a document, arising from the language itself." *Id.* at *19. The Sixth Circuit stated that Plaintiffs did not argue that "for the duration of this Agreement" was unclear; instead, they pointed back to the caps, the use of the word "continue," the early termination mechanisms, and the tying of healthcare and pension together to argue that the contract was ambiguous. The Sixth Circuit rejected these arguments, and further opined that the arguments said nothing about whether the phrase "for the duration of this Agreement" might not mean what it says. *Id.* at *20. Accordingly, the Sixth Circuit affirmed the District Court's ruling granting Defendant's motion to dismiss.

***Zino, Jr. v. Whirlpool Corp.*, 2017 U.S. Dist. LEXIS 117905 (N.D. Ohio July 28, 2017).** Plaintiffs, a group of retirees, filed a class action alleging that Defendants breached its agreement to provide Plaintiffs with vested healthcare benefits. At phase one of the trial, the Court granted summary judgment in favor of Plaintiffs, and ruled that Defendants had agreed to provide Plaintiffs in certain sub-classes with vested healthcare benefits. Defendants moved the Court to reconsider its prior rulings considering the Sixth Circuit's recent decision in *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir. 2016). Defendants argued that under *Gallo*, the plain language of the parties' contracts unambiguously precluded vested retiree benefits, and the Court erred by using extrinsic evidence to evaluate the contracts. Alternatively, Defendants contended that even if the extrinsic evidence were proper, evidence from the second phase of trial, and additional evidence not presented at trial, demonstrated that the Court's rulings were in error. At the outset, the Court noted that the Federal Rules of Procedure do not provide for motions to reconsider; however, it treated Defendant's motion as motion to alter or amend judgment pursuant to Rule 59(e). *Id.* at *8. Defendants argued that the *Gallo* decision precluded a finding of ambiguity in this case as the language in the agreements were similar. *Id.* at *9. Defendants asserted that the plain language of the contracts, the general durational clause, the reservation of rights clause, and contrasting pension plan language all supported its contention that there was no ambiguity in the agreements. *Id.* at *10. The Court rejected each argument. Defendants contended that the parties' contractual provisions regarding retiree healthcare benefits were unambiguous and did not convey an intent to vest retiree healthcare benefits as the language used in this case was no more binding than that used in *Gallo*. Accordingly, Defendant asserted that *Gallo* mandated that the Court find no ambiguity. The Court found that Defendant misread *Gallo* and it rejected Defendant's assertion that *Gallo* created a bright-line rule, as the Sixth Circuit cautioned in *Gallo* that its decision did not create a clear-statement rule, and that ordinary principles of contract law still must be applied. *Id.* at *11. The Court rejected Defendants' approach in comparing individual phrases of each contract with language in the *Gallo* contract, because Defendant failed to consider the context of the language within the agreements. *Id.* at *14. The Court found no basis to alter or reconsider its ruling that there was sufficient ambiguity in the contract language to permit the use of extrinsic evidence in the Court's analysis. *Id.* at *20. The Court also rejected Defendant's alternative argument that extrinsic evidence weighed against vesting and denied Defendant's motion to reconsider of alter the judgment. Finally, the Court denied Defendant's motion to strike Plaintiff's declarant submitted for phase two of the trial as the Court's trial ruling provided for inclusion of such information and any prejudice to Defendant was minimal. *Id.* at *24.

(xliv) Non-Workplace Class Action Arbitration Issues

***Ambulatory Surgical Center Of Somerset, et al. v. Allstate Fire Casualty Insurance Co*., 2017 U.S. Dist. LEXIS 165021 (D.N.J. Oct. 5, 2017).** Plaintiffs, an injured individual and a hospital, filed a class action seeking liability and damages on behalf of individuals insured by Defendant who had sustained injuries in automobile accidents and were entitled to medical benefits pursuant to New Jersey law and of ambulatory surgical facilities that performed procedures for which Defendant refused payment. *Id.* at *2. Plaintiffs also sought a declaratory judgment that Defendant must pay for those procedures and asserted related contract claims and violations of the New Jersey Consumer Fraud Act. *Id.* Defendant moved to compel arbitration and to stay proceedings. The Court denied the motion, and Defendant moved for reconsideration of the Court's decision. Subsequently, the Court granted Defendant's motion for reconsideration. Plaintiffs' case dealt with New Jersey's "deemer statute," which extends New Jersey Personal Injury Protection ("PIP") coverage to out-of-state insureds who were injured in-state or utilized in-state care. *Id.* at *4. Defendant argued that the Court should reconsider the breadth of the deemer statute and whether the deemer statute incorporates PIP's dispute resolution provision. *Id.* Plaintiffs claimed that Defendant was not entitled to relief pursuant to the reconsideration standard because he merely put forth the same case law that the Court relied on in its initial opinion in support of an alternative outcome. *Id.* The Court noted that while Defendant repeated some of the same arguments, the Court determined that it overlooked important law related to the legislative history of PIP amendments. *Id.* The Court reasoned that it did not consider the underlying purpose of the amendments, nor the effect of this purpose on the breadth of the deemer statute. The Court therefore found that reconsideration was justified to avoid any potential injustice that might result. *Id.* at *5. The Court stated that review of deemer statute case law suggest that the deemer statute converts out-of-state policies into PIP policies in their entirety. *Id.* at *6. The Court found that the combination of the liberal treatment of the deemer statute by New Jersey case law authorities and the underlying purpose of the arbitration provision – designed to encourage more dispute resolution by expanding the class of parties who can compel arbitration – together implied that the deemer statute should incorporate PIP's amended dispute resolution provision. *Id.* Therefore, pursuant to the deemer statute, the Court held that an insurance company can compel an out-of-state claimant to arbitrate. *Id.* The Court opined that its original holding was misplaced. *Id.* at *9. The Court found that the PIP's dispute resolution provision was amended to empower any party to a dispute to compel arbitration, including insurance companies. *Id.* Therefore, because the deemer statute treated Plaintiff's insurance policy as though it were a New Jersey policy, including the arbitration provision, the statutory notice of arbitration was enough to justify compelling arbitration. Accordingly, the Court granted Defendant's motion for reconsideration.

***Burcham, et al. v. Ford Motor Co.*, 2017 U.S. Dist. LEXIS 98393 (S.D. Ill. June 23, 2017).** Plaintiff filed a one-count putative class action alleging that Defendant failed to release security interests on purchased vehicles pursuant to Illinois law at 625 ILCS 5/3-205. *Id.* at *1. Defendant filed a motion to compel arbitration, asserting that Plaintiff consented to arbitrate any claims, disputes, or controversies related to the purchase contract of his pre-owned 2006 Ford Fusion SE. Defendant argued that the claim should be arbitrated because it fell within the scope of the retail installment contract's arbitration provision. Plaintiff argued that his cause of action – the enforcement of a security interest – was expressly excluded from the arbitration clause within the contract. *Id.* at *2. Plaintiff contended that the legal dispute was premised on enforcement of security interest in his vehicle, and therefore, the motion to compel arbitration should be denied because the arbitration clause excluded this dispute. Defendant argued that the delegation provision within the contract enforced arbitration of "claims regarding the interpretation, scope, or validity of the arbitration provision, or arbitrability of any issue." *Id.* Defendant further asserted that the delegation provision must be imposed because Plaintiff neglected to raise a direct challenge to the provision. *Id.* at *3-4. Defendant maintained that each statutory element required to compel arbitration under the Federal Arbitration Act had been satisfied, including: (i) the existence of a written arbitration agreement set forth in the contract; (ii) Plaintiff's claim for alleged violation of 625 ILCS 5/3-205 fell within the scope of the written arbitration agreement; and (iii) Plaintiff refused to arbitrate his claim, which was inferred by the filing of his complaint against Defendant. *Id.* at *4. The Court agreed with Defendant with respect to existence of the delegation provision. The Court held that unless a delegation provision was challenged, the Court must treat it as valid and enforceable, "leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at *7-8. The Court reasoned that Plaintiff's response to the motion to compel failed to address the delegation provision, much less specifically challenge its legality. *Id.* at *8. Therefore, since the delegation clause in the arbitration agreement was unambiguous in both declaring and requiring parties to

arbitrate claims regarding the interpretation, scope, or validity of the arbitration clause, or arbitrability of any issue, the Court granted Defendant's motion to compel arbitration.

***Catamaran Corp., et al. v. Towncrest Pharmacy*, 2017 U.S. App. LEXIS 13689 (8th Cir. July 27, 2017).** Plaintiff, a pharmacy benefit manager, contracts with entities that sponsor, administer, or otherwise participate in prescription drug benefit plans. Among the services Plaintiff provides is reimbursing pharmacies who furnish prescription drugs to individuals covered by such a plan. Defendants were four pharmacies that had agreements with Plaintiff for reimbursements. After a dispute arose between the parties, Plaintiff filed a declaratory judgment action under 28 U.S.C. § 2201 and the Federal Arbitration Act ("FAA") in District Court. Plaintiff asserted that Defendants were subject to two agreements containing arbitration agreements. Plaintiff sought declaratory relief and an injunction preventing Defendants from proceeding with class arbitration. Plaintiff moved for summary judgment, arguing that the relevant agreements did not permit the pharmacies to proceed to arbitration as a class. Plaintiff contended that each pharmacy must engage in individual, bilateral arbitration proceedings. The District Court denied Plaintiff's motion for summary judgment. The District Court viewed the issue before it as twofold: (i) whether the availability of class arbitration is a substantive or a procedural question; and (ii) whether the agreements clearly and unmistakably commit the class arbitration question to an arbitrator. *Id.* at *3-4. On the first question, the District Court recognized that the Eighth Circuit has yet to decide the issue. As to the second question, relying on Eighth Circuit precedent analyzing bilateral arbitration, the District Court held that the agreements' reference to AAA rules was a clear and unmistakable commitment for an arbitrator to decide whether the agreements contemplated class arbitration. *Id.* at *4. On appeal, the Eighth Circuit reversed and remanded. The Eighth Circuit stated that it must first determine whether the question of class arbitration was substantive in nature, and therefore one for the District Court to decide absent clear and unmistakable language to the contrary, or procedural in nature and presumably for an arbitrator to decide. *Id.* at *6. The Eighth Circuit stated that although the Supreme Court has not definitively ruled on the issue, recent cases have strongly hinted at the Supreme Court's ultimate conclusion that the question of class arbitration is substantive in nature and requires judicial determination. *Id.* at *7. To that end, the Eighth Circuit identified a number of fundamental differences between bilateral and class arbitration suggesting that the question of whether an agreement permits class arbitration is reserved for judges to decide. First, the Eighth Circuit noted that the benefits of arbitration are substantially lessened in a class arbitration proceeding because class arbitration requires the kind of procedural formality seen in class action litigation. *Id.* at *8. Second, confidentiality is lost or becomes more difficult because class arbitration requires procedural formalities similar to class action suits. *Id.* at *8-9. Third, the Eighth Circuit noted that class arbitration brings the bet-the-company stakes of class action litigation into the realm of arbitration without the safety net of multilayered judicial review. Fourth, class arbitration raises important due process concerns because an arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. *Id.* at *9. After considering all of these fundamental differences, the Eighth Circuit concluded that the question of class arbitration belongs with the courts as a substantive question of arbitrability. However, the Eighth Circuit determined that even though it presumed the question of class arbitration lies with the courts, parties to an agreement may nonetheless commit the question to an arbitrator. The Eighth Circuit found that in looking at the parties' agreements, there was no mention of class arbitration. *Id.* at *10. The Eighth Circuit stated that when dealing with class arbitration, there must be clear and unmistakable evidence of an agreement to arbitrate the particular question of class arbitration. Because the agreements here failed to delegate the particular issue of class arbitration, the Eighth Circuit concluded that the question fell to the District Court. *Id.* at *11. Accordingly, because the District Court erred in concluding that the question of class arbitration was procedural rather than substantive, the Eighth Circuit reversed the District Court's order denying Plaintiff's motion for summary judgment and remanded for further proceedings.

***Chamberlain, et al. v. LG Electronics U.S.A., Inc*., 2017 U.S. Dist. LEXIS 117968 (C.D. Cal. June 29, 2017).** Plaintiffs, a group of cellular telephone purchasers, alleged that the phones contained a defect that caused them to reboot interminably, rendering them inoperable and not fit for any use. Plaintiff asserted claims on behalf of a national class, a California sub-class, a Washington sub-class, a Florida sub-class, and an Illinois sub-class for breach of implied warranty, violations of the Magnuson-Moss Warranty Act, violations of the Song-Beverly Consumer Warranty Act, violations of California's Unfair Competition Law, violations of Washington's Consumer Protection Act, violations of Florida's Deceptive and Unfair Trade Practices Act, violations of Illinois' Consumer

Fraud and Deceptive Business Practices Act, and for unjust enrichment. *Id.* at *2-3. The named Plaintiffs were citizens of seven states, including California, Florida, New York, Washington, Texas, Tennessee, and Illinois. Defendants argued that the arbitration clause contained in the phone box was binding and therefore prohibited Plaintiffs' class claims from proceeding. Plaintiffs conceded that five of eight named Plaintiffs' claims must be arbitrated because the phone boxes stated that an arbitration clause could be found inside. *Id.* at *5. Accordingly, the Court granted Defendant's motion to compel as to those five Plaintiffs' claims. *Id.* at *6. With respect to the three remaining named Plaintiffs, Plaintiffs asserted that as to the remaining three Plaintiffs, no arbitration agreement was formed between Defendants and those Plaintiffs. In addition, Plaintiffs argued that the three Plaintiffs were not suing on the contract with the arbitration provision because they were not alleging breach of express warranty. The three relevant Plaintiffs purchased their phones in New York, Washington, and Florida. Each submitted nearly identical declarations stating that a phone salesman removed the phone from its box, activated it, and handed the phone to them while placing the phone's box and associated paperwork in a bag that was also given to them. *Id.* at *7. Plaintiff contended that they did not look at that paperwork when they got home or at any point until filing their instant lawsuit. The Court found that the state-specific law of each Plaintiff's' state of purchase recognized that shrink-wrap or "in-the-box" agreements, such as Defendants' agreements, were accepted through silence or inaction. *Id.* at *14-15. The Court determined that the agreements, which could be found inside the box of the product, gave Plaintiffs 30 days to return the product or opt-out of the arbitration clause. *Id.* at *15. Plaintiffs chose to keep the phones without opting-out. As a result, the Court agreed with Defendants that Plaintiffs assented to the agreement found inside the box, including the arbitration clause. *Id.* at *16. Accordingly, the Court granted Defendants' motion to compel arbitration and dismissed Plaintiffs' claims without prejudice.

***Chesapeake Appalachia, et al. v. Scout Petroleum*, 2017 U.S. Dist. LEXIS 64718 (W.D. Pa. April 28, 2017).** Plaintiff entered into various oil & gas leases with landowners in several northeastern Pennsylvania counties to explore for, and produce natural gas from, the landowners' property. The leases consisted of a basic boilerplate form contract, often together with an individually negotiated addendum. Defendant purchased the rights to certain leases from certain landowners and received royalties from Plaintiff on the gas produced from the mineral estates. *Id.* at *2. The parties contested the calculation of royalties. Defendant sought to commence a class arbitration against Plaintiff on behalf of themselves, together with a putative class of thousands of landowners. The leases at issue contained an arbitration provision stating that: "in the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee." *Id.* at *5-6. Plaintiff asserted that the lease term did not provide for class arbitration, only individual arbitration. Plaintiff filed the instant action and motion for summary judgement seeking to have the Court declare that class arbitration was not available under the leases. *Id.* at *6. At the outset, the Court noted that this exact issue was recently decided based on identical language from Plaintiff's leases, as *Chesapeake Appalachia, L.L.C. v. Ostroski*, 199 F. Supp. 3d 912 (M.D. Pa. 2016), ruled that the lease language at issue did not permit class arbitration. In *Ostroski*, the Court granted summary judgment in Plaintiff's favor and declared that the lease with identical language to the leases in the matter at hand did not permit class arbitration. Because the plain language of the arbitration clause in the Lease was silent as to class arbitration, the Court found that the lease did not allow Defendants to compel it. *Id.* at *7. Defendant contended that although class arbitration was not explicitly mentioned in the clause, it was implicitly assumed. *Id.* at *8. The Court determined that the contracts at issue clearly allowed for arbitration; but what the plain language of the leases allowed was individual or bi-lateral arbitration, not a class arbitration. *Id.* at *12-13. The Court held that the language was written in the singular, which indicated individual or bi-lateral arbitration, *i.e.*, "in the event of a disagreement between lessor and lessee concerning this lease." *Id.* at *13. Accordingly, the Court granted Plaintiff's motion for summary judgment.

***Cubria, et al. v. Uber Technologies, Inc.*, 2017 U.S. Dist. LEXIS 37721 (W.D. Tex. Mar. 6, 2017).** Plaintiffs, a group of consumers, filed a putative class action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA"), by robo-texting riders without the riders' express consent. Plaintiff created an account through her cell phone using the Uber App. At the time Plaintiff created her account, the process involved three steps, including: (i) entering an email address, cell phone number, and password; (ii) entering her first and last

name; and (iii) entering credit card information to pay for ride requests. *Id.* at *3. Below the entry field for the credit card information were the words "By creating an Uber account, you agree to the Terms of Service & Privacy Policy." *Id.* The words "Terms of Service & Privacy Policy" featured bold text inside a box outline. *Id.* The box was a clickable button, which if clicked, would take the user to a page with two hyperlinks, one for Defendant's terms and conditions and another for its privacy policy. *Id.* Subsequently, Plaintiff used Defendant's services over 300 times. *Id.* The terms and conditions also contained an arbitration agreement. Defendant moved to compel arbitration, and the Court granted the motion. Defendant argued that the question of arbitrability was for the arbitrator to decide. *Id.* at *6. Plaintiff responded she never agreed to arbitration, the arbitration agreement did not include a clear and unmistakable delegation of arbitrability to the arbitrator rather than the Court, the claims were outside the scope of the arbitration clause, and the arbitration clause was unconscionable. *Id.* The Court found that Plaintiff agreed to the arbitration clause and that the clause contained a clear and unmistakable intent to delegate arbitrability to an arbitrator. *Id.* at *7. The Court found that the delegation provision was severable from the remainder of the arbitration clause, and therefore the issues of whether the parties' dispute fell within the scope of the arbitration clause or whether the arbitration clause was unconscionable were reserved for the arbitrator. *Id.* The Court stated that the process through which Plaintiff established her account with Defendant put her on reasonable notice that the act of signing up for Defendant's services bound her to the arbitration agreement in the terms and conditions. *Id.* at *12. Further, the Court found that Plaintiff's argument that she did not have reasonable notice of or manifest assent to the terms and conditions was unpersuasive, especially because Plaintiff accessed Defendant's services over 300 times and therefore confirmed her agreement to the terms and conditions that many times as well. *Id.* at *13. The Court ruled that the agreement contained clear and unmistakable language providing that Plaintiff and Defendant intended to delegate the power to decide arbitrability to an arbitrator. *Id.* at *14-15. The Court concluded the parties clearly and unmistakably agreed to arbitrate arbitrability, including whether the parties' dispute was within the arbitration clause's scope and whether the arbitration clause was unconscionable. The Court therefore granted Defendant's motion to compel arbitration and stayed the case.

***Dang, et al. v. Samsung Electronics Co., Ltd.*, 673 Fed. Appx. 779 (9th Cir. 2017).** Plaintiff, a customer, brought a putative class action alleging that Defendants repeatedly infringed the patents of its chief competitor, Apple Inc., and as a result, the resale value of Defendants' products was much less than the prices consumers actually paid, thereby resulting in injury and damages to the consumers. Defendants moved to compel arbitration pursuant to an arbitration provision contained in an "Information Booklet" that Plaintiff received when he purchased his Galaxy SIII from Defendant. The District Court granted Defendant's motion because of a "shrink-wrap agreement" enclosed with Plaintiff's Smartphone that mandated arbitration and dismissal of class claims under California law. Plaintiff did not dispute that it was a valid or enforceable agreement, but argued that the contractual nature of the agreement was not obvious enough for him to have accepted it through his purchase. The District Court granted Defendants' motion to compel arbitration. On Plaintiff's appeal, the Ninth Circuit reversed and remanded the District Court's order. The Ninth Circuit found that the District Court erred in granting Defendant's motion to compel arbitration because Plaintiff and Defendant did not form an agreement to arbitrate under California law. *Id.* at 779-80. The Ninth Circuit determined that Plaintiff did not expressly agree to the arbitration provision contained in the "Standard Limited Warranty," which was included in the brochure entitled "Important Information for the Samsung SPH-L710" contained in the Galaxy SIII box. *Id.* at 780. The Ninth Circuit further opined that Plaintiff also did not accept Defendant's offer by failing to opt-out of the arbitration provision because an offeree's silence does not constitute acceptance under California law, and the inclusion of an arbitration provision in a product box is not an exception to this general rule. *Id.* Moreover, the Ninth Circuit ruled that even if Plaintiff could be bound in certain circumstances by the failure to opt-out of terms included in a product box under California law, no contract was formed because Defendant did not provide Plaintiff with adequate notice that the information brochure contained an offer to enter into a bilateral contract. *Id.* Although the back of the Galaxy SIII box gave Plaintiff notice that the box contained a "warranty disclaimer associated with SAFE," the Ninth Circuit reasoned that a seller's offer of a warranty did not create a binding bilateral contract with a buyer. *Id.* The Ninth Circuit also held that Plaintiff did not concede that he formed an agreement to arbitrate with Defendant in his complaint. Accordingly, the Ninth Circuit concluded that the District Court erred in granting Defendant's motion to compel arbitration, and reversed and remanded the order.

***Dillon, et al. v. BMO Harris Bank N.A.*, 2017 U.S. App. LEXIS 8281 (4th Cir. May 10, 2017).** Plaintiff brought an action alleging that Defendant violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") when it used its role within a network of financial institutions to conduct and participate in the collection of unlawful payday loans. *Id.* at *2. Defendant sought to enforce an arbitration agreement for the loan at issue, which was entered into by Plaintiff and Plains Lending, LLC ("Great Plains"), a lender. The District Court held that the arbitration agreement was unenforceable, and denied Defendant's motion to compel arbitration. On appeal, the Fourth Circuit also found that the arbitration agreement was unenforceable, and affirmed the District Court's order denying Defendant's motion. The Great Plains arbitration agreement stated that "this agreement to arbitration is made pursuant to a transaction involving the Indian Commerce Clause of the Constitution of the United States of America, and shall be governed by the law of the Otoe-Missouia Tribe of Indians." *Id.* at *11. The agreement further stated that "neither this Agreement nor the Lender is subject to the laws of any state of the United States." *Id.* The Fourth Circuit found that that the provisions in the Great Plains agreement implicitly stated that the arbitrator shall not allow for the application of any law other than tribal law. The Fourth Circuit held that terms in the arbitration agreement were an unambiguous attempt to apply tribal law to the exclusion of federal and state law. *Id.* Because the effect of the arbitration agreement was unambiguous in the context of the whole contract, the Fourth Circuit concluded that the arbitration agreement functioned as a prospective waiver of federal statutory rights, and therefore was unenforceable as a matter of law. *Id.* at *12-13. The Fourth Circuit further determined that the Great Plains agreement contained unenforceable choice-of-law provisions, which were not severable from the broader arbitration agreement and therefore rendered the entire arbitration agreement unenforceable. Accordingly, the Fourth Circuit affirmed the District Court's order denying Defendant's motion to compel arbitration.

***Forby, et al. v. One Technologies, LP*, 2017 U.S. Dist. LEXIS 106237 (N.D. Tex. July 10, 2017).** Plaintiffs filed a class action against Defendants alleging claims for violations of the Illinois Consumer Fraud Act ("ICFA") and unjust enrichment. Specifically, Plaintiff contended that Defendants' website led consumers to believe they are signing up for a free credit report; however, once consumers sign up, they are enrolled in a credit monitoring service for which they were charged $29.95 per month. *Id.* at *2. Defendants moved to dismiss or transfer the case. In its motion, Defendants contended that the parties entered into a valid contract that required their dispute to be resolved by arbitration in Dallas, Texas. The Court transferred action to the Northern District of Texas pursuant to 28 U.S.C. § 1404(a). *Id.* at *3. Defendants then moved to dismiss Plaintiff's claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, which the Court denied with respect to Plaintiff's ICFA claim and granted as to all other claims. *Id.* at *4. Almost 13 months after the case was transferred to the Northern District of Texas, Defendants moved to compel arbitration. The Court found the arbitration agreement was enforceable as Plaintiff did not dispute that she assented to the terms and conditions on the Defendants' website, which contained the arbitration provision at issue. *Id.* at *6-7. Accordingly, there did not appear to be any dispute over the existence of a valid arbitration clause or whether the parties' dispute fell within that clause. *Id.* at *7. Plaintiff contended that Defendants invoked the judicial process when they sought to adjudicate the merits of Plaintiff's claims by filing a stand-alone Rule 12(b)(6) motion to dismiss. *Id.* at *8. Defendants countered that they had not substantially invoked the judicial process, and even if they did, Plaintiff failed to establish any resulting prejudice. The Court determined that Defendants substantially invoked the judicial process by: (i) filing a substantive motion to dismiss; (ii) seeking and partially obtaining dismissal with prejudice of Plaintiff's claims; (iii) waiting until after the Court's ruling on the motion to dismiss in moving to compel arbitration; and (iv) waiting almost 13 months after the transfer of the case to compel arbitration. *Id.* at *10. However, the Court agreed with Defendants that Plaintiff failed to establish prejudice to her legal position, as she primarily relied on conclusory statements to support her position. Accordingly, the Court concluded that Defendants had not waived their right to compel arbitration. The Court therefore granted Defendants' motion to compel arbitration

***G.G., et al. v. Valve Corp.*, 2017 U.S. Dist. LEXIS 50640 (W.D. Wash. April 3, 2017).** Plaintiffs, a group of on-line gamblers on the website Steam, filed a class action alleging that Defendant violated the Washington Consumer Protection Act and the Washington Gambling Act of 1973, by linking on-line accounts to third-party websites. Plaintiffs were minor children who signed Defendant's "Steam Subscriber Agreement" ("SSA") and their parents who did not sign the SSA. Defendant filed a motion to compel arbitration pursuant to the SSA. Plaintiffs opposed the motion, arguing that: (i) the SSA was unenforceable based on contract defenses; (ii)

Defendant could not enforce the SSA against minor Plaintiffs; (iii) Defendant could not enforce the SSA against the non-signatory parent Plaintiffs; and (iv) Plaintiffs' claims were not subject to the SSA. *Id.* at *4. Plaintiffs also claimed that the arbitration agreement was procedurally unconscionable because it is a contract of adhesion. *Id.* at *6. The Court noted that the fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable. *Id.* The Court concluded that the key provisions of the arbitration agreement were conspicuous and each party had an opportunity to understand the terms, and therefore it was not procedural unconscionability. *Id.* at *7. Plaintiffs also argued the arbitration agreement was substantively unconscionable because: (i) it would require Plaintiffs to front the costs of arbitration but be reimbursed later; and (ii) Defendant allowed the gambling sites to target minor children. *Id.* The Court found that the requirement that Plaintiffs pay the upfront costs of arbitration, but then be reimbursed after, was not so overly harsh as to render the agreement substantively unconscionable. *Id.* Further, the Court held that Plaintiffs' assertions about Defendant's allegedly illegal conduct dealt with the merits of case, not whether the terms of the arbitration agreement were substantively unconscionable. *Id.* Therefore, the Court rules that the agreement was not substantively unconscionable. Plaintiffs further contended that Defendant could not enforce the arbitration clause against Plaintiffs who are minor children. Under Washington law, contracts with minors are valid unless the minor disaffirms the contract within a reasonable time after attaining the age of majority. The Court determined that Plaintiffs' continued use was contingent on accepting the SSA and its agreement to arbitrate; therefore, Plaintiffs only disaffirmed the SSA in name, but not in practice, because they continue to receive benefits from the SSA by their continued use of Defendant's products. *Id.* at *8. Accordingly, the Court held that the arbitration agreement with minor Plaintiffs was valid. Plaintiffs also maintained that the arbitration agreement did not apply to parent Plaintiffs who did not sign the SAA. The Court stated that although the parents of Plaintiffs did not sign the arbitration agreement, they have a close relationship to the minor Plaintiffs as their parents. *Id.* at *10. Moreover, the parents did not allege any facts to establish personal claims. Instead, their claims existed solely through the SSA, which gave the minor Plaintiffs license to use Steam. *Id.* Plaintiffs also contended that their claims should be excluded from arbitration because they dealt with Defendant's alleged failure to prevent unauthorized use by third-party bots. *Id.* at *12. However, the Court determined that the arbitration exclusion applied to unauthorized use by only subscribers, as the exclusion and *de facto* definition of unauthorized use explicitly stated. *Id.* at *12-13. Accordingly, the Court granted Defendant's motion to compel arbitration.

***Henson, et al. v. United States District Of Northern California*, 2017 U.S. App. LEXIS 17104 (9th Cir. Sept. 5, 2017).** Plaintiff, a cellular and data subscriber, alleged that Defendant Verizon ("Verizon") utilized a third-party, Defendant Turn, Inc. ("Turn") for targeted advertising and employed the use of "zombie" cookies, claiming that Turn: (i) engaged in deceptive business practices in violation of § 349 of the New York General Business Law, and (ii) committed trespass to chattels by intentionally interfering with the use and enjoyment of Verizon subscribers' mobile devices. *Id.* at *3-4. Plaintiff alleged that Turn collected data about Verizon users without their knowledge, used that data to create profiles that it marked with its own identifier ("Turn ID"), stored those Turn IDs on users' mobile web browsers, and auctioned off users' collected data so that advertisers could place targeted advertisements on their mobile phones. Turn moved to dismiss Plaintiff's claims and sought to compel arbitration by invoking the arbitration provision in the customer agreement between Plaintiffs and Verizon. Turn asked the District Court to compel arbitration under the doctrine of equitable estoppel because it provided a service to Plaintiffs that was closely connected to the Verizon wireless service. The District Court granted Turn's motion to compel arbitration under New York's equitable estoppel doctrine and stayed the action. Plaintiffs filed a writ of mandamus to vacate the District Court's order compelling arbitration. On appeal, the Ninth Circuit analyzed whether a writ of mandamus was warranted by weighing the *Bauman* factors – from *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) – including: (i) whether the petitioner has other adequate means, such as a direct appeal, to attain the relief he or she desires; (ii) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (iii) whether the District Court's order is clearly erroneous as a matter of law; (iv) whether the District Court's order makes an "oft-repeated error," or "manifests a persistent disregard of the federal rules;" and (v) whether the District Court's order raises new and important problems, or legal issues of first impression. *Id.* at *6. The Ninth Circuit stated that a petitioner need not satisfy all five factors at once, and here the majority of the *Bauman* factors weighed heavily in favor of granting the writ. *Id.* First, the Ninth Circuit determined that an order staying proceedings and compelling arbitration is not a final decision that is subject to ordinary appeal under 28 U.S.C. § 1291, and therefore because a "contemporaneous ordinary appeal" is unavailable, the first *Bauman* factor supported issuance of the writ. *Id.* at *6-7. Second, the

Ninth Circuit found that the customer agreement did not allow Plaintiff to arbitrate his dispute in a representative capacity or on behalf of a class. *Id.* at *7. The Ninth Circuit stated that if Plaintiff won the arbitration, then his individual claims would be rendered moot because they would fully be satisfied, and Plaintiff would lose his status as class representative because he would no longer have a concrete stake in the controversy. Until the arbitration award was actually vacated by order of the District Court, Henson could represent only himself and would thus have no legal or ethical obligation to refuse the offer. Third, the Ninth Circuit found that the District Court committed clear error by applying New York's equitable estoppel doctrine, rather than California law, and by failing to apply California law correctly. *Id.* at *8. Because the Ninth Circuit held that there was a definite and firm conviction that a mistake had been committed, the third *Bauman* factor strongly favored granting the writ. The Ninth Circuit stated that Plaintiff's claims against Turn were not based on the customer agreement, and that New York's consumer protection statute allowed Plaintiff to sue Turn for its allegedly deceptive acts and practices regardless of whether Plaintiff signed a customer agreement with Verizon. *Id.* at *13-14. The Ninth Circuit reasoned that the fourth and fifth *Bauman* factors weighed against granting mandamus relief. However, because the first three *Bauman* factors strongly favored mandamus relief, the Ninth Circuit concluded that the balance of factors favored issuing the writ. Accordingly, the Ninth Circuit vacated the District Court's ruling order granting Turn's motion to stay the action and compel arbitration.

***Hoover, et al. v. Sears Holding Corp.*, 2017 U.S. Dist. LEXIS 91081 (D.N.J. June 14, 2017).** Plaintiff brought an action asserting that Defendant violated the Telephone Consumer Protection Act by calling Plaintiff's cellular telephone with approximately sixty-eight automated, promotional telemarketing text messages without his prior written consent. *Id.* at *1. Defendant alleged that Plaintiff consented to "Shop Your Way" automated advertisement messages from K-Mart, and this authorized Defendant's messages, as they are related companies. *Id.* at *2. Defendant moved to compel arbitration and to stay the matter pending arbitration. Defendant alleged that Plaintiff entered into a contract with Defendant at a K-Mart store to receive Shop Your Way text messages and that contract included an agreement to arbitrate. Plaintiff argued that the agreement was an illusory contract and therefore unenforceable and that there was no reasonable notice and therefore no mutual assent to the arbitration clause. *Id.* The Court noted that the "Membership Terms and Conditions" for Shop Your Way Program clearly included issues relating to automated text messages from both K-Mart and Defendant's stores. *Id.* at *3. Therefore, the Court found that the dispute fell within the arbitration clause. The Court explained that the issue, therefore, was whether there was an agreement to arbitrate, and whether Plaintiff received sufficient notice of the arbitration provision to be bound by it. *Id.* at *3-4. It was undisputed that Plaintiff signed up for Shop Your Way text messages at a K-Mart store. The sign up screen stated, "I agree to get SYWR text messages 10msgs/mo + confirmation of opt-out. I asked for/agree to SYWR Terms. Msg+Data rates may apply. CONFIRM YOUR MOBILE #." *Id.* at *4. Plaintiff selected, "YES I agree and # is correct." *Id.* at *5. The Court thereby held that Defendant presented a clear offer, which explicitly and succinctly included terms by reference. Further, Plaintiff had the opportunity to obtain the terms, and had notice that he was agreeing to terms. Plaintiff then accepted the contract terms and the arbitration clause. *Id.* at *5. The Court noted that contractual terms must be "reasonably conspicuous" in order to be binding. *Id.* The Court determined that the arbitration provision was contained as a separate sub-title clearly indicated in bold font in the agreement, and the waiver of a right to trial was in bold and all caps. The Court found that the agreement thereby constituted reasonable notice. *Id.* at *6. Accordingly, the Court held that an arbitration agreement existed and granted Defendant's motion to compel arbitration.

***In Re Wholesale Grocery Products Antitrust Litigation*, 2017 U.S. App. LEXIS 3744 (8th Cir. Mar. 1, 2017).** A number of retail grocers sued two large wholesale grocers, alleging that the wholesalers' contract to exchange retailer supply agreements constituted market allocation in violation of the Sherman Act. The retailers formed two putative classes consisting of the Midwest class and the New England class. Each class had an arbitration sub-class of retailers who had arbitration agreements with their current wholesaler. Each arbitration sub-class sued only its previous wholesaler, with which it no longer had a current arbitration agreement. The District Court dismissed the arbitration sub-classes from the case on the theory that the previous wholesalers, as "non-signatory" Defendants, could compel the retailers to arbitrate based on equitable estoppel. *Id.* at *2. On appeal, the Eighth Circuit reversed and remanded for the District Court to consider the wholesalers' alternate theory that the non-signatory Defendants could compel arbitration because they were successors-in-interest to the signatory Defendants. The District Court rejected the successors-in-interest theory, as well as the wholesalers'

third alternate theory that they could directly enforce their previous arbitration agreements because some of the conduct at issue occurred when the previous agreements were still in effect. *Id.* at *2-3. On a subsequent appeal, the Eighth Circuit upheld the District Court's order. First, the wholesalers argued that even if they could not directly enforce the arbitration agreements they assigned, they could enforce them as non-signatories under a "close relationship" theory. *Id.* at *7. The Eighth Circuit found that as assignors, the "non-signatory" Defendants were predecessors-in-interest to their assignees, not successors-in-interest. *Id.* at *8. The Eighth Circuit stated that there was no authority supporting the proposition that a predecessor-in-interest bore a sufficiently close relationship to a successor-in-interest such that the predecessor-in-interest could compel arbitration under an agreement to which only the successor-in-interest was a signatory. *Id.* Second, the wholesalers asserted they could compel arbitration under the agreements to which they were once signatories "because Plaintiffs' claims are based on an alleged conspiracy that occurred when the original arbitration agreements were in effect between the arbitration Plaintiffs and their former suppliers." *Id.* at *9. The Eighth Circuit held that here the agreements between the wholesalers and the retailers did not expire or terminate; instead, the wholesalers expressly agreed to "convey, assign, transfer and deliver" to each other "all of [their] right, title and interest" in the underlying supply and arbitration agreements. *Id.* at *10. The Eighth Circuit found no reason to extend a presumption about what rights and obligations the parties to a contract might have intended to keep after the contract expired, to a situation where a party had affirmatively given up everything it had under the contract. *Id.* at *11. The Eighth Circuit therefore affirmed the decision of the District Court.

***James, et al. v. Global Tellink Corp.*, 852 F.3d 262 (3d Cir. 2017).** Plaintiffs, a group of inmates, brought a putative class action alleging that Defendant violated the New Jersey Consumer Fraud Act, the Federal Communications Act ("FCA"), the Takings Clause of the Fifth Amendment, and various New Jersey state laws by charging unconscionable fees for prison phone services. The District Court had previously denied Defendant's motion to compel arbitration. On appeal, the Third Circuit affirmed the District Court's decision. Defendant provides telecommunications services that enable inmates at state and local correctional facilities to call family, friends, attorneys, and other approved persons outside the prisons. *Id.* at 264. Users sign up for an account and deposit funds either through Defendant's website or through an automated telephone service that uses an interactive voice-response system with standardized scripts and prompts. *Id.* People who create an account through the website are shown a copy of Defendant's terms of use and must click a button that says "Accept" to complete the process. *Id.* However, unlike web users, those who set up accounts by telephone are not required to indicate their assent to the terms of use. Defendant informed telephone users each time they set up or deposited funds in their accounts that its service was governed by terms of use available on its website. However, users were not required to visit the website or demonstrate acceptance of the terms of use through any affirmative act. Nor were they notified by the automated telephone service that their use of GTL's service would constitute assent to the terms of use. Defendant asserted that some of the Plaintiffs' claims were subject to binding arbitration and moved to compel arbitration. The District Court denied Defendant's motion to compel arbitration with respect to Plaintiffs who opened accounts by telephone. The District Court found that, although Plaintiffs were notified that Defendant's service was "governed by the terms of use," they were not informed that "use of the service alone constituted an acceptance of these terms." *Id.* at 265. On appeal, Defendant argued that Plaintiffs manifested assent by using its services after being repeatedly informed that their accounts were governed by its terms of use. In support of its argument, Defendant relied on several case law authorities finding assent to contract terms through use of a product or service. The Third Circuit stated that in those cases, the purchasers manifested assent through the affirmative act of signing contracts that contained arbitration provisions, which was not the case here. *Id.* at 266. The Third Circuit determined that because Plaintiffs never received Defendant's terms of use, and were never informed that merely using Defendant's telephone service would constitute assent to those terms, they did not accept the terms of use or the arbitration provision contained therein. *Id.* at 267-68. Accordingly, the Third Circuit held that the District Court properly determined that Plaintiffs could not be required to arbitrate their claims and affirmed the decision denying Defendant's motion to compel arbitration.

***Johnson, et al. v. Uber Technologies, Inc.,* Case No. 16-CV-5468 (N.D. Ill. Mar. 13, 2017).** Plaintiffs, a consumer, filed an action alleging that Defendant sent him unsolicited text messages in violation of the Telephone Consumer Protection Act ("TCPA"). Defendant moved to compel Plaintiff to arbitrate his claims pursuant to the Federal Arbitration Act ("FAA"). Plaintiff denied that he formed an agreement with Defendant.

Plaintiff downloaded Defendant's application to his cell phone and approximately three years later Defendant sent Plaintiff an autodialed text message. *Id.* at 1. Defendant submitted a declaration from a senior software engineer, Vincent Mi, in support of its position that an arbitration agreement existed. *Id.* at 3. Mi, however, neither described the process as it existed three years prior when Plaintiff downloaded the application, and did not represent that the process was the same as it was now. *Id.* Further, the Court found that it would be unreasonable to infer that the process was the same in 2013 as it was now, because in another document filed in a different case, Defendant submitted a declaration from Mi that described a substantially different process. *Id.* The Court thus determined that it would not rely on Mi's representations in order to compel arbitration at this stage. *Id.* at 4. The Court therefore held that Defendant failed to support its motion with the facts necessary to make a determination as to whether there was a reasonable notice of the terms, as well as assent to those terms. Accordingly, the Court denied Defendant's motion to compel arbitration.

***Leidel, et al. v. Coinbase, Inc.*, 2017 U.S. Dist. LEXIS 83833 (S.D. Fla. June 1, 2017).** Plaintiffs, a group of consumers, brought a class action against Defendant – a digital currency wallet and on-line platform where merchants and consumer can buy, sell, transfer and store their digital currency – asserting claims for aiding and abetting breach of fiduciary duty; aiding and abetting conversion; negligence; and unjust enrichment. Plaintiffs were similarly-situated users of Project Investors, Inc. d/b/a Cryptsy, a cryptocurrency and money service business. Cryptsy was owned, operated, and directed by Paul Vernon. Cryptsy and Vernon each had an account at Coinbase. *Id.* at *2. Unbeknownst to Plaintiffs, Cryptsy and Vernon were stealing from user accounts and liquidating the currency through Cryptsy and Vernon's accounts with Defendant. Plaintiffs alleged that Defendant knew or should have known that Plaintiffs' assets were being liquidated through its exchange. *Id.* at *2-3. Plaintiffs signed an arbitration agreement stating that: "for claims for injunctive or equitable relief or claims regarding intellectual property rights . . . any dispute arising under this Agreement shall be finally settled on an individual basis in accordance with the American Arbitration Association's rules for arbitration of consumer-related disputes." *Id.* at *3. Defendant moved to compel arbitration of Plaintiffs' claims, as a non-signatory under the doctrine of equitable estoppel. Alternatively, Defendant requested that the Court stay the litigation pending the resolution of the arbitration. The Court stated that arbitration may be compelled against non-signatories to an arbitration agreement if, "assent [is] shown by the acts or performance of the party." *Id.* at *5. The Court further noted that a non-signatory can be estopped "from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Id.* Defendant alleged that Plaintiffs' claims were based upon the assertion that when Defendant agreed to open the accounts, Defendant took on a duty to Plaintiffs and other Cryptsy account holders to oversee the activities of Cryptsy and Vernon with regard to the accounts. Therefore, Defendant asserted that because Plaintiffs' claims were based upon the accounts established pursuant to the user agreement, Plaintiffs must arbitrate their claims under the principles of equitable estoppel. *Id.* The Court disagreed and found that Plaintiffs received no benefits from the agreement entered into between Cryptsy/Vernon and Defendant, and Plaintiffs were not asserting any rights or benefits under the agreement. *Id.* at *6. Moreover, the Court held that Plaintiffs' claims were not derivative of the receiver's claims, and Plaintiffs were directly harmed. Furthermore, the Court stated that the contract entered into between Cryptsy/Vernon and Defendant had nothing to do with the alleged wrongful conduct, and therefore any indirect benefits Plaintiffs received did not arise from the contract, but from the regulatory scheme under which Defendant operated. *Id.* at *6. The Court therefore found that a contractually-imposed arbitration requirement would not apply to such a claim. As to Defendant's request that the case be stayed pending the arbitration of the receiver's claims, the Court held that the "the outcome of the non-arbitrable claims" would not "depend on the arbitrator's decision" and the claims brought by Plaintiffs were independent of the claims brought by the receiver. *Id.* at *8. The Court thereby denied Defendant's motion to compel arbitration.

***Mallh, et al. v. Showtime Networks Inc.*, 2017 U.S. Dist. LEXIS 184471 (S.D.N.Y. Nov. 7, 2017).** Plaintiff brought a class action asserting claims for breach of contract, consumer fraud and/or unconscionable or unfair practices, violations of New York General Business Law §§ 349 and 350, and unjust enrichment resulting from purchasing a live stream of a boxing match from Defendant that he was unable to view due to technical failures. Defendant moved to compel arbitration, or in the alternative, to dismiss the complaint in part and/or to strike the class allegations. The Court granted Defendant's motion to compel arbitration. When purchasing the live stream, Plaintiff was required to agree to Defendant's terms of use ("TOU") by clicking on an on-line box which transferred purchasers to a purchase page, on which buyers were required to check boxes to indicate that they

read and agreed to the TOU. *Id.* at *2-3. The purchase page contained an arbitration agreement and class action waiver requiring Plaintiff to arbitrate his disputes with Defendant on an individual basis or file an individual action in small claims court. *Id.* at *3. The Court stated that Plaintiff did not dispute that he checked a box indicating that he had read and agreed to the TOU, nor did the parties dispute that the TOU contained an arbitration clause and class action waiver that covered Plaintiff's claims. *Id.* at *10. Plaintiff argued that the website did not give him sufficient notice of the arbitration clause and the waiver of his rights to pursue a class action. Specifically, Plaintiff argued that he did not have adequate notice of the obligation to arbitrate disputes with Defendant on an individual basis because: (i) the website was cluttered and the arbitration clause and class action waiver are "buried" behind three hyperlinks; (ii) the hyperlinks to the TOU, privacy policy, and video services policy were in grey text and hard to see against the black background of the website; (iii) Plaintiff was compelled to check a single box at the point of purchase indicating his agreement with four different policies; (iv) the arbitration clause and class action waiver did not appear until the fifteenth page of the TOU; and (v) the text of the arbitration clause and, in particular, the class action waiver were no more conspicuous than any other paragraph of the TOU. *Id.* at *10-11. The Court found Plaintiff's arguments unavailing and determined that: (i) the website was not cluttered; (ii) the arbitration clause and class action waiver were not buried behind the hyperlinks; (iii) fact that the TOU was available only by hyperlink did not preclude a finding that the arbitration clause and class action waiver were reasonably conspicuous; and (iv) once the user accessed the TOU, the arbitration clause and class action waiver were reasonably conspicuous. *Id.* at *11-12. The Court further determined that Plaintiff's manifestation of assent was unambiguous as a matter of law, as Plaintiff did not dispute that he affirmatively clicked on a box agreeing to the TOU. Because notice of the arbitration clause and class action waiver were reasonably conspicuous and Plaintiff unambiguously manifested assent, the Court granted Defendant's motion to compel arbitration.

***McLellan, et al. v. Fitbit, Inc.*, 2017 U.S. Dist. LEXIS 168370 (N.D. Cal. Oct. 11, 2017).** Plaintiffs, a group of consumers, filed a class action alleging that Defendant misled consumers about the accuracy and reliability of the heart rate monitoring functionality in its wearable devices. Defendant moved to compel arbitration for 12 named Plaintiffs who signed a terms of service agreement ("TOS") containing an arbitration provision. Defendant also moved to stay or dismiss the claims of Plaintiff Robb Dunn, who opted-out of the arbitration provision. *Id.* at *3. In essential part, the TOS stated that "any dispute . . . arising out of . . . the Fitbit Service, or any other Fitbit products or services" will be resolved through arbitration pursuant to AAA rules. *Id.* at *7. Plaintiffs contended that that the delegation clause in the arbitration agreement was unenforceable. Plaintiffs argued that the fact that they were not "sophisticated" cast doubt on the clarity of the agreement, as case law authorities have held elsewhere that an arbitration agreement can be enforced only for sophisticated parties such as law firms or banks. *Id.* at *7-8. However, the Court found that the majority of the federal circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' intent do so without explicitly limiting that holding to sophisticated parties or to commercial contracts. The Court noted that California law, which governed the TOS and Plaintiffs' consumer claims, does not make a categorical distinction between "sophisticated" and "unsophisticated" parties for purposes of enforcing an incorporated delegation clause. *Id.* at *8. The Court further stated that the sophistication distinction was not intended to prevent arbitration agreements from applying to consumer contracts. *Id.* The Court conclude that it was well-established under California law that a "contract may validly include the provisions of a document not physically a part of the basic contract" so long as the reference is "clear and unequivocal," "called to the attention of the other party and he must consent thereto," and the terms are "known or easily available to the contracting parties." Accordingly, the Court granted Defendant's motion to compel as to the 12 Plaintiffs who had signed arbitration agreements. However, the Court denied Defendant's motion for a stay as to the remaining Plaintiff's claims, finding that Defendant had not shown that the outcome of the arbitration proceedings would have any effect on the Court's consideration of the remaining Plaintiff's claims. *Id.* at *17.

***Norcia, et al. v. Samsung Telecommunications America,* 2017 U.S. App. LEXIS 991 (9th Cir. Jan. 19, 2017).** Plaintiffs, a group of consumers, filed a class action against Defendant alleging that Defendant made misrepresentations as to the performance of the Galaxy S4 phone. Defendant moved to compel arbitration on the grounds that an arbitration provision in the warranty brochure in the Galaxy S4 box was binding on Plaintiffs. The District Court denied Defendant's motion. On appeal, the Ninth Circuit affirmed the District Court's decision. The Ninth Circuit rejected Defendant's assertion that the product and warranty information brochure contained in

the Galaxy S4 box created a binding contract to arbitrate the claims between Plaintiffs and Defendant. There was no dispute that Plaintiffs did not expressly consent to any agreement in the brochures. The Ninth Circuit held that Defendant failed to demonstrate the applicability of any exception to the general California rule that an offeree's silence does not constitute consent and that the brochure was not enforceable as a binding contract. Defendant asserted that Plaintiff agreed to arbitrate his claims by signing a customer agreement with Verizon Wireless. The Ninth Circuit rejected this argument because Defendant was neither a signatory to the agreement nor a third-party beneficiary of the agreement. Accordingly, the Ninth Circuit affirmed the District Court's ruling to deny Defendant's motion to compel arbitration.

***Rahmany, et al. v. T-Mobile USA, Inc.*, 2017 U.S. Dist. LEXIS 9638 (W.D. Wash. Jan. 5, 2017).** Plaintiffs, two cell phone customers, activated cellular telephone contracts with Defendant T-Mobile ("T-Mobile"). Plaintiffs alleged that they received an unsolicited text message from Defendant advertising Defendant Subway's ("Subway") sandwiches in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiffs signed contracts with Defendant that required arbitration of any and all claims or disputes related to the agreement, Defendant's privacy policy, and Defendant's services, equipment, devices or products. *Id.* at *2. Plaintiffs then voluntarily dismissed Defendant T-Mobile, and all claims alleged against T-Mobile and Subway remained in the case. *Id.* at *3. Subway filed a motion to compel arbitration, arguing that it should be allowed to enforce the arbitration provisions of the agreement between T-Mobile and Plaintiffs. At the outset, the Court stated that whether Subway was able compel arbitration was based on three questions, including: (i) whether Plaintiffs' claims fell within the scope of the arbitration agreements; (ii) whether the arbitration agreements were procedurally and substantively unconscionable; and (iii) whether Subway was entitled to enforce those arbitration agreements under a theory of equitable estoppel. *Id.* The Court found that since Plaintiffs based their claims on the allegation that T-Mobile sent a text message to Plaintiffs' cellular phones as part of a T-Mobile promotion, Plaintiffs' claims related to T-Mobile's services and devices and therefore fell within the scope of the arbitration agreements. *Id.* at *4. Plaintiffs argued that the agreement was procedurally unconscionable because the terms and conditions were incorporated by reference. The Court opined that when Plaintiffs signed the agreement, they acknowledged that it included the terms and conditions. *Id.* at *5. Accordingly, the Court held that Plaintiffs did not met their burden of proving the arbitration agreement was unconscionable. The Court further determined that a non-signatory may enforce an arbitration agreement: (i) when a signatory must rely on the terms of the written agreement in asserting its claims against the non-signatory or the claims are intimately founded in and intertwined with the underlying contract; or (ii) when the signatory alleges substantially interdependent and concerted misconduct by the non-signatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement. *Id.* at *5-6. Although only one element is necessary, the Court found that both were satisfied. Plaintiffs' complaint asserted claims against Subway based on a text sent by T-Mobile. The Court held that because Plaintiffs' claims rest on T-Mobile's alleged conduct, they could not be resolved without analyzing the conduct of T-Mobile. Plaintiffs also alleged that T-Mobile and Subway colluded to violate the TCPA by sending customers a text message offering a free Subway sandwich. The Court determined that Plaintiffs' allegations were intimately connected with the underlying agreement because, under the terms and conditions, Plaintiffs agreed to be contacted "by T-Mobile or anyone calling on its behalf, for any and all purposes, at any telephone number." *Id.* at *7. The Court reasoned that it would need to examine the terms and conditions to determine the viability of Plaintiffs' TCPA claims. *Id.* Accordingly, the Court held that Subway could enforce the arbitration agreement between Plaintiffs and T-Mobile, and it granted Subway's motion to compel arbitration.

***Roberts, et al. v. AT&T Mobility LLC*, 2017 U.S. App. LEXIS 24946 (9th Cir. Dec. 11, 2017).** Plaintiffs, a group of consumers, filed a class action alleging that Defendant falsely advertised its mobile services plan as unlimited in violation of statutory and common law consumer protection laws and certain state false advertising laws. Defendant moved to compel arbitration in light of the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion* 563 U.S. 333 (2011), that the Federal Arbitration Act ("FAA") preempted state law deeming an arbitration provision unconscionable. Plaintiffs opposed arbitration on First Amendment grounds. The District Court granted Defendant's motion. On appeal, the Ninth Circuit affirmed the District Court's ruling. Plaintiffs contracted with Defendant for wireless data service plans and their contracts included arbitration agreements. *Id.* at *4. Plaintiffs alleged that Defendant falsely advertised that its mobile service customers could use "unlimited data," but actually intentionally slowed down customers' data speeds once reaching "secret data

usage caps" between two and five gigabytes. *Id.* Plaintiffs argued that forcing arbitration would violate the petition clause of the First Amendment, as they "did not knowingly and voluntarily give up their right to have a court adjudicate their claims," and could not "bring their claims in small claims court." *Id.* at *5. The District Court granted Defendant's motion to compel arbitration, holding that, as a threshold matter, there was no state action and thus it did not reach Plaintiffs' constitutional challenge. *Id.* The District Court rejected Plaintiffs' main arguments, concluding that: (i) judicial enforcement alone does not automatically establish state action; and (ii) there was insufficient "encouragement" to attribute Defendant's conduct to the government. *Id.* at *6. The Ninth Circuit agreed and first stated that Defendant's conduct must be fairly attributable to the State, and Plaintiffs could not convert Defendant into a State actor simply by framing their FAA challenge as "direct." *Id.* at *10. The Ninth Circuit found that if every private right were transformed into a governmental action just by raising a direct constitutional challenge, "the distinction between private and governmental action would be obliterated." *Id.* Plaintiffs further argued "that requiring private actors to be State actors as a prerequisite to challenging permissive statutes would immunize many such statutes from constitutional scrutiny, including the FAA." *Id.* at *21. The Ninth Circuit rejected this argument, and concluded that Defendant's conduct was not attributable to the State, and there was not a "sufficiently close nexus between the State and the challenged action of Defendant." *Id.* The Ninth Circuit concluded that "private parties do not face constitutional litigation whenever they seek to rely on some [statute] governing their interactions with the community surrounding them." *Id.* at *22. Accordingly, because there was no state action, the Ninth Circuit affirmed the District Court's ruling compelling arbitration.

***Shore, et al. v. Johnson & Bell*, 2017 U.S. Dist. LEXIS 25612 (N.D. Ill. Feb. 22, 2017).** Plaintiffs, a group of clients of Defendant, a law firm, brought an action alleging that Defendant's information-technology infrastructure was compromised and that Plaintiffs' confidential information was exposed because of those vulnerabilities. *Id.* at *2-3. Plaintiffs filed a related complaint in arbitration as well as a demand for class arbitration. Defendant filed a motion to compel individual arbitration and enjoin the class arbitration. Plaintiffs had signed a client engagement letter, which set out the terms of the legal representation and included an arbitration clause stating that "[a]lthough we do not expect that any dispute between us will arise, in the unlikely event of any dispute under this agreement, including a dispute regarding the amount of fees or the quality of our services, such dispute shall be determined through binding arbitration with the mediation/arbitration services of JAMS." *Id.* at *2. Defendant argued that whether or not Plaintiffs may proceed to class arbitration was a gateway question for the Court to decide and not the arbitrator, and that the client engagement letter did not provide for class arbitration. *Id.* at *4. Plaintiffs argued that, even if class arbitrability was presumptively a question for the Court, the parties had agreed to arbitrate questions of arbitrability. *Id.* at *6. Plaintiffs claimed that the selection of JAMS as a forum implied that the parties accepted the governance of any dispute under JAMS rules. The Court found that the arbitration clause did not specify that JAMS rules applied or that they were incorporated by reference. *Id.* at *7. Defendant further asserted that the client engagement letter's arbitration clause did not authorize class arbitration. *Id.* at *8. The Court agreed and determined that the client engagement letter's arbitration clause did not explicitly or implicitly agree to the use of class arbitration. Accordingly, the Court granted Defendant's motion to compel individual arbitration and to enjoin class arbitration.

***Stevens-Bratton, et al. v. Trugreen*, 675 Fed. Appx. 563 (6th Cir. 2017).** Plaintiffs, a former lawn service customer, brought an action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") when it used an automatic telephone dialing system to call her. Defendant provided lawn care services to Plaintiff from May 15, 2013 until May 15, 2014, when Plaintiff terminated the agreement with Defendant. Plaintiff's agreement with Defendant included three provisions at issue, including: (i) a provision stating that if Plaintiff provided Defendant her cell phone number, Defendant could contact the number using an automatic telephone dialing system or pre-recorded or artificial voice to discuss the account and lawn care services or future services; (ii) an provision stating that any claim, dispute, or controversy between them would be resolved by neutral binding arbitration; and (iii) a class action waiver stating that claims must be brought in the parties' individual capacity. *Id.* at 565. In January of 2015, Plaintiff received over 10 telemarketing calls on her cell phone from Defendant. Despite Plaintiff's requests that Defendant stop calling her, the calls continued. Plaintiff sought class certification, or in the alternative, a stay of certification briefing pending discovery. *Id.* at 566. Defendant filed a motion to dismiss and compel arbitration, or in the alternative, to stay the litigation. The District Court denied Plaintiff's motion for class certification, granted Defendant's motion to compel arbitration, and dismissed

Plaintiff's claims. On appeal, the Sixth Circuit reversed the District Court's judgment compelling arbitration, vacated the judgment denying class certification, and remanded for further proceedings. Plaintiff argued that the agreement's arbitration clause did not apply to her TCPA claim concerning the legality of the telemarketing calls because the agreement expired before she received the calls. *Id.* at 567. The Sixth Circuit found that a majority of the material events of the dispute occurred after the agreement expired. The Sixth Circuit noted that the District Court had found that the agreement allowed Defendant to call Plaintiff about "possible future services" and thus the right to call her accrued or vested under the agreement. *Id.* at 568. The Sixth Circuit opined that the right to call a phone number does not accumulate over time and is revocable by that person at any point. The Sixth Circuit remarked that it must read the provision regarding "possible future services" with the interpretation that favored Plaintiff and concerned Plaintiff's account with Defendant before the contract expired. *Id.* at 569. Thus, the Sixth Circuit determined that Defendant's disputed right to call Plaintiff could not survive expiration under the contract under normal principles of contract interpretation. The Sixth Circuit thereby concluded that Plaintiff's TCPA claims did not arise under the contract and thus the District Court's judgment compelling arbitration was erroneous. *Id.* The Sixth Circuit further observed that the District Court denied Plaintiff's motion for class certification on the basis that the claim was arbitrable. The Sixth Circuit found that since the District Court did not make findings of fact or conclusions of law regarding the merits of Plaintiff's motion for class certification, there was no record to review regarding application of the class action waiver. The Sixth Circuit held that because it reversed and remanded the District Court's order granting the motion to compel arbitration and dismissing Plaintiff's claims, it also must vacate the District Court's order denying the motion for class certification, and remand for further proceedings.

***White, et al. v. Sonoco, Inc.,* 2017 U.S. App. LEXIS 17098 (3d Cir. Sept. 5, 2017).** Plaintiff, a rewards credit cardholder, filed a putative class action alleging claims of fraud. *Id.* at *1. Plaintiff obtained a rewards credit card that Citibank issued as part of Defendant's promotional reward program. Plaintiff alleged that Defendant did not apply a 5 cent per gallon discount on all fuel purchases that cardholders made at Defendant's store as was represented in Defendant's promotional materials. *Id.* at *3. Plaintiff did not bring claims against Citibank. *Id.* Defendant moved to compel arbitration based upon an arbitration clause in the credit card agreement between Plaintiff and Citibank. It was undisputed that Defendant was not a signatory to the agreement and was not mentioned in the agreement. *Id.* at *4. The District Court denied Defendant's motion to compel arbitration. *Id.* at *6. Defendant appealed, and the Third Circuit affirmed. *Id.* at *22. Defendant argued that equitable estoppel prevented Plaintiff from refusing to arbitrate and contended that a non-party to an arbitration agreement may compel arbitration pursuant to § 3 of the Federal Arbitration Act ("FAA") if the relevant state law allows a non-signatory to enforce an arbitration clause against a signatory. *Id.* at *9. Defendant asserted that South Dakota contract law applied and Plaintiff argued that Florida law applied. The Third Circuit concluded that the result would be the same under either state's law and Plaintiff could not be forced to arbitrate under principles of equitable estoppel. *Id.* at *10. The Third Circuit held that principles of equitable estoppel did not apply because there was no alleged concerted conduct on the part of Defendant and Citibank and the claims asserted against Defendant did not rely on any terms in the card agreement. *Id.* at *14-15. Defendant also argued that: (i) its reward program's promotional materials and the card agreement must be read together as an integrated whole contract; and (ii) the arbitration clause required that Plaintiff arbitrate against connected entities and Defendant was a connected entity. *Id.* at *16. The Third Circuit rejected both arguments, reasoning that Defendant's own representatives stated that the promotional materials were merely an invitation for Plaintiff to apply. *Id.* at *17. Further, Defendant advanced no legal basis to suggest that the promotional materials were integrated into the card agreement. *Id.* at *17. Lastly, the Third Circuit reasoned that the agreement did not provide for a third-party to elect arbitration and that Defendant confused the nature of the claims covered by the clause with the question of who could compel arbitration. *Id.* at *19. As such, the Third Circuit affirmed the District Court's decision to deny Defendant's motion to compel arbitration.

(xlv) Notice Issues In Class Actions

***Arkansas Teacher Retirement System, et al. v. State Street Bank & Trust Co.*, Case No. 11-CV-10230 (D. Mass. May 2, 2017).** In this class action, the Court considered submissions of Labaton Sucharow LLP concerning the notice to be sent to class members regarding developments since the Court ordered payment of over $75 million as reasonable attorneys' fees, expenses, and service awards. *Id.* at 1-2. The Court proposed that notice be sent to class members informing them of the issues that have emerged since the appointment of

the Special Master and the scope of the Special Master's duties. *Id.* at 2. The Court also proposed that any objections by class members to the awards made previously be filed after the Special Master issued his Report and Recommendation rather than within 45 days of the service of the notice. *Id.* The Court ordered Plaintiffs' counsel to file memoranda on these issues and the proposals within three days. *Id.*

(xlvi) Objectors And Opt-Out Issues In Class Actions

***Aranda, et al. v. Caribbean Cruise Line, Inc.*, 2017 U.S. Dist. LEXIS 135755 (N.D. Ill. Aug. 24, 2017).** Plaintiffs filed a suit against Defendants and its affiliates for violation of the TCPA. Over a million people across the United States received pre-recorded phone calls from Defendant requesting participation in various short political surveys. After roughly four years of litigation, the parties settled on the eve of trial, and the settlement required Defendants to establish a common fund in an amount no lower than $56 million and no higher than $75 million. Following final approval of the class-wide settlement, Plaintiffs' counsel petitioned for an award of attorneys' fees in amount equal to one-third of the final common fund total. The Court granted in part the fee request. The Court declined to depart from the "sliding-scale structure" used in the Seventh Circuit to award attorneys' fees in class actions. *Id.* at *2. Freedom Home Care, Inc., a member of the class, filed an objection to class counsel's fee request. The Court ultimately granted Plaintiffs' fee petition, but awarded a lower amount than class counsel requested, in part because of the concerns both Freedom Home Care and Defendants raised. Freedom Home Care then moved for an award of attorneys' fees in the amount of $59,410 to compensate its lawyers for their work in opposing class counsel's fee request. Plaintiffs and Defendants both opposed Freedom Home Care's request, and argued that Freedom Home Care's objection did not materially benefit the class because the arguments in the objection were not significantly different from those that Defendants made in response to the fee petition. Plaintiffs and Defendants also maintained that, even if Freedom Home Care were entitled to a fee award of some amount, it failed to provide adequate documentary support for the amount it requested. *Id.* at *3. In addition to requesting a fee for its counsel, Freedom Home Care argued that it was entitled to an incentive award in the amount of $1,000 for agreeing to represent the interests of the class as an objecting class member. *Id.* at *4. The Court noted that Freedom Home Care knew or reasonably should have known that Defendants would be raising the very same argument it intended to make regarding its original fee award. Thus, the Court found that the interests of the class would have been protected whether or not Freedom Home Care objected. The Court determined that, in reality, Defendants were especially well equipped to respond to class counsel's petition because they had participated in the litigation since the beginning and could speak from experience about the value of class counsel's services and the reasonableness of their fee request. *Id.* at *7. Given the background, the Court found no legitimate basis to compensate Freedom Home Care's counsel. The Court also noted that principles of restitution did not require the class members to pay for services they would not have bargained for when they were already going to receive them for free from Defendants. Freedom Home Care emphasized that it was the only party to propose applying a sliding scale to the whole fund, including attorneys' fees but excluding administration and notice costs, which was the approach the Court adopted. *Id.* at *12. Freedom Home Care contended that it should get credit for being the only party that proposed the fee structure the Court ultimately adopted. The Court stated that it would have arrived at that structure whether or not Freedom Home Care proposed it. Accordingly, the Court denied Freedom Home Care's request for attorneys' fees. Finally, because the objector's counsel did not provide a material benefit to the class, the Court denied the requested incentive award.

***Farber, et al. v. Crestwood Midstream Partners, L.P.,* 2017 U.S. App. LEXIS 12765 (5th Cir. July 17, 2016).** In this consolidated lawsuit stemming from a merger between Crestwood Midstream Partners LP ("Midstream") and Crestwood Equity Partners LP ("Equity"), the District Court approved a zero-dollar class action settlement and award of attorneys' fees. Isaac Aron, a Midstream unitholder and the class representative, alleged that Midstream's directors breached their fiduciary duties in approving the merger and that Equity's preliminary proxy statement omitted material information in violation of federal securities laws and Securities and Exchange Commission ("SEC") rules. David Duggan, a class member, objected to the settlement and appealed the District Court's order approving the settlement. On appeal, the Fifth Circuit affirmed the District Court's ruling for lack of subject-matter jurisdiction. Midstream and Equity entered into a merger agreement in which Midstream would become a wholly-owned subsidiary of Equity and Midstream's unitholders would receive 2.75 common units of Equity for each unit of Midstream that they owned. Lawrence Farber, a Midstream unitholder, filed a putative class action against 16 named Defendants, asserting that: (i) Midstream's directors breached their fiduciary

duties by attempting to sell Midstream by means of an unfair process and for an unfair price; and (ii) Equity aided and abetted such breaches. *Id.* at *4. The parties eventually reached a proposed settlement. Midstream and Equity agreed to: (i) disclose financial projections that they omitted from the proxy statement; (ii) allow Aron to conduct discovery to confirm that the proposed settlement was fair, adequate, and reasonable and to terminate the settlement if he determined that it was not fair; and (iii) not oppose Aron's application for an award of attorneys' fees and expenses not to exceed $575,000, which Midstream or its successor-in-interest or their respective insurers would pay. *Id.* at *6. No objections were filed prior to the deadline to object to the settlement; however, Duggan filed an objection approximately two weeks past the deadline. *Id.* at *7. Duggan stated that, although the notice was dated June 21, 2016, he did not receive it until "sometime in August" and he was unable to file the objection timely because he had to go on "a long-planned European vacation." *Id.* at *10. The District Court conducted the fairness hearing focused on Duggan's objection. The District Court concluded that the attorneys' fees were fair and warranted and approved the class action settlement, granted certification of the settlement class, awarded attorneys' fees and expenses of $575,000, and entered final judgment. *Id.* at *11. On appeal, Duggan contended that the Fifth Circuit had jurisdiction to hear the merits of his appeal, because he had Article III standing and that the untimeliness of his objection to the settlement did not constitute a waiver of his right to appeal. *Id.* The Fifth Circuit, however, held that it lacked jurisdiction over the appeal because Duggan, a non-party and non-Intervener, waived his right to appeal by filing an untimely, procedurally deficient objection. *Id.* at *13-14. Accordingly, the Fifth Circuit upheld the District Court's ruling granting settlement approval and attorneys' fees.

***In Re Lidoderm Antitrust Litigation*, 2017 U.S. Dist. LEXIS 129357 (N.D. Cal. Aug. 14, 2017).** End Payor Plaintiffs' class counsel ("EPP class counsel") requested the Court to enter a set-aside order requiring Defendants to place 12.5% of any judgment or settlement secured from Defendants by opt-out EPPs into an escrow account. EPP class counsel would then negotiate with EPP opt-out counsel and seek the Court's approval of a payment to EPP class counsel out of that escrow fund to reimburse EPP class counsel for their "common" work and expenditures that benefitted the EPP opt-outs. *Id.* at *37. Defendants opposed a set-aside order, arguing that there was little precedent for set-aside orders in antitrust class action cases and that EPP class counsel's interests in securing adequate compensation for their work and costs was protected by their ability to seek fees and costs under Rule 23(h). *Id.* at *37-38. Defendants also argued that a set-aside order was premature because it was unknown how many opt-outs there would be or the eventual opt-outs' stake in the litigation. Finally, Defendants opposed the size of the set aside, arguing that set-asides more typically fall in the 3% to 6% range. *Id.* at *38. The Court granted EPP class counsel's request. The Court first found that set aside orders are entered prior to any recovery, so long as the litigation has been "significantly advanced." *Id.* at *39. This litigation had been significantly advanced such that an order would be appropriate. Defendants argued that a set-aside was unnecessary because EPP class counsel would be able to negotiate separately with any opt-outs. The Court stated that the more orderly and efficient course would be to set up one mechanism for the Court to resolve EPP class counsel's entitlement to compensation for common fund work performed. *Id.* at *41-42. The Court also rejected Defendants' argument that the imposition of a set-aside order might deter settlements because it imposed a "tax." *Id.* at *42. The Court explained that establishing a set maximum percentage from the outset would provide clarity and certainty to the negotiating parties as to the most EPP class counsel could seek from any opt-out settlements or judgments. Accordingly, the Court entered the set-aside order.

***Muransky, et al. v. Godiva Chocolatier, Inc.,* 2017 U.S. Dist. LEXIS 2482 (S.D. Fla. Jan. 9, 2016).** Plaintiffs, a group of consumers, brought a class action alleging that Defendant willfully printed credit and debit card transaction receipts that included more than the last 5 digits of the card number in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). The parties settled the matter for $6.3 million and the Court granted settlement approval. Two objectors, James Price and Eric Alan Isaacson, filed an appeal. Plaintiffs requested that the Court require the objectors to post an appeal bond pursuant to Rule 7 and 8. *Id.* at *3. Specifically, Plaintiffs requested that the Court require the objectors to post an appeal bond of $115,934, broken down as: (i) $10,000 in estimated Rule 39 appeal costs under Rule 7; (ii) $31,594 in estimated additional administration costs under Rule 7; and (iii) $74,340 in interest on the funds to be distributed that will be delayed as a result the objectors' appeal. *Id.* at *2. The Magistrate Judge previously recommended that Plaintiffs' motion be granted in part and denied in part, and that the Court require that the objectors be jointly and severally

responsible for posting an appellate cost bond of $2,500. Isaacson filed Rule 72 objections to the Magistrate Judge's recommendation, which the Court denied. Isaacson asserted two objections as to the recommendation. First, he argued that the Magistrate Judge incorrectly relied on the "deferential review" that the Eleventh Circuit offers to District Courts' approvals of class action settlements in her determination that the objectors' likelihood of success on appeal "is not great." *Id.* at *3-4. While Isaacson conceded that the Eleventh Circuit reviews orders approving class action settlements for abuse of discretion, he asserted that his likelihood of success on appeal was actually "rather strong" and "extremely likely," as he raised several legal issues on appeal that were subject to *de novo* review. *Id.* at *4. The Court opined that regardless of what level of deference the Eleventh Circuit affords to the Court's final approval of the class action settlement, the imposition of a $2,500 cost bond to the objectors was entirely reasonable. *Id.* Second, Isaacson contended that, in the event the Court imposed a cost bond, the Court should apportion the bond amount between the objectors at $1,250 each. However, the Court found that the Magistrate Judge's recommendation of a joint and several cost bond in the amount of $2,500 to be reasonable. The Court noted that if the cost bond was set at $1,250 and only one of the objectors posted bond, the objector could still proceed on every issue on appeal, yet the costs Plaintiffs would incur would not be reduced by half. *Id.* at *5. The Court therefore adopted the Magistrate Judge's recommendation and ordered the objectors to pay a $2,500 joint bond.

(xlvii) OFCCP Enforcement Actions

OFCCP v. Google,* 2017 OFCCP LEXIS 8 (OFCCP July 14, 2017).** The Office of Federal Contract Compliance Programs ("OFCCP"), the agency of the U.S. Department of Labor charged with auditing government contractors to determine whether they are compliant with certain contractually-imposed anti-discrimination and affirmative action obligations, audited Defendant in relation to gender-based pay discrimination. Defendant produced extensive documentation and made employees available to the OFCCP for interviews for purposes of the audit. *Id.* at *4. The amount of information involved made this the largest on-going audit in the OFCCP's Pacific Region and one of the largest that the OFCCP had ever conducted. The process halted when the OFCCP requested a large amount of additional information and materials. Defendant agreed to produce some of what the OFCCP requested and objected to the remainder. Defendant's objections related to the OFCCP's requests to produce: (i) an additional "snapshot" of data regarding Defendant's employees as of a moment frozen in time; (ii) employees' personal contact information; and (iii) employees' salary and job history data. The Administrative Law Judge ("ALJ") recommended an order that required Defendant to provide only some of the information that the OFCCP sought. *Id.* at *5. As to the OFCCP's request for a snapshot for September 1, 2014 (a year earlier than the first snapshot that Defendant produced pursuant to the OFCCP's original request), the OFCCP argued that an additional snapshot was relevant because it would show whether a possible adverse impact violation existed over time, not just on the single day reflected on the September 1, 2015 snapshot that Defendant originally provided. *Id.* at *64. However, the OFCCP's request went beyond its original request and asked Defendant to supplement the snapshot with much more data, including categories regarding name, date of birth, bonus earned, bonus period covered, campus hire or industry, whether the employee had a competing offer, country of citizenship, secondary country of citizenship, visa, visa type, and place of birth, and any factors related to compensation. *Id.* at 15. In all, Defendant produced 844,560 compensation data points for the 21,114 employees on the snapshot for September 1, 2015. The Administrative Law Judge found that much of the information requested to be irrelevant and burdensome and excluded some of the data categories such as employee's date of birth and locality information as being unduly burdensome. *Id. at *70.** As to the personal employee contact information that the OFCCP requested for 25,000 employees, the ALJ concluded that this was unreasonable and recommended an order that the OFCCP submit to Defendant names of 5,000 employees for which Defendant must provide the personal contact information. Finally, the OFCCP sought the salary history and job history for each of the 25,000 employees, going back to each employee's hire date. The ALJ found this request to be unenforceable, based upon its lack of relevance and the burden that the request imposed upon Defendant, and denied the request for such information. In sum, the ALJ recommended an order that Defendant be required to produce a limited snapshot for September 1, 2014, personal contact information for no more than 5,000 employees, and denied the all the OFCCP's requests for employees' salary and job histories.

***U.S. Department Of Labor v. Google Inc.,* 2017 OFCCP LEXIS 10 (OFCCP May 2, 2017).** The Office of Federal Contract Compliance Programs ("OFCCP"), audited Defendant to evaluate and review its compliance with non-discrimination and affirmative action requirements. *Id.* at *1. Defendant moved to dismiss the action

and asserted that: (i) the OFCCP had reached a determination that Google was in violation of the Executive Order; (ii) the OFCCP could not have reached this determination unless it had completed its compliance review; and (iii) the OFCCP was not entitled to additional information from Defendant because its compliance review was complete. *Id.* at *2. The Regional Solicitor who represented the OFCCP answered questions from a reporter and an article published on the internet that day formed the basis for Defendant's motion to dismiss. The Regional Solicitor gave a statement to the press indicating that the OFCCP found systemic compensation disparities against women in Defendant's workforce and needed to understand the reason for that disparity. *Id.* at *3. The article also attributed information to the Regional Director that concluded the Department found pay disparities in a 2015 snapshot of salaries and officials needed earlier compensation data to evaluate the root of the problem. Defendant contended that the comments to the press revealed that the OFCCP had completed the compliance review; otherwise, it could not assert that it had compelling evidence of discrimination Defendant asserted that the OFCCP was seeking extensive additional information not to complete an investigation – that in fact it had already completed – but to enhance its preparation for upcoming litigation on the merits. Defendant asserted that the OFCCP wanted to use the broad investigative authority it is accorded in compliance reviews to circumvent the more constrained access it would receive in formal discovery. *Id.* at *8. The Administrative Law Judge ("ALJ") denied Defendant's motion to dismiss and concluded that the OFCCP had not completed its compliance review. *Id.* at *10. The ALJ opined that a finding of a wage disparity that correlated to gender, standing alone, was not legally sufficient to entitle the OFCCP to a remedy for a violation and a showing of a wage disparity on one particular date, without more, could not be generalized to cover the two-year scope of the OFCCP's investigation. Further, the Director testified that the investigation had revealed widespread pay disparities by gender, but that the OFCCP lacked sufficient information to determine the cause. The ALJ opined that the implication of the testimony was that only with additional information and further analysis could the OFCCP conclude whether Defendant was in violation of the Executive Order. The ALJ gave more weight to the testimony of the Director under oath than it did to the statements to the media. Accordingly, the ALJ concluded that the OFCCP had not completed its investigation and Defendant's argument for dismissal failed. *Id.* at *18. The ALJ further found that there was no ethical violation as the statement did not have the substantial likelihood of materially prejudicing the proceeding, although the ALJ questioned the propriety of the Department's extrajudicial statements while a matter was pending. *Id.* at *23.

(xlviii) Preemption Issues In Class Actions

***Ballard, et al. v. American Airlines,* 2017 U.S. Dist. LEXIS 206948 (N.D. Ill. Dec. 18, 2017).** Plaintiff, an aviation maintenance technician, filed a class action on behalf of himself and all others similarly-situated claiming breach of oral contract, estoppel, fraud, unjust enrichment, and negligent misrepresentation. Defendant moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6), arguing that Plaintiff's claims were preempted under the Railway Labor Act ("RLA"). The Court granted Defendant's motion. Plaintiff applied to work with Defendant after he learned of Defendant's "Hiring Program," which offered years-of-service credit and top-of-scale pay rates for new hires. *Id.* at *2. Defendant told Plaintiff during an employment interview that he would have to join the labor union representing Defendant's employees if hired. Plaintiff accepted the position, began working for Defendant, and became a member of the union. Defendant subsequently informed the union that it was discontinuing the Hiring Program under which Plaintiff was hired. *Id.* at *3. As a result of the decision, employees (like Plaintiff) who had not met their years of service prior to the discontinuation date had to work additional years before they could achieve the top-of-scale pay promised under the Hiring Program. *Id.* at *4. Plaintiff alleged that Defendant's refusal to honor the benefits it agreed to under the Hiring Program constituted a breach of contract. Defendant argued that Plaintiff's claims were preempted under the RLA and thus Plaintiff failed to state a claim. *Id.* at *4-5. At the outset, the Court noted that the RLA requires air carriers to negotiate "rates of pay, rules, and working conditions" with their employees' collective bargaining representatives, and accordingly, the entire collective bargaining process was governed by federal law through the RLA. *Id.* Further, where the collective bargaining process was governed by federal law through the RLA, Defendant asserted that claims arising under the bargaining process were subject to preemption. *Id.* at *5. Plaintiff argued that his claims arose not from any collective bargaining agreement ("CBA"), but from an individual oral agreement made before Plaintiff was hired and before Plaintiff became a union member. *Id.* at *6. The Court found that the CBA extinguished any individual agreements when Plaintiff became a union-represented employee and received the collectively bargained rights in the CBA. *Id.* at *8. Accordingly, preemption applied and any claim Plaintiff may have had relating to the terms of his employment must be pursued within the procedures established in the

CBA. *Id.* at *9. Further, Plaintiff's state law claims of estoppel, fraud, unjust enrichment, and negligent misrepresentation claims all arose from the collective bargaining negotiations memorialized in the CBA and thus were also preempted. The Court therefore granted Defendant's motion to dismiss.

***Schiesser, et al. v. Ford Motor Co.,* 2017 U.S. Dist. LEXIS 53180 (N.D. Ill. April 6, 2017).** Plaintiff brought a putative class action against Defendant alleging that certain Ford vehicles had a defect that allows harmful exhaust gases to enter the passenger compartment of the vehicles. The Court had previously dismissed Plaintiff's first amended complaint. In his second amended complaint ("SAC"), Plaintiff brought claims for breach of express warranty and common law fraud, as well as for violations of the Magnuson-Moss Warranty Act, the Illinois Uniform Deceptive Trade Practices Act ("UDTPA"), and the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"). Defendant moved to dismiss the SAC pursuant to Rule 12(b)(6), and the Court granted the motion. Plaintiff purchased a model year 2013 Ford Explorer, which came with a 3-year or 36,000 mile warranty. *Id.* at *5. Plaintiff began noticing exhaust odor in August 2015, but as the needed repair was no longer under warranty, Plaintiff decided not to incur the cost of repair. The Court explained that to state a claim for breach of express warranty, Plaintiff "must allege the terms of the warranty, the failure of some warranted part, a demand upon Defendant to perform under the warranty's terms, a failure by Defendant to do so, compliance with the terms of the warranty by Plaintiff, and damages measured by the terms of the warranty." *Id.* at *6. Plaintiff argued that the warranty was unconscionable because Defendant knew of the defect at the time of sale, making any limitation on the warranty unconscionable. However, the Court found that Plaintiff's SAC contained no allegations that Defendant knew of the defect at the time Plaintiff purchased his vehicle. *Id.* at *7. Therefore, because Plaintiff did not seek to have a problem repaired within the time period or mileage limitation stated in the warranty, the Court dismissed his breach of express warranty claim. The Court further ruled that because Plaintiff's state law warranty claim failed, he also could not make out a claim under the Magnuson-Moss Warranty Act. Defendant argued that the Court should dismiss the UDTPA claim because federal law preempts Plaintiff's requested injunctive relief. In the SAC, Plaintiff requested injunctive relief to require Defendant to "develop a fix to the dangerous defect, and develop a common fund to provide that fix to Plaintiff and all Class Members." *Id.* at *11. Defendant argued that the National Highway Traffic and Motor Vehicle Safety Act (the "Safety Act"), preempted the requested relief. The Court found that a nationwide recall would conflict directly with and frustrate the Safety Act. The Court stated that while the Safety Act does not expressly provide that only the Secretary of Transportation may order a motor vehicle recall, "the comprehensive nature of the federal administrative scheme" indicated Congress' intent that only the Secretary of Transportation do so. *Id.* at *13. Accordingly, the Court determined that the Safety Act preempted Plaintiff's UDTPA claim. Finally, as to Plaintiff's ICFA claim, the Court found that Plaintiff failed to allege that he saw or heard any allegedly deceptive communications prior to purchasing the vehicle. Therefore, the Court determined that Plaintiff's claims should be dismissed in their entirety, and it granted Defendant's motion to dismiss.

(xlix) Preemptive Motions To Strike Or Dismiss Class Allegations

***Ahmed, et al. v. HSBC Bank United States, N.A*., 2017 U.S. Dist. LEXIS 183912 (C.D. Cal. Nov. 6, 2017).** Plaintiff filed a class action alleging that Defendants violated the Telephone Consumer Protection Act ("TCPA"). Defendants move to strike the class allegations pursuant to Rule 12(f) on the grounds that: (i) recent Ninth Circuit decisions precluded the possibility that a "class can possibly be maintained on the face of the pleadings" for this type of TCPA case; (ii) TCPA claims based on whether individual class members consented are not appropriate for class determination; and (iii) Plaintiffs lacked standing to represent class members who received calls directly from Defendant. As an initial matter, Defendants did not cite to any relevant binding authority in support of their motion. *Id.* at *6. Defendants also argued that the Court should strike Plaintiff's class allegations because the proposed class was an improper fail-safe class. However, the Court found that case law authorities have rejected such arguments with respect to class definitions similar to Plaintiffs' class definitions. *Id.* at *7. Finally, Defendants contended that Plaintiff did not have standing to represent class members who received calls directly from Defendant HSBC because Plaintiff only received calls from Defendant PHH Mortgage Corp. *Id.* at *8. The Court held that Defendants failed to explain the basis for the standing argument or cite to applicable case law authorities. The Court explained that a request to find that Plaintiff did not have standing did not fall within the scope of Rule 12(f). *Id.* The Court stated that given the lack of obvious defects in Plaintiff's class definitions and the infrequency of striking class allegations prior to motions for class certification, it denied Defendants' motion under Rule 12(f).

***Alpha Pet Tech Inc., et al. v. LaGasse LLC,* 2017 U.S. Dist. LEXIS 182499 (N.D. Ill. Nov. 3, 2017).** Plaintiffs filed a consolidated putative class action alleging that Defendants sent unsolicited fax advertisements in violation of the Telephone Consumer Protection Act ("TCPA"). Defendants moved to deny class certification and for judgment on the pleadings pursuant to Rule 12(c). The Court granted Defendants' motion to deny certification, but denied Defendants' motion for judgment on the pleadings. The central basis of both motions was a recent change in the law in which a panel of the D.C. Circuit in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017), struck down the Federal Communications Commission's ("FCC") solicited fax rule ("SFR") which required both unsolicited and solicited faxes to include opt-out notices with certain language. The D.C. Circuit held in *Bais Yaakov* that the SFR was unlawful to the extent that it required opt-out notices on solicited faxes because the language of the TCPA reached only unsolicited fax advertisements, and the FCC did not have the authority to promulgate a rule regarding solicited faxes. *Id.* at *4. Defendants asserted that Plaintiffs were unable to show that the proposed classes met Rule 23's requirements considering the individualized consent issues resulting from the decision in *Bais Yaakov*. The Court rejected Plaintiffs' assertions that *Bais Yaakov* was not governing law in the Seventh Circuit, and that individualized consent issues did not defeat class certification. *Id.* at *7. The Court rejected Plaintiffs' assertion that *Bais Yaakov* was not binding in the Seventh Circuit and concluded that because the Judicial Panel on Multi-District Litigation ("JPML") consolidated several petitions from multiple circuits challenging the SFR to be heard in the D.C. Circuit, it became the sole forum for addressing the validity of the FCC's rule. *Id.* at *8. The Court determined that the cases which Plaintiffs cited for general, inter-circuit *stare decisis* principles were irrelevant, because *Bais Yaakov* did not arise through a standard appeal. The Court also rejected Plaintiffs assertion that *Bais Yaakov* did not strike down the FCC's SFR and reasoned that the D.C. Circuit was clear and unequivocal in that the SFR was unlawful to the extent that it required opt-out notices on solicited faxes. *Id.* at *9. Further, the Court ruled that certification was not proper given the individualized consent issues as context-dependent questions regarding consent precluded certification under Rule 23(b)(3) on predominance or superiority grounds. As such, the Court granted Defendants' motion to deny certification of the class. The Court, however, denied Defendants' motion for judgment on the pleadings pursuant to Rule 12(c). The Court determined that Defendants' motion sought judgment on the pleadings only as to Plaintiffs claims that related to fax advertisements sent with prior express permission, and did not relate to faxes sent without prior express permission. The Court denied the motion because it was procedurally improper for it to award judgment on the pleadings on just part of a claim. *Id.* at *25. Accordingly, the Court granted Defendants' motion to deny certification and denied Defendants' motion for judgment on the pleadings. *Id.* at *27.

***Campbell, et al. v. Chadbourne & Parke LLP*, 2017 U.S. Dist. LEXIS 91289 (S.D.N.Y. June 14, 2017).** Plaintiffs, a group of law firm partners, alleged that Defendant, their law firm, subjected them to pay discrimination, wrongful termination, and retaliation in violation of Title VII of the Civil Rights Act, the FLSA, the Equal Pay Act ("EPA"), and the District of Columbia Human Rights Act ("DCHRA"). Defendants filed a motion for summary judgment, arguing that they were entitled to relief on the basis of whether Plaintiffs were "employees" within the meaning of the law. Because of Plaintiffs' status as partners at the firm and according to the terms of the operative partnership agreement, Defendants contended that Plaintiffs could not be considered "employees" under the relevant statutes. *Id.* at *4. The Court explained that whether Plaintiffs were considered "employees" under the relevant statutes involved analysis under the six "*Clackamas* factors," adopted by the U.S. Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449-50 (2003), including: (i) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (ii) whether and, if so, to what extent the organization supervises the individual's work; (iii) whether the individual reports to someone higher in the organization; (iv) whether and, if so, to what extent the individual is able to influence the organization; (v) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (vi) whether the individual shares in the profits, losses, and liabilities of the organization. *Id.* at *5-6. Defendants argued that the title "partner" and the terms of the operative partnership agreement automatically foreclosed the possibility that Plaintiffs could be considered employees. However the Court opined that the Supreme Court has made clear that "[t]he mere fact that a person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor," and "the mere existence of a document styled," for example, as an "employment agreement," or a partnership agreement, does not necessarily answer the question. *Id.* at *6. As such, the Court found that ordering discovery on these factors was appropriate. Plaintiffs submitted affidavits by their counsel

and the named Plaintiffs Campbell and Johnson, identifying areas of discovery necessary to adequately respond to Defendants' factual representations under each *Clackamas* factor. *Id.* at *7. For example, Plaintiffs contested Defendants' representation that its hiring, firing, and status-change of partners was determined by the partners generally; rather, Plaintiffs argued that discovery would show that a sub-committee of partners exercised unilateral control over these decisions. *Id.* Plaintiffs also contested any individual partner's degree of control, autonomy, and access to profits, and argued that discovery would reveal that the firm's Management Committee alone wielded that authority. As a result, the Court concluded that summary judgment was not appropriate at this time and denied Defendants' motion without prejudice to renewal, following limited discovery. *Id.* at *8. Defendants also sought to dismiss Plaintiffs' class and collective action allegations. Plaintiffs asserted that the motion was premature, as Defendants' arguments were not raised in opposition to a motion for class or collective action certification. *Id.* The Court found that Defendants' motion to dismiss Plaintiffs' class and collective action allegations relied upon the Rule 23 factors that would be analyzed and addressed by the Court in the course of deciding a motion for class or collective action certification, and thereby Defendant's motion did not warrant early consideration. Moreover, the Court held that because all members of the putative class or collective action have the same (or substantially similar) employment status as the named Plaintiffs, the success or failure of the class and collective action allegations hinged fundamentally on the analysis on which the Court directed for discovery. *Id.* at *10.

***Grant, et al. v. New York Times Co.*, 2017 U.S. Dist. LEXIS 149403 (S.D.N.Y. Sept. 13, 2017).** Plaintiffs, two employees, filed a class action alleging that Defendants subjected them to employment discrimination and equal pay violations under Title VII of the Civil Rights Act of 1964, the Equal Pay Act ("EPA"), the Age Discrimination in Employment Act of 1967, ("ADEA"), the Americans With Disabilities Act ("ADA"), § 1981 of the Civil Rights Act ("§ 1981"), the New York Equal Pay Law ("EPL"), the New York City Human Rights Law ("NYCHRL"), and the New York State Human Rights Law ("NYSHRL"). *Id.* at *1-2. Plaintiffs alleged that Defendants discriminated against them because of their race, age, gender, and for Plaintiff Walker, her disability. Defendants moved to dismiss the Title VII gender discrimination claims, the Equal Pay Act claims, and the corresponding state and city law claims and moved to strike Plaintiffs' class claims. The Court found that Plaintiffs' complaint did not allege sufficient factual circumstances from which gender-based discrimination could be inferred. Similarly, the Court determined that Plaintiffs submitted insufficient factual allegation of the skill, effort, responsibility and working conditions of those males to whom their pay was compared to nudge the equal pay claim over the line of plausibility. *Id.* at *15-16. Plaintiffs also brought claims under the EPL, which the Court noted should be analyzed using the same standards used to consider a federal EPA claim. Thus, the Court held that the outcome of Plaintiffs' NYSHRL and EPL discrimination claims followed that of their Title VII and EPA claims. Therefore, the Court ruled that Plaintiffs' NYSHRL gender discrimination and EPL claims were also insufficient. The Court found no facts, arguments, or theories advanced with respect to Plaintiffs' NYCHRL claim different from those advanced in support of the other gender and equal pay claims. The Court stated that nothing in the complaint plausibly demonstrated that Plaintiffs were discriminated against because of their gender, or that any of the conduct alleged in the complaint was motivated by gender-based animus. *Id.* at *23. Therefore, the Court dismissed Plaintiffs' claims under the NYCHRL insofar as they alleged discrimination or a denial of equal pay based on gender. Defendants also moved to strike Plaintiffs' class claims under Rules 23(b)(1) and 23(b)(2), arguing that they failed "as a matter of law" and that if the putative class were to be certified at all, it could only be pursuant to Rule 23(b)(3). *Id.* The Court noted that generally "motions to strike class allegations . . . are . . . disfavored because they require 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 the discovery to which they would otherwise be entitled on questions relevant to class certification." *Id.* at *24. The Court therefore determined that Defendants' motion to strike Plaintiffs' class allegations was premature, and should be addressed at the class certification stage. *Id.* Accordingly, the Court denied Defendants' motion to strike without prejudice to Defendants' right to oppose certification on these same grounds.

***Muir, et al. v. Nature's Bounty,* 2017 U.S. Dist. LEXIS 159679 (N.D. Ill. Sept. 28, 2017).** Plaintiff filed a putative class action alleging claims of breach of warranty, consumer fraud, and unjust enrichment on the basis that he purchased Defendant's supplement, which was falsely labeled as containing an anti-depressant ingredient when it did not contain the claimed amount of the ingredient. *Id.* at *2. Plaintiff filed suit on behalf of himself and three classes of purchasers, including: (i) a nationwide class of every consumer who purchased the

supplement within the last four years; (ii) Illinois purchasers; and (iii) a class of purchasers in multiple states that had similar consumer fraud statutes. Defendant moved to dismiss on the basis that Plaintiff failed to state a claim and lacked standing to assert consumer fraud claims under the laws of states where he did not suffer an injury. The Court granted Defendant's motion in part and denied it in part. The Court dismissed Plaintiff's breach of warranty claims, nationwide class allegations, and multi-state class allegations, and denied Defendant's motion as to all other claims. The Court ruled that Plaintiff's breach of warranty claim failed because he failed to give timely notice of the claim before to bringing suit as required by the Uniform Commercial Code ("UCC"). The Court rejected Plaintiff's argument that an exception to the notice rule applied because Defendant had actual knowledge of the defect. The Court determined that the actual knowledge exception did not apply as it was extremely narrow and required a manufacturer to be apprised of the trouble with the product that a particular consumer purchased. Accordingly, the Court dismissed the breach of warranty claim. The Court denied Defendant's motion as to the Illinois Consumer Fraud Act ("ICFA") claim. Plaintiff contended that Defendant failed to disclose a known defect in its product and Defendant asserted that the "simple breach" exception defeated Plaintiff's ICFA claim. Defendant maintained that it was not liable even if it knowingly failed to disclose a defect, if the defect was the subject of an express warranty. The Court disagreed with Defendant's assertion because if adopted, this logic would have the undesirable result of a manufacturer avoiding ICFA liability by expressly guaranteeing that a product did not have a defect of which Defendant was aware. Further, because the Court did not dismiss Plaintiff's ICFA claim and the unjust enrichment claim was tied to that claim, the Court denied Defendant's motion to dismiss as to the unjust enrichment claim. The Court granted Defendant's motion to dismiss the nationwide class allegations because there were presumably many consumers who bought the supplement outside of Illinois and saw the misrepresentation in their home states. The Court reasoned that for consumers who lived and purchased the product outside of Illinois, the transaction had nothing to do with Illinois and Plaintiff could not maintain a nationwide class under the law of Illinois. *Id.* at *27. The Court also dismissed the claims as to the multi-state class. *Id.* at *32. Plaintiff sought to bring claims for consumers in a select group of states with consumer fraud laws that he asserted were "similar" to the ICFA. Plaintiff contended that instead of applying Illinois law to these consumers, each state's law would apply to the resident consumers. Defendant objected on the basis that Plaintiff did not have standing to bring claims under the laws of states in which he did not reside and did not purchase the product. The Court agreed with Defendant that Plaintiff lacked standing and determined that the question of Plaintiff's standing was properly addressed before class certification. Accordingly, the Court dismissed Plaintiff's claims as to the multi-state class.

Perrero, et al. v. Walt Disney Parks And Resorts U.S., Inc., **Case No. 16-CV-2144 (M.D. Fla. Aug. 10, 2017).** Plaintiffs, a group of former American-born and American employees, filed a class action alleging that Defendant discriminated against them on the basis of their race and national origin in violation of Title VII of the Civil Rights Act. Defendant terminated 250 employees in its IT department when it decided to outsource the positions to Indian national origin workers. Plaintiffs were required to train the new employees and alleged that Defendant was "curt and unprofessional" to them during the training and that the new employees received preferential treatment. *Id.* at 2. Defendant filed a motion to dismiss, which the Court granted. Defendant alleged that the entire action should be dismissed because Plaintiffs failed to state a plausible claim for discrimination and that several of Plaintiffs' individual claims should be dismissed for failure to exhaust administrative remedies. *Id.* at 3. The parties did not dispute that Plaintiffs failed to timely file charges of discrimination, but Plaintiffs argued that the single-filing rule should apply, which would allow those individuals to "piggy-back" off the timely filed claims of other Plaintiffs. *Id.* The Court explained that a Plaintiff may rely on the EEOC charge of another Plaintiff if several conditions were met, including: (i) the charge being relied upon must be timely and not otherwise defective; and (ii) the individual claims of the filings and non-filing Plaintiffs must have arisen out of similar discriminatory treatment in the same time-frame. *Id.* at 3-4. Defendant argued that Plaintiffs could not meet the second prong of the test because it applied on to non-filing Plaintiffs, and since the Plaintiffs filed charges but failed to timely file suit. *Id.* at 4. The Court noted that the Eleventh Circuit has held that claimants that filed an EEOC charge but then failed to timely file suit after receiving his or her right-to-sue letter would not be permitted to piggy-back under the single-filing rule. *Id.* Accordingly, the Court applied the same reasoning and dismissed the claims of individual Plaintiffs. As to Defendant's assertion that Plaintiff failed to plead sufficient facts to state plausible claims for relief under Title VII, the Court found it was unable to discern from the complaint the legal theory being asserted by Plaintiffs. *Id.* at 4-5. The Court stated that the complaint asserted several legal theories with different elements that must be pleaded and proved. *Id.* at 5. Accordingly, the Court dismissed Plaintiffs'

complaint but provided an opportunity to amend so that the Court could evaluated all potentially applicable theories to determine which, if any, Plaintiffs could successfully plead. *Id.* at 6.

***Santangelo, et al. v. Comcast Corp.*, 2017 U.S. Dist. LEXIS 200935 (N.D. Ill. Dec. 6, 2017).** Plaintiff filed a class action on behalf of himself and four putative classes, alleging that Defendant conducted an unauthorized credit check that caused a drop in his credit score in violation of the Fair Credit Reporting Act ("FCRA") and the Illinois Consumer Fraud Act ("ICFA"). Plaintiff also asserted state law claims for breach of contract and unjust enrichment. Defendant has moved to strike Plaintiff's class allegations. The Court granted Defendant's motion insofar as it sought to require Plaintiff to amend his proposed classes to exclude individuals who did not opt-out of the arbitration provision contained in Defendant's subscriber agreement. *Id.* at *1-2. Plaintiff proposed four classes, including an FCRA class, and ICFA class, a breach of contract class, and an unjust enrichment class, each composed of "all natural persons residing in the United States or its Territories, who were the subject of a consumer report obtained by Comcast during the ordering process, after Comcast collected the credit inquiry deposit from the consumer." *Id.* at *3-4. Defendant argued that Plaintiff's proposed classes failed to satisfy Rule 23(a) because Plaintiff was neither typical of the classes he sought to represent, nor adequate to protect the interests of the classes. The Court noted that each of Plaintiff's proposed classes included subscribers who were bound by the arbitration provision, and Plaintiff himself was not bound to the provision. The Court found that the enforceability of the arbitration provision, including its limitations sub-provision, was sufficiently "arguable" to challenge the ability of Plaintiff, who was not bound by the arbitration provision, to adequately represent the interests of the individuals in the four classes who were bound to the agreement. *Id.* at *9-10. The Court reasoned that by virtue of the fact that he successfully opted-out of the arbitration provision, Plaintiff would be unable to assert, in any credible fashion, a number of arguments that would potentially undermine the provision's enforceability, including that subscribers somehow felt compelled to accept the arbitration provision or that it was not sufficiently noticeable to warrant enforcement. *Id.* at *13. For these reasons, the Court concluded that Plaintiff was inadequate to represent the interests of the putative classes as currently defined in the complaint. The Court therefore granted Defendant's motion to strike the class allegations. The Court concluded that to the extent that Plaintiff wished to pursue this action on a class-wide basis, he must amend the proposed class definitions in a manner consistent with the Court's order before filing a motion for class certification. *Id.* at *13-14.

***Sloan, et al. v. 1st American Auto Sales Training,* 2017 U.S. Dist. LEXIS 58476 (C.D. Cal. April 17, 2017).** Plaintiff, a sales trainee, brought a putative class action alleging that Defendants violated the False Advertising Law ("FAL") set forth in § 17500 of the California Business and Professions Code and the Unfair Competition Law ("UCL") set forth in § 17200 of the California Business and Professions Code. Defendants filed a motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), and the Court denied Defendants' motion. Defendants advertised a three-day automotive sales training course on-line, which Plaintiff alleged was misleading and deceptive because they were charged $695 for the course, did not receive national certification as promised, and were not offered employment at the course's conclusion despite promises of "guaranteed" positions. *Id.* at *2. Defendants contended that Plaintiff failed to establish the requisite amount-in-controversy for jurisdiction under the CAFA. The Court examined whether Plaintiff alleged in good faith that the amount-in-controversy exceeded $5 million. Plaintiff alleged that the aggregate total of the class members' claims was "in excess of $5,000,000 . . . exclusive of interests and costs." *Id.* at *6. Plaintiff's alleged damages consisted of actual damages, punitive damages, and attorneys' fees. To meet the amount-in-controversy requirement and exceed the $5 million threshold, 7,195 class members would need to have taken the $695 course. *Id.* at *7. The Court noted that this number was consistent with Plaintiff's allegation that the "proposed class is composed of thousands of persons." *Id.* at *8. The Court further opined that the 7,195 figure could be dramatically reduced once punitive damages and attorneys' fees were included. Ultimately, the Court found that the prospect of thousands of class members was not so unbelievable as to fall outside the bounds of good faith. *Id.* The Court therefore turned to whether Defendants had shown to a legal certainty that Plaintiff could not meet the amount-in-controversy requirement. The Court determined that Defendants' sole argument was that the three-year statute of limitations period relevant to the alleged claims precluded a class of thousands. *Id.* The Court noted that this was more of a factual argument than a legal one, and, although it made Plaintiff's proposed class size less likely, it did not prove to a legal certainty that the value of Plaintiff's claims was $5 million or less. *Id.* at *8-9. Accordingly, the Court denied Defendants' motion to dismiss pursuant to Rule 12(b)(1). Defendants also moved

to dismiss based on Plaintiff's failure to state a claim. Defendants argued that the class lacked predominance under Rule 23(b)(3). Plaintiff asserted that Defendants' motion was premature because the class definition could be amended before certification and because the parties had yet to undertake discovery. The Court stated that a motion to dismiss class claims is rarely appropriate "before discovery commences." *Id.* at *9. Because discovery had yet to begin, the Court explained that Defendants must make a compelling argument for dismissal and it concluded that they failed to do so. First, Defendants argued that some class members might have suffered less damages than others, and therefore predominance could not be met. The Court ruled that Defendants alluded to factual scenarios that had no basis in the allegations or in the evidence before the Court. *Id.* at *10. Defendants also asserted that the action should be dismissed because individual inquiries would have to be made into whether each class member received a binding offer of employment and which advertisements each class member viewed. The Court found Defendants' contention unpersuasive because Plaintiff specifically had alleged that all class members' claims arose from the identical, false, affirmative written advertisements guaranteeing a job to which class members responded when attending and paying for training. *Id.* at *11. Accordingly, the Court denied Defendants' motion to dismiss. *Id.* at *11-12.

***Spencer, et al. v. Comcast Corp.*, 2017 U.S. Dist. LEXIS 22790 (E.D. Pa. Feb. 17, 2017).** Plaintiff, a telecommunications operator, brought a putative class action alleging that Defendant discriminated against him on the basis of his race during the course of his employment. Plaintiff asserted claims alleging retaliation based on race, individual disparate treatment, systemic disparate treatment, failure to promote, and hostile work environment. Plaintiff also claimed that Defendant engaged in actions that had a systemic disparate impact upon African-Americans in violation of Title VII. *Id.* at *5. Defendant filed a motion to dismiss Plaintiff's disparate impact claim for failing to exhaust his administrative remedies, and the Court granted the motion. In March 2015, Plaintiff received his annual review, which stated that he needed improvement in communication, motivation, inter-personal skills, and organizing his thoughts. *Id.* at *3. Plaintiff filed an internal complaint of racial discrimination in the workplace. Plaintiff's managers scheduled a meeting with Plaintiff to discuss his allegations. Defendant discharged Plaintiff 11 days later for hanging up the phone on a customer. Plaintiff filed a charge with the EEOC alleging that he was discriminated against based on his race and skin color. *Id.* at *4. Defendant argued that Plaintiff was barred from bringing a systemic disparate impact claim because Plaintiff failed to exhaust his administrative remedies with the EEOC. Defendant asserted that Plaintiff did not raise any disparate impact claim or class action allegations in his discrimination charge with the EEOC and solely alleged a discrete act of intentional discrimination. *Id.* at *8. Plaintiff contended that he put the EEOC on notice that it needed to investigate whether Defendant's employment practices had a disparate impact on African-Americans. Plaintiff asserted that, although the four corners of the discrimination charge itself did not contain a disparate impact claim, the additional supporting documentation that he provided to the EEOC placed the EEOC on notice of the need for further investigation. *Id.* at *10. The Court held that Plaintiff's allegations raised a claim that he was discharged because of his race and color, but not a claim of disparate impact. *Id.* at *14. The Court concluded that, because Plaintiff did not mention other similarly-situated employees within his charge, or make reference to any facially-neutral policy, Plaintiff did not allege a systemic disparate impact claim. *Id.* Accordingly, the Court concluded that Plaintiff did not exhaust his administrative remedies with respect to his claim of systemic disparate impact. The Court therefore granted Defendant's motion to dismiss Plaintiff's systemic disparate impact claim.

(l) Privacy Class Actions

***Cole, et al. v. Gene By Gene, Ltd.*, Case No. 14-CV-4 (D. Alaska July 28, 2017).** Plaintiff filed a putative class action alleging that Defendant violated the Alaska Genetic Privacy Act when it allegedly disclosed his genetic testing information on a public website. Plaintiff purchased a DNA testing kit from Defendant's website. After testing, participants could sign up for "projects" or on-line forums run by third-party independent volunteers called project administrators. *Id.* at 2. Plaintiff signed up for nine projects and understood that the project administrators would have access to his name, contact information, and testing kit number. *Id.* at *2-3. However, Plaintiff alleged that when he signed up for the projects, he was not informed that some project administrators had separate websites, or that his full DNA test results would be disclosed on those sites. *Id.* at 3. Plaintiff filed a motion for class certification, which the Court denied on the ground that Plaintiff failed to meet the Rule 23(b) requirements of predominance or superiority. Plaintiff's proposed class consisted of all individuals who purchased a DNA test from Defendant and who executed a release form and joined a project from May 13, 2012

and August 1, 2016, while residing in the state of Alaska. *Id.* The Court found that there were significant aspects of the case that would require individualized proof that weighed against a finding that common questions predominated. For example, the Court noted that whether each proposed class member gave informed and written consent to disclosure could depend on several individualized determinations, including whether the customer signed a release form, the language of the form, and the information provided to the customer about potential disclosures of the genetic information. *Id.* at 9. The Court held that the individualized proof that would be required to establish each customer's consent, together with the proof needed to demonstrate Defendant's disclosure of each customer's test results, supported a finding that individual questions predominated over common questions, as both consent and disclosure are key elements of the Genetic Privacy Act. *Id.* at 10. The Court also opined that individual damages would also defeat class certification, as approximately 900 proposed class members sustained actual damages, but Plaintiff failed to present any method for measuring such damages. *Id.* at 11. The Court also determined that Plaintiff failed to meet the superiority requirement because: (i) Plaintiff's claim alone was sufficient to make an individual lawsuit economical; (ii) there was no indication that class action would achieve great economy of time, effort, or expense; (iii) no other cases of the same nature existed in the district; and (iv) the relative complexities in the case. *Id.* at 13-15. The Court ruled that a class action was not the superior method for adjudicating the dispute. The Court therefore denied Plaintiff's motion for class certification.

***Dunkin, et al. v. Appriss, Inc.*, 2017 U.S. Dist. LEXIS 112155 (N.D. Ind. July 18, 2017).** Plaintiffs, two car accident victims, brought a class action alleging that Defendant violated the Driver's Privacy Protection Act ("DPPA") when it sold copies of accident reports containing personal information to third-parties for solicitation purposes and without their consent. *Id.* at *8. Plaintiffs sought liquidated damages in the amount of $2,500 each. Defendant filed a motion for summary judgement, which the Court granted. The Court explained that Congress enacted the DPPA to prevent "stalkers and criminals from utilizing motor vehicle records to acquire information about their victims," and to stop "the States' common practice of selling personal information to businesses engaged in direct marketing and solicitation. *Id.* at *9-10. The DPPA provides that a "motor vehicle record" is "any record that "pertains" to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." *Id.* at *10. The Court held that the name, address, and driver's license number written down or scanned from a driver's license handed over by the license-holder was not "personal information, from a motor vehicle record," protected by the DPPA. *Id.* The first issue was whether the driver's license itself is a "motor vehicle record." *Id.* at *11-12. If so, the disclosure of personal information from it would fall under the statute. *Id.* at *12-13. The Court noted that the word "pertains," as used in the DPPA, meant "to belong as a part, member, accessory, or product." *Id.* at *13. The Court held that a driver's license is not a part, member, accessory, or product of a motor vehicle operator's permit; rather, it is a motor vehicle operator's permit. *Id.* Plaintiffs contended that the word "pertains" was intentionally expansive. However, the Court determined that such an expansive reading would pull conduct into the Act's orbit well beyond what Congress intended to govern. *Id.* The Court therefore held that a driver's license itself was not the relevant "motor vehicle record." *Id.* at *14. Plaintiffs argued that the DPPA protects information on driver's licenses only when that information is disclosed involuntarily. *Id.* at *17. They argued that, because Indiana law requires disclosure of a driver's license to the police after an accident, they did disclose it voluntarily, so therefore it remained under the DPPA's protection. *Id.* at *18. The Court found no basis for using voluntariness to determine DPPA coverage, as no language in the statute alluded to that distinction. The Court concluded that when the holder of a driver's license hands over personal information to an entity other than a DMV, even when that information is printed onto a driver's license, the DPPA does not protect it. Accordingly, the Court granted Defendant's motion for summary judgment.

***In Re Facebook Internet Tracking Litigation,* 2017 U.S. Dist. LEXIS 102464 (N.D. Cal. June 30, 2017).** 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 had previously granted Defendant's motion to dismiss on the grounds that Plaintiffs failed to articulate a cognizable basis for standing pursuant to Article III. Plaintiffs filed an amended complaint and Defendant again moved to dismiss. The Court granted Defendant's motion. In their amended 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 Crime Law ("CCL"), and the Invasion of Privacy Act ("IPA"), as well as constituting fraud, larceny, breach of contract, and breach of good faith and fair dealing. *Id.* at *15-16. 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.* at *16. In seeking dismissal, Defendant argued that Plaintiffs lacked standing to pursue all claims. Although Plaintiffs asserted that the information Defendant 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. First, because economic injury was not a prerequisite for Plaintiffs' Federal Wiretap Act, SCA, or IPA claims, the Court found that the allegations alone were sufficient to establish standing as to those claims. *Id.* at *18-19. The Court had previously found that Plaintiffs did not establish a "realistic economic harm or loss that is attributable to Facebook's alleged conduct." *Id.* at *19. Although Plaintiffs' personal web browsing information might have "some degree of intrinsic value," this Court held that Plaintiffs failed to show, "for the purposes of Article III standing, that they personally lost the opportunity to sell their information or that the value of their information was somehow diminished after it was collected by Facebook." *Id.* The Court noted that the amended complaint contained no new facts that established economic harm or loss, not did it establish that Defendant intended to permanently deprive Plaintiffs of property of any sort. *Id.* at *21. As such, the Court found that Plaintiffs lacked Article III standing to pursue their claims for trespass to chattels, violations of the CDAFA, fraud, and larceny. *Id.* Plaintiffs also alleged that Defendant committed privacy tort violations by collecting URLs of pages that Plaintiffs visited and by using persistent cookies to associate Plaintiffs' identities with their web browsing histories. *Id.* at *21-22. The Court determined that Plaintiffs need not show actual loss to establish standing for common law claims of invasion of privacy and intrusion upon seclusion. Plaintiffs further added claims for breach of contract and breach of the duty of good faith and fair dealing. The Court found that Plaintiffs had standing to pursue their claims for breach of contract and breach of the duty of good faith and fair dealing because actual damages are not required to establish standing for contractual claims. *Id.* at *22-23. The Court then reviewed the sufficiency of each of those claims and held that Plaintiffs failed to state an actionable Wiretap Act claim because they failed to plead that Facebook intercepted the "contents" of an electronic communication. *Id.* at *24. The Court further dismissed the SCA claims as deficient, because the SCA only applies to information that is temporarily stored "incident to [the] transmission" of a communication; it does not apply to information in local storage on a user's computer. *Id.* at *27. The Court also ruled that Plaintiffs had not established that they had a reasonable expectation of privacy in the URLs of the pages they visited because Plaintiffs could have taken steps to keep their browsing histories private. *Id.* at *29. Finally, the Court held that Plaintiffs' claim for breach of the duty of good faith and fair dealing also failed, because Plaintiffs had not identified the terms of the agreement that imposed a duty on Defendant not to engage in the tracking activity at issue. *Id.* at *30. Accordingly, the Court granted Defendant's motion to dismiss with leave to amend only the breach of contract and breach of the duty of good faith and fair dealing claims.

***In Re Facebook Internet Tracking Litigation*, 2017 U.S. Dist. LEXIS 190819 (N.D. Cal. Nov. 17, 2017).**
Plaintiffs pursued a consolidated, multi-district class action on behalf of individuals with active Facebook accounts and sought more than $15 billion in damages and injunctive relief for Defendant's purported tracking of their on-line activities. The Court had previously granted Defendant's motion to dismiss on the grounds that Plaintiffs failed to articulate a cognizable basis for standing pursuant to Article III. Plaintiffs filed an amended complaint, and Defendant again moved to dismiss. The Court granted Defendant's motion with leave to amend the breach of contract and breach of the duty of good faith and fair dealing claims. Plaintiffs timely filed their third amended complaint and Defendant again moved to dismiss under Rules 12(b)(6) and 15(c). The Court granted Defendant's motion again. Plaintiffs alleged that each of them entered into a contract with Facebook that consisted of: (i) Facebook's Statement of Rights and Responsibilities ("SRR"); (ii) Facebook's privacy policy; and (iii) relevant pages from Facebook's help center. *Id.* at *15. According to Plaintiffs, Facebook promised in the contract that it would not track the web browsing activity of logged-out Facebook users on third-party websites, and Facebook broke that promise by collecting data about logged-out users' browsing activity and using cookies to connect that activity to users' identities. *Id.* at *15-16. The Court explained that, to state a claim for breach of contract, Plaintiffs must allege that: (i) they entered into a contract with Facebook; (ii) Plaintiffs performed or were excused from performance under the contract; (iii) Facebook breached the contract; and (iv) Plaintiffs suffered damages from the breach. *Id.* at *16. Plaintiffs argued that the language in Facebook's data use policy

"implicitly promises to the average user that Facebook will not receive [a user-identifying] cookie when the user is not logged-in." *Id.* at *17. However, the Court noted that the SRR that Plaintiffs identified as a contract did not use the term "data use policy" and did not contain any reference to the data use policy. As such, because the SRR did not "clearly and unequivocally" reference it, the Court concluded that the SRR did not incorporate the data use policy. *Id.* at *20. Plaintiffs also argued that certain help center pages were incorporated by reference into the privacy policy and that the privacy policy, in turn, was incorporated into the SRR. *Id.* at *21. The Court stated that, even if it assumed that the privacy policy was incorporated into the SRR, Plaintiffs' argument failed because the help center pages were not incorporated into the privacy policy. *Id.* at *22. Plaintiffs also argued that the help center in its entirety was incorporated into the privacy policy because the privacy policy linked to some of its pages. The Court concluded that Plaintiffs' argument that the privacy policy "directed" users to help center pages "without exclusion" was at odds with the third amended complaint, wherein Plaintiffs alleged that the privacy policy linked to some help center pages but not to the help center pages containing Facebook's promises not to track logged-out users. *Id.* at *23. The Court thus found this relationship too attenuated to support Plaintiffs' position that the entire help center was incorporated into the privacy policy. *Id.* Accordingly, the Court ruled that Plaintiffs' breach of contract claim must be dismissed. Further, because Plaintiffs' claim for a violation of the duty of good faith and fair dealing must rest "upon the existence of some specific contractual obligation," the Court also found that Plaintiffs had not identified contractual provisions that prohibited Facebook from tracking logged-out users in the manner Plaintiffs alleged. *Id.* at *24. The Court therefore determined that Plaintiffs' claim for breach of the duty of good faith and fair dealing must also be dismissed.

***Ingalls, et al. v. Spotify USA, Inc.*, 2017 U.S. Dist. LEXIS 110817 (N.D. Cal. July 17, 2017).** Plaintiff, a consumer, filed an unfair competition class action alleging violations of California's Automatic Renewal Law ("ARL") and various sections of the California Business and Professions Code. Plaintiff claimed that when using Defendant's subscription streaming music service, Defendant allegedly: (i) failed to present automatic renewal terms in a clear and conspicuous manner in visual proximity to the request for consent to the offer; (ii) failed to obtain consumers' affirmative consent for automatic renewal; and (iii) failed to provide an acknowledgment that included its automatic renewal terms in a manner capable of being retained by the consumer. *Id.* at *4. Defendant filed a motion for summary judgment, which the Court granted in part and denied in part. The Court found that the ARL itself did not provide a civil remedy. *Id.* at *6. Accordingly, the Court granted Defendant's motion as to Plaintiff's direct ARL claim. Defendant also contended that Plaintiff lacked standing to bring his claim. The Court determined that Plaintiff paid $29.97 to Defendant, and thus made a *prima facie* showing of injury. *Id.* at *7-8. Defendant further argued that even had the disclosures been presented in a more conspicuous manner, it would have made no difference because Plaintiff admitted that, in most instances, he did not read disclosures for subscription services. *Id.* at *8. Further, Defendant stated that Plaintiff was a sophisticated consumer who owned his own on-line business, and was therefore aware of how on-line disclosures worked. Defendant contended that if there were more prominent warnings, Plaintiff would have subscribed to the service and would not have cancelled before the trial period ended, and therefore Defendant's failure to strictly comply with the ARL did not cause Plaintiff's loss. *Id.* at *11. The Court determined that viewing the evidence in the light most favorable to Plaintiff, it was possible a reasonable fact-finder could determine that, had the terms been more prominently presented, Plaintiff would have read them and cancelled his subscription before the paid period began. Accordingly, the Court denied Defendant's motion for summary judgment as to Plaintiff's § 17602(a)(1) allegations. *Id.* at *12. Defendant further asserted that Plaintiff's failure to read its disclosures proved that he lacked standing to pursue his § 17602(a)(2) claim. The Court ruled that assuming there was not affirmative consent, as Plaintiff alleged, a failure to read terms on a sign-up page did not show lack of causation. *Id.* at *13. The Court therefore denied Defendant's motion as to Plaintiff's § 17602(a)(2) allegations. In addition, the Court stated that Defendant's motion did not specifically address the adequacy of the disclosures in the confirmation email, or whether Plaintiff read the confirmation email. *Id.* at *13-14. Accordingly, the Court denied Defendant's motion with request to Plaintiff's § 17602(a)(3) allegations. *Id.* at *14. As to injunctive relief, the Court explained that to establish standing, a Plaintiff must generally show "a sufficient likelihood that he will again be wronged in a similar way." *Id.* at *14-15. Defendant argued that Plaintiff could not show a likelihood of future injury since he now knew about the automatic renewal policies, and had indicated that he did not have any current plans to sign up again. *Id.* at *15. However, the Court noted that Plaintiff indicated that he would consider purchasing the service again if an injunction were issued in this action. *Id.* at *16. Accordingly, Plaintiff could very well be harmed by a future iteration of Defendant's service if it was not

required to conform its disclosures to the law. Hence, the Court found it premature to decide whether Plaintiff was entitled to injunctive relief. Thus, the Court granted in part and denied in part Defendant's motion.

***Santana, et al. v. Take Two Interactive Software,* 2017 U.S. App. LEXIS 23446 (2d Cir. Nov. 21, 2017).** Plaintiffs alleged that Defendant violated the Illinois Biometric Privacy Act ("BIPA"), which prohibits companies from collecting employees' biometric information until the company notifies the employee in writing that the information is being collected. Plaintiff asserted that Defendant's NBA 2K15 and NBA 2K16 video games contained a feature called "MyPlayer" that allows gamers to create a personalized basketball player that has a realistic 3-D rendition of the gamer's face. The 3-D mapping process used cameras to capture a scan of the gamer's facial geometry to disseminate a realistic rendition of the gamer's face; this device required gamers to hold their faces within 6 to 12 inches of the camera and slowly turn their heads during the scanning process. *Id.* *2-3. To use the feature, gamers had to agree to terms and conditions acknowledging that the face scan will be visible and may be recorded during gameplay and requires gamers to "agree and consent to such uses." *Id.* Plaintiffs alleged that Defendant: (i) collected their biometric data without their informed consent; (ii) disseminated their biometric data to others during game play without their informed consent; (iii) failed to inform them in writing of the specific purpose and length of term for which their biometric data would be stored; (iv) failed to make publicly available a retention schedule and guidelines for permanently destroying Plaintiffs' biometric data; and (v) failed to store, transmit, or protect from disclosure Plaintiffs' biometric data by using a reasonable standard of care or in a manner that is at least as protective as the manner in which it stored, transmitted, and protected other confidential and sensitive information. *Id.* *4. Defendant moved to dismiss Plaintiffs' claims for lack of Article III standing and for failure to state a cause of action under the statute. The District Court granted the motion on both grounds and dismissed the action with prejudice. On appeal, the Second Circuit affirmed the District Court's decision insofar as it held that Plaintiffs lacked Article III standing, but vacated the decision in part insofar as it held that Plaintiffs lacked a statutory cause of action as "aggrieved" parties. *Id.* at *6. In regards to Article III standing, the Second Circuit held that "none of the alleged procedural violations raised a material risk of harm" to Plaintiffs arising out of the use, collection, or disclosure of an individual's biometric data. *Id.* at *7. In reaching this conclusion, the Second Circuit noted that no reasonable person would believe that the feature of the game at issue was anything other than a facial scan and Plaintiffs did "not plausibly assert (beyond a mere conclusory allegation) that they would have withheld their consent had Defendant included additional language in its consent disclaimer." *Id.* at *8. The Second Circuit found that Plaintiffs' alleged violations of the BIPA's notice provisions similarly failed to raise a material risk of harm because Plaintiffs did not allege that Defendant had not or would not destroy their biometric data within the period specified by the statute, nor did Plaintiffs allege that Defendant lacked such protocols or that its policies were inadequate. Accordingly the Second Circuit reasoned that there was "no material risk that Defendant's procedural violations have resulted in Plaintiffs' biometric data being used or disclosed without their consent." *Id.* at *9. Finally, the Second Circuit was not persuaded by Plaintiffs attempts to "manufacture an injury" by alleging that they would be deterred from using biometric technology in the future because "Plaintiffs' fear, without more, was insufficient to confer Article III injury-in-fact." *Id.* at *11. Despite this ruling, the Second Circuit remanded to the District Court with the instruction that the District Court enter a dismissal without prejudice. *Id.* at *12. The Second Circuit held that since the statutory standing arguments were based on differing constructions of the term "aggrieved party" as used in the BIPA, the District Court's resolution of the issue was a judgment on the merits that could not be properly addressed absent subject-matter jurisdiction. *Id.* The Second Circuit found that the District Court was therefore without power to dismiss the complaint with prejudice for failure to state a cause of action under the statute. *Id.* at *13.

(li) Procedural Issues And Proof Requirements In Rule 23 Class Actions

***Albert D. Seeno Construction Co., et al. v. Aspen Insurance UK Ltd*., 2017 U.S. Dist. LEXIS 147646 (N.D. Cal. Sept. 12, 2017).** Plaintiff filed a class action in state court alleging: (i) breach of contract; (ii) breach of the implied covenant of good faith and fair dealing; (iii) four claims for declaratory relief; (iv) unfair, unlawful, and fraudulent business practices pursuant to § 17200 of the California Business and Professions Code; and (v) unfair, deceptive, untrue, and/or misleading advertising pursuant to § 17200 of the California Business and Professions Code relating to Defendant's alleged refusal to defend Plaintiffs in lawsuits against them. *Id.* at *2. Defendant moved to strike various paragraphs and language in the complaint containing Plaintiffs' class allegations. *Id.* at *5-6. Defendant contended that the allegations were deficient because Plaintiffs did not allege

that the case could be certified pursuant to Rule 23. *Id.* at *6. Defendant noted that complaint did not set forth a definition of the proposed class, nor did the complaint plead the Rule 23 requirements for class certification such as commonality, typicality, adequacy, superiority, and predominance. *Id.* Defendant also argued that Plaintiffs could not satisfy the Rule 23 requirements because every insurance policy was customized to address the needs of the individual insured, and therefore that individual issues would predominate. *Id.* Plaintiffs responded that Defendant failed to demonstrate that Rule 23 applied to Plaintiffs' § 17200 claims, which Plaintiffs stated they were bringing as representative claims under state law, and not class claims under Rule 23. *Id.* Plaintiffs also contended that Defendant's arguments regarding the propriety of class certification were premature, and that the Court should consider such matters in connection with a motion for class certification and not in a motion to strike. *Id.* at *7. In light of Plaintiffs' clarification that the complaint sought to assert representative claims under § 17200, the Court denied Defendant's motion to strike Plaintiffs' class allegations.

***American Trucking Association Inc., et al. v. New York Truway Authority*, 2017 U.S. Dist. LEXIS 30496 (S.D.N.Y Feb. 28, 2017).** Plaintiffs, a group of interstate truck drivers, filed suit against Defendant claiming that its use of tollway revenue collected from Plaintiffs to fund the New York State Canal Corporation ("NYSCC") violated the dormant commerce clause. Plaintiffs sought injunctive relief as well as refunds for paid tolls. After extensive discovery, both parties moved for summary judgment on the issue of liability. The Court granted summary judgment in favor of Plaintiffs, ruling that Defendant's practice of funding the NYSCC with tolls collected in the thruway violated the dormant commerce clause. Accordingly, the Court granted injunctive relief. However, at that time, neither the parties nor the Court were aware that in 1991 Congress had enacted the Intermodal Surface Transportation Efficiency Act ("ISTEA") that specifically authorized Defendant to use tollway receipts to fund the NYSCC. Subsequently, the Defendant moved to dismiss Plaintiff's complaint pursuant to Rules 12(b)(1), 12(b)(6), and 12(c), alleging that the Court lacked subject-matter jurisdiction and that Plaintiffs failed to state a cognizable claim for relief. The Court ruled that it did have subject-matter jurisdiction over the matter. However, the Court granted Defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(c) because Congress had authorized the Defendant to use toll revenues to fund the NYSCC. Therefore, there was no violation of the dormant commerce clause. Plaintiffs argued that "congressional authorization" was an affirmative defense and Defendant had waived this defense by not pleading it as such. The Court disagreed and ruled that Defendants raised the defense of failure to state a claim in its original pleadings, Defendant preserved its right to move for judgment on the pleadings. The Court also ruled that because Defendant did not know of the 1991 congressional authorization, it could not have waived its rights. While the Court noted that Defendant "should have known" about the congressional authorization, this did not constitute a waiver. *Id.* at *23. The Court ruled that Plaintiffs' claim was barred because Congress had specifically authorized the use of tolls for such purposes. Accordingly, the Court granted Defendant's motion to dismiss and vacated its previous order as to the parties' motions for summary judgment.

***Doe, et al. v. NFL Enterprises,* 2017 U.S. Dist. LEXIS 24991 (N.D. Cal. Feb. 22, 2017).** Plaintiff, a former cheerleader, brought a class action alleging that Defendant and its member clubs conspired to eliminate competition for recruiting cheerleaders and to keep cheerleaders' wages below market value. *Id.* at *2. Plaintiff filed a motion for permission to continue the action under a pseudonym and alleged that she would be subject to harassment, injury, ridicule, or personal embarrassment if forced to maintain the action under her legal name *Id.* Plaintiff contended that cheerleaders needed anonymity "to prevent overzealous fans from stalking or otherwise inappropriately contacting" them, and to protect them from "social stigmatization" on account of their revealing uniforms. *Id.* at *3. Additionally, Plaintiff did not want her true name to be associated with this lawsuit because "former cheerleaders who have filed complaints against the NFL and various NFL teams have been subject to vicious on-line attacks and harassment, and even stalking" *Id.* Plaintiff provided declarations of two other former cheerleaders who claimed that they were subjected to harassing calls, stalking, and name-calling after they filed lawsuits against Defendant. *Id.* at *3-4. The Court held that the judicial system belongs to the people, and the public and press have a right to see how the judicial system was being used. *Id.* at *5. The Court opined that this consideration counseled in favor of requiring the true names of those suing others. Further, the Court stated that Plaintiff failed to show that public disclosure of her identity presented a substantial risk of harm. *Id.* at *5-6. Accordingly, the Court denied Plaintiff's motion to proceed under a pseudonym.

***Glasser, et al. v. Hilton Grand Vacations Co*., LLC, 2017 U.S. Dist. LEXIS 157690 (M.D. Fla. Sept. 26, 2017).** Plaintiff brought a class action alleging that Defendant used an automated dialing system to place automated or pre-recorded telemarketing calls to her cellular telephone to encourage the purchase of its promotional vacation packages and timeshares without express written consent in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff filed a renewed motion for leave to file under seal an unredacted version of her motion for class certification. The Court had denied Plaintiff's previous motion without prejudice for failing to show good cause. *Id.* at *1. The Court noted that Plaintiff's renewed motion contained additional information from Defendant claiming that the redacted information was "confidential." *Id.* The Court reasoned that Plaintiff sought to file its motion under seal to preserve the interest Defendant asserted under the parties' confidentiality agreement. The Court found that as the true party in interest, Defendant had not shown good cause to file under seal the redacted portions of Plaintiff's motion. Defendant claimed confidentiality as to the name of the automatic telephone dialing system, the number of telemarketing calls, the number of cellular telephone numbers called, the number of calls placed to Plaintiffs cellular telephone, and the class definition. *Id.* at *2. The Court stated that the parties' mutual agreement to keep documents confidential or to seal materials was "immaterial" to a Court's decision regarding the public's right of access. *Id.* at *3. Further, the right to file a document under seal does not automatically follow a confidentiality designation during discovery. *Id.* Accordingly, the Court directed Defendant to show good cause why each redacted portion of Plaintiff's class certification motion should be filed under seal.

***Gordon, et al. v. New West Health Services,* 2017 U.S. Dist. LEXIS 10414 (D. Mont. Jan. 25, 2017).** Plaintiffs, an employee and his wife, brought a class action alleging that Defendant had a common policy and practice of systematically denying substance abuse and mental health treatment in violation of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (the "Federal Parity Act") and Montana state laws. Plaintiffs allege further that Defendant uniformly employed the use of impermissible criteria for treating addiction cases in violation of state and federal parity laws. Plaintiffs were insured for healthcare under Defendant's plan in 2010 and 2011. Plaintiffs made a claim to Defendant on behalf of their minor son. Defendant's policy provided criteria for what it considered to be medically necessary treatment. Plaintiff's physician recommended inpatient detoxification therapy, but Defendant denied the claim based upon its determination that inpatient detoxification was not medically necessary. *Id.* at *2. Plaintiffs asked for reconsideration of the denial and Defendant refused. In their lawsuit, Plaintiffs sought an injunction that would order Defendant to reopen and properly adjust class members' claims for alcohol, mental illness, and drug addiction benefits using criteria that passed muster under the Federal Parity Act. *Id.* at *3. Plaintiffs further requested that the Court order Defendant to reimburse the members of the class for the money that they paid for such benefits that Defendant should have paid, and to disgorge any money that Defendant earned from the profits that it obtained from its unlawful conduct. Plaintiffs moved for class certification under Rule 23(b)(2), which the Court denied. Plaintiffs claimed that final injunctive relief or corresponding declaratory relief was appropriate for the class as a whole. Defendant argued that it no longer provided claims administration for any plans using the benefits booklet to which Plaintiffs referred and it no longer administered any commercial health insurance plans. *Id.* at *7. Defendant further asserted that its decision to stop providing claims administration using the benefits booklet, or for commercial clients in general, rendered Plaintiffs' claims for prospective class relief moot. *Id.* Defendant contended that Plaintiffs lacked standing to seek prospective relief, because neither Plaintiffs nor their son were currently covered individuals under any plan for which Defendant provided claims administration. *Id.* at *7-8. The Court stated that Rule 23(b)(2) certification is inappropriate when the majority of the class does not face future harm. *Id.* The Court determined that Plaintiffs no longer received benefits under Defendant's health plan and therefore they lacked standing to certify a Rule 23(b)(2) class. The Court found that Plaintiffs' proposed class met the numerosity, commonality, typicality, and adequacy requirements. *Id.* at *13-17. Therefore, since the Court ruled that Plaintiffs met the requirements of Rule 23(a), it permitted Plaintiffs to amend their complaint to include a claim for class certification under Rule 23(b)(3). Accordingly, the Court denied Plaintiffs' motion to certify a class under Rule 23(b)(2).

***Hayes, et al. v. Magnachip Semiconductor Corp.,* 2017 U.S. Dist. LEXIS 18032 (N.D. Cal. Feb. 8, 2017).** Plaintiffs, a group of stock purchasers, brought a class action alleging that Defendants issued false and misleading statements regarding its business and financial results in violation of the Securities Exchange Act. Plaintiffs previously had filed a motion for class certification of a class of all stock purchasers from February 1,

2012 to February 12, 2015. The Court granted Plaintiffs' motion for class certification, but limited the class period to February 1, 2012 through March 11, 2014. Subsequently, Plaintiffs filed a second motion for class certification of stock purchasers between March 12, 2014 and February 12, 2015, which was the time period that was removed from the class definition by the Court in its prior order. Defendants moved to strike Plaintiff's motion. The Court determined that Plaintiffs' second motion for class certification did not comply with the Court's previous order. Plaintiffs argued that Rule 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." *Id.* at *5. However, the Court found that Plaintiffs cited no authority supporting their theory that Rule 23(c)(1)(C) allowed Plaintiffs to file a second class certification motion because they received an unfavorable ruling on their first one. *Id.* at *5-6. The Court opined that Rule 23(c)(1)(C) applies where "subsequent developments" warrant revisiting a class certification decision. *Id.* at *6. The Court held that there were no "subsequent developments" that justified Plaintiffs' second motion for class certification. *Id.* at *7. Moreover, the Court held that Plaintiffs failed to identify a case where the Court's ruling on one motion qualified as a subsequent development justifying the filing of a second motion. Accordingly, the Court granted Defendants' motion to strike Plaintiff's motion for class certification.

***In Re Pella Corp. Architect And Designer Series Windows Marketing, Sales Practices And Products Liability Litigation,* 2017 U.S. Dist. LEXIS 114223 (D.S.C. July 21, 2017).** Plaintiffs in this consolidated multi-district litigation were owners of certain Pella Architect Series and Designer Series Windows manufactured between 1997 and 2007 (the "Windows"). Plaintiffs alleged that the Windows suffered from a common design defect and that defect was exacerbated by the use of inadequate, or inadequately applied, wood treatment and preservative. Plaintiffs filed a number of class action complaints in separate jurisdictions based on these allegations, which the Court considered for coordinated or consolidated pre-trial proceedings. Plaintiffs moved for class certification in three cases. One of these cases was dismissed before the Court could rule on class certification, leaving only *Romig v. Pella Corp.*, Case No. 14-CV-433 ("*Romig*") and *Naparala v. Pella Corp.*, Case No. 14-CV-3465 ("*Naparala*"). Subsequently, the Court issued orders denying class certification in both *Romig* and *Naparala. Id.* at *3-4. The Court held that individual issues predominated over the common defect issue under Rule 23(b)(3) and Rule 23(b)(2), and even if the class could escape the predominance inquiry by seeking certification on just the defect issue, certification was still inappropriate under the superiority requirement of Rule 23(b)(3). *Id.* at *4. Defendant subsequently filed a motion arguing that the principles set forth in the Court's class certification orders should be applied to all remaining class actions in the MDL. Defendant sought an order denying class certification in all remaining cases. The Court denied the motion. At the outset, the Court noted that Defendant's request did not arise under any Federal Rule of Civil Procedure or other established body of law. The Court stated that it, therefore, was faced with an initial question of whether the requested relief was even available, and if so, what standards should guide its decision to grant or withhold it. *Id.* Plaintiffs argued that such relief unconstitutionally would deprive them of their right to procedural due process. *Id.* at *4-5. Defendant asserted that its request came from the principles of *stare decisis*, rather than issue preclusion or *res judicata* which might raise due process concerns. *Id.* at *5. However, the Court concluded that the concept of *stare decisis* presupposes a determination that an issue has been previously decided in prior litigation. *Id.* at *5-6. Because *stare decisis* involves a reapplication, rather than an extension, of a prior ruling, the Court stated that it necessarily creates a new ruling, suggesting that the parties should be given a full opportunity to address the reapplication of the old rule to new facts. *Id.* at *6. Further, the Court opined that, while deciding all remaining class certification questions in one fell swoop would provide some benefits to judicial economy, these benefits should not be overstated. For example, the Court noted that if the rationale laid down in the *Romig* and *Naparala* orders would clearly dispose of any subsequent class certification motions, then it should not be particularly difficult for Defendant to brief, or for the Court to resolve, such motions. *Id.* at *6-7. Alternatively, if these questions were not easily resolved, that suggested the Court should not be denying class certification without a full briefing in each individual case. *Id.* at *7. The Court ruled that, to the extent such relief could be available, it should only be granted in rare circumstances and only after a Defendant had made an exceptionally strong showing that future motions for class certification would be futile. *Id.* Turning to the substance of Defendant's arguments, the Court held that there were many ways in which the remaining cases in the MDL might be distinguished from *Romig* and *Naparala*. The Court held that, because some potential arguments had not been fully explored, it would be imprudent – if not unconstitutional – to deny the remaining Plaintiffs the opportunity to advance such arguments. *Id.* at *9. Accordingly, the Court denied Defendant's motion to deny class certification.

***Millman, et al. v. United Technologies Corp.*, 2017 U.S. Dist. LEXIS 189638 (N.D. Ind. Nov. 16, 2017).** Plaintiff brought an action on behalf of herself and all others similarly-situated against various Defendants, alleging that Defendants improperly disposed and dumped hazardous chemicals into the groundwater in Andrews, Indiana. *Id.* at *2. Defendant L.D. Williams made an offer of judgment, and filed a Rule 12(f) motion to strike Plaintiff's first amended complaint. At the same time, Plaintiff filed a motion for class certification. The Magistrate Judge subsequently granted Plaintiff's motion for leave to file a third amended complaint, which Plaintiff filed the same day. Accordingly, the Court found that Defendant's motion to strike Plaintiff's first amended complaint was moot, as the complaint has since been amended twice. *Id.* at *3. The Court explained that the law in the Seventh Circuit used to be that when a Plaintiff received an offer of judgment for full relief requested, the claim became moot, and mooting a would-be class representative could head off the specter of a larger case. Plaintiffs typically avoided this result by filing a "place-holder" motion for class certification, which the Court found was the case here. *Id.* The Court noted that the pendency of this place-holder motion would serve to protect a putative class from attempts to buy off the named Plaintiff. *Id.* The Court explained that the premature filing of a motion for class certification was no longer necessary to prevent buy-offs because Defendant's offer of compensation did not moot the litigation or otherwise end the Article III case or controversy. *Id.* at *4. The Court further reasoned that filing a motion that the parties were not yet ready to support or defend, and the Court was not yet able to rule upon, would not promote the efficient administration of justice. *Id.* The Court concluded that Plaintiff's motion was filed prior to the third amended complaint and the parties were still in the process of discovery and filing their respective answers. *Id.* The Court therefore denied Plaintiff's class certification as premature.

***RJF Chiropractic Center, et al. v. BSN Medical Inc.,* 2017 U.S. Dist. LEXIS 167949 (W.D.N.C. Oct. 11, 2017).** Plaintiff alleged that Defendants sent an unsolicited advertisement in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff asserted that Defendants' unsolicited faxes caused damages to recipients by invading their privacy and consuming paper, toner, and time. *Id.* at *1. Plaintiff filed a motion for certification of a class of all persons who received an advertisement from Defendants. *Id.* at *2-3. The Court denied the motion. Plaintiff stated that the proposed class contained more than 40 members who share a common questions of law and fact and that common questions derived from Defendants' "standardized conduct" of "faxing a single advertisement form to persons on a list generated by Defendants and/or a third-party, which did not obtain prior express invitation or permission to send Defendants' advertisement by fax." *Id.* at *3. Defendants argued that Plaintiffs "motion should be denied because it was premature, unsupported, and in violation of the Federal and Local Rules." *Id.* Defendants argued that Rule 23 has a higher standard requiring affirmative demonstrations by Plaintiff to prove that the prerequisites of class have been fulfilled. Furthermore, Defendants pointed to the Court's Local Rules, asserting that they do not allow "placeholder" motions such as the one Plaintiff filed. *Id.* at *4. The Court found that it need not begin to analyze whether Plaintiff's motion met the requirements for class certification, because its motion never intended to satisfy Rule 23. The Court held that Plaintiff's motion seemed to be a tactical motion aimed to prevent Defendants from offering individual named Plaintiffs relief while giving nothing to the class. The Court stated that by filing a vague placeholder motion to certify a class simultaneously with their complaint, Plaintiff attempted to defeat Defendants' strategy. Accordingly, the Court denied Plaintiff's motion on the grounds that it was an obsolete procedural tactic. *Id.* at *6-7. The Court reasoned that Plaintiff's complaint faced no threat of becoming moot if Defendants attempted to pick-off Plaintiff as long as Plaintiff did not accept the offer. *Id.* at *7. The Court determined that Rule 23 requires that a Plaintiff prove affirmatively that there are facts showing sufficiently numerous parties, common questions of law or fact, and all other requirements of the Rule. The Court opined that Plaintiff's placeholder motion was little more than another form of the complaint. Accordingly, the Court denied Plaintiff's motion for class certification.

***Robertson, et al. v. The Republic Of Nicaragua,* 2017 U.S. Dist. LEXIS 98599 (N.D. Cal. June 26, 2017).** Plaintiff, a Reverend, brought an action alleging that the Nicaraguan government committed numerous human rights abuses against the Miskitu people, a Native American ethnic group, over the last 200 years, including the unlawful seizure of Miskitu territory without just compensation. Plaintiff further alleged that the Nicaraguan government engaged in torture and genocide in violation of international law, and exterminated the Miskitu people and their inherent right to their natural resources, lands, waters, forests, farms, and livestock by selling their land to other foreign nations. *Id.* at *2-3. Plaintiff alleged multiple violations of international and federal law,

and brought claims for conversion, unjust enrichment, and accounting on behalf of herself and a class of eight named, unrepresented Plaintiffs. Defendant filed a motion to dismiss, which the Court granted. As an initial matter, the Court dismissed all class claims, stating that Plaintiff could not maintain a purported class action, or bring claims on behalf of the other unrepresented Plaintiffs. *Id.* at *5. Defendant asserted that Plaintiff's complaint presented issues that were not justiciable. *Id.* at *7. The Court agreed with Defendant that the core of Plaintiff's complaint indeed was "not the redress of particular alleged wrongs inflicted upon individuals, but rather a request to adjudicate nearly 200 years of relations between the Miskitu people and various sovereign governments as well as the corresponding impacts on the territorial integrity of the present-day Republic of Nicaragua." *Id.* at *10. The Court stated that Plaintiff did not identify the legal basis on which it could make such a determination. *Id.* at *11. The Court held therefore, that deciding this case would therefore require it to "engage in decision-making on the basis of policy rather than law." *Id.* Accordingly, the Court concluded that Plaintiff's claims posed a political question over which the Court did not have jurisdiction. The Court therefore granted Defendant's motion to dismiss.

***Shabotinsky, et al. v. Deutsche Lufthana*, 2017 U.S. Dist. LEXIS 44052 (N.D. Ill. Mar. 27, 2017).** Plaintiff, an airline passenger, brought a putative class action against Defendant pursuant to Article 19 of the Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention"). *Id.* at *2. The Montreal Convention provides that an airline carrier is liable for damage caused by delay in the carriage by air of passengers. *Id.* at *3. Count I of the complaint alleged that Plaintiff suffered damages because of his flight's delay when it was cancelled and he was rebooked on another flight departing four hours later than the original flight. *Id.* at *2. Plaintiff claimed that he incurred out-of-pocket expenses for food, refreshments, medications, and telecommunication services due to the delay and that he missed the event for which he was traveling. *Id.* Defendant moved to dismiss the complaint pursuant to Rules 8(a) and 12(b)(6) and moved for Rule 11 sanctions. The Court granted the motion to dismiss in part and denied it in part. The Court denied Defendant's motion to dismiss pursuant to Rule 8(a) for failure to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at *4. While the Court agreed with Defendant that the 35-page complaint could be more concise, it denied the motion because the Court found that it still provided Defendant with fair notice of Plaintiff's claims. *Id.* Defendant also moved to dismiss pursuant to Rule 12(b)(6) on the grounds that Plaintiff's claims were not covered by the Montreal Convention. *Id.* at *5. Defendant argued that count I of the complaint should be dismissed for failure to state a claim because the Convention does not cover matters occurring prior to departure and only applies after the passenger presents to travel. The Court rejected this argument. *Id.* The Court, however, dismissed counts II and III of the complaint, which alleged that Defendant failed to "meaningfully consider" Plaintiff's pre-suit settlement offers; the Court ruled that these claims were based upon a non-existent legal requirement. *Id.* at *13. Plaintiff's counsel proposed two classes. *Id.* at *14. The Court dismissed all class claims relating to the class that encompassed all of Defendant's international flights since 2014. *Id.* at *17. The Court found that the class would encompass disparate claims involving hundreds of flights and was not maintainable. *Id.* at *18. The Court, while skeptical of the viability of the other class, did not dismiss Plaintiff's claim as to that class. *Id.* at *22. The Court instructed Plaintiff's counsel to file a motion for class certification within 90 days. *Id.* Defendant's motion for Rule 11 sanctions was denied as the Court ruled that it could "not say, at this time" that Plaintiff's counsel lacked any good faith basis for asserting his claims. *Id.*

(lii) Public Employee Class Actions

***AFSCME , et al. v. Charter County Of Wayne*, 2017 U.S. App. LEXIS 12692 (6th Cir. July 14, 2017).** Plaintiffs, the American Federation of State, County, & Municipal Employees Council 25 and its affiliated local unions ("AFSCME"), filed a class action alleging that their due process rights under the Fourteenth Amendment had been violated by Defendants' unilateral changes to pension benefit levels and refusal to submit to arbitration. The District Court dismissed Plaintiffs' claims, finding that they failed to assert a protected property interest under the due process clause. On appeal, the Sixth Circuit affirmed. Plaintiffs alleged that Defendants violated rights under the due process clause of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law." *Id.* at *12. The District Court noted that due process has both procedural and substantive components. Plaintiff asserted violations of procedural due process, and the District Court explained that to establish a claim for violation of procedural due process, "a Plaintiff must show that: (i) it had a life, liberty, or property interest protected by the due process clause; (ii) it was deprived of this protected interest; and (iii) the state did not afford it adequate procedural rights." *Id.* Plaintiff

asserted two property interests to serve as the basis of its due process allegations, including: (i) a guaranteed right to accrue pension benefits at a 2.5% level until 2020; and (ii) the right to submit issues to arbitration under Act 312. *Id.* at *13. The District Court rejected both of these arguments, finding that as pled in the complaint and its exhibits, these did not constitute property interests protected by the due process clause. On appeal, the Sixth Circuit agreed with the District Court that Plaintiffs only offered the arbitration process itself, provided for in the collective bargaining agreement ("CBA"), as a property interest to support their claims. *Id.* at *17-18. The Sixth Circuit further determined that Plaintiffs had not pointed to any case law finding that the arbitration process, or a similar grievance resolution process, can itself be a property interest protected by the due process clause. Rather, arbitration is a procedural process that may be due to a Plaintiff in order to protect some other property interest. Here, the Sixth Circuit found that Plaintiffs were not clear what underlying benefits or rights in the CBA they sought to arbitrate. Further, Plaintiffs did not allege or indicate what these grievances were, how they related to the claims in this case, or how they were constitutionally protected property interests. *Id.* at *19. The Sixth Circuit found that Plaintiffs' allegations of a right to arbitration were insufficient to establish a constitutionally protected property interest. Accordingly, the Sixth Circuit ruled that because Plaintiffs had not shown that they had a protected property interest, their due process claim must fail. The Sixth Circuit therefore affirmed the District Court's ruling dismissing Plaintiffs' claims.

(liii) Sanctions, Contempt, And Unethical Misconduct In Class Action Litigation

***Adams, et al. v. United Services Automobile Association,* 863 F.3d 1069 (8th Cir. 2017).** Plaintiffs filed a class action in state court claiming that Defendant, an insurer, improperly applied depreciation when adjusting claims for structural losses under its homeowners insurance policies. After Defendant removed the action, the parties notified the District Court that they had reached agreement on almost all material terms and moved to stay the action pending mediation. *Id.* at 1073. Later, the parties filed a stipulation of dismissal because the terms of settlement included dismissal of the action and refiling in state court. Plaintiffs subsequently re-filed the action in state court, together with a motion for preliminary approval of class settlement. On August 26, 2015, the state court certified the settlement class and preliminarily approved the settlement agreement. *Id.* at 1074. On December 14, 2015, the District Court learned that the case had been re-filed in state court. The District Court entered a show cause order directing counsel of record to show cause as to how their filings in the District Court – including the removal, request for stay, and stipulation of dismissal – were not made for "any improper purpose." *Id.* In particular, the District Court identified the improper purpose of mid-litigation forum shopping, wasting resources by using the District Court's jurisdiction as leverage in negotiations for a settlement that would be pursued before a state court, and procedural "gamesmanship." *Id.* at 1075. After a hearing, the District Court imposed sanctions against the 16 attorneys of record for abuse of judicial process. The District Court held that filing the stipulation of dismissal was a violation of Rule 11. The Court also concluded that, although Rules 41 and 23 allow for dismissal of a putative class action by stipulation, Rule 11 still might be violated if that stipulation of dismissal has an improper purpose. *Id.* The attorneys argued that, because the Class Action Fairness Act ("CAFA) does not expressly prohibit dismissal of a putative class action from the District Court and refiling of that same action in state court for certification and settlement approval, their actions in dismissing the case for the purpose of refiling in state court for certification and settlement approval could not be improper. *Id.* at 1079. The District Court found the attorneys' argument unavailing because its concern was not on the procedural mechanism adopted for dismissal, but on the use of the procedural mechanism for an improper purpose. *Id.* On appeal, the Eighth Circuit reversed the District Court's ruling. The Eighth Circuit found that Rule 41(a)(1) does not require judicial approval or review as a prerequisite to dismissal; in fact, the dismissal is effective upon filing, with no action required by the District Court. *Id.* at 1080. The Eighth Circuit held that the reason for the dismissal is irrelevant under Rule 41(a)(1). *Id.* Therefore, the Eighth Circuit ruled that the District Court erred in concluding that the 16 attorneys engaged in sanctionable conduct by stipulating to a dismissal under Rule 41(a)(1) for the purpose of forum shopping and avoiding an adverse result. *Id.* at 1081. Further, the Eighth Circuit noted that: (i) when no class has been certified, voluntary dismissal of a putative class action is governed by Rule 41; and (ii) the CAFA did not affect the 2003 amendment to Rule 23. The Eighth Circuit, accordingly, concluded that a reasonable lawyer would have a colorable legal argument that a stipulation of voluntary dismissal under Rule 41(a)(1)(A)(ii) was permissible in a case in which the class had not yet been certified. *Id.* at 1083. The Eighth Circuit therefore determined that case law precedent necessitated a holding that counsel did not violate Rule 41(a)(1) in stipulating to the dismissal of the action and that counsel had at least a colorable legal argument that the District Court's approval was not needed under Rule 23(e) to voluntarily

dismiss the claims of the putative class. As a result, the Eighth Circuit held that the District Court abused its discretion in finding that counsel acted with an improper purpose under Rule 11 and abused the judicial process by stipulating to the dismissal of the class action for the purpose of seeking a more favorable forum and avoiding an adverse decision.

Arkansas Teacher Retirement System, et al. v. State Street Bank, **2017 U.S. Dist. LEXIS 16545 (D. Mass. Feb. 6, 2017).** Plaintiffs brought a class action against Defendant alleging that it overcharged customers in certain foreign exchange transactions. The Court approved a $300 million settlement and applied the common fund method to determine the award of attorneys' fees. *Id.* at *4. The Court awarded $74,541,250 in attorneys' fees to Plaintiffs' counsel and $1,257,697.94 in expenses. *Id.* The award represented about 25% of the common fund. *Id.* The Court employed the lodestar method to test the reasonableness of the fees requested and the nine law firms representing Plaintiffs stated that their total lodestar was $41,323,895.75. After an article was published in the Boston Globe criticizing the award of attorneys' fees, the Court decided to exercise its authority to refer issues related to the amount of the attorneys' fees and the values of the services pursuant to a special master. The article reported that the staff attorneys involved in this case were typically paid between $25 to $40 an hour for document review. *Id.* at *8. However, in calculating the lodestar, Plaintiffs' counsel represented to the Court that the regular hourly billing rates for the staff attorneys were between $325 and $425. The Court questioned whether the hours reportedly worked by Plaintiffs' attorneys were actually worked. In a letter to the Court, Plaintiffs' counsel admitted inadvertent errors that resulted in duplicative billing of staff attorney time in the fee petitions. *Id.* at *7. Plaintiffs' counsel maintained that after the duplicative time was deducted from the $41.32 million combined lodestar, it resulted in a reduced combined lodestar of about $4 million. However, Plaintiffs' counsel asserted that a 2.00 multiplier, as opposed to a 1.8 multiplier that was used in the award, was still reasonable for cross-check purposes in common fund cases and that the fees awarded by the Court were justified by the $300 million settlement obtained and fees awarded in comparable cases. *Id.* at *19. The Court noted that the letter did not address whether the reported lodestar was based upon what Plaintiffs' counsel typically charged paying clients for the type of work done by the staff attorneys in this case or the reliability of the previous representations to the Court regarding the number of hours each attorney worked on this case. *Id.* at *8. The Court proposed to appoint a former Judge as a special master to investigate and prepare a report for the Court so that it could determine whether the original award of attorneys' fees was reasonable and whether there was any misconduct warranting sanctions. The Court ordered Plaintiffs' counsel to file a memorandum on whether they objected to the appointment of a special master and set a hearing to address the appointment.

***Ayer, et al. v. Frontier Communication Co.,* 2017 U.S. Dist. LEXIS 146640 (C.D. Cal. Sept. 5, 2017).** Plaintiff Ayer filed a putative class action against Defendant. The Court noted that although seeking to represent a putative class, Plaintiff violated Local Rule 23-3 by failing to file a motion for class certification within 90 days of serving Defendant, or seeking relief from that deadline. The Court therefore issued an order to show cause requiring briefing on why the class allegations should not be stricken from Plaintiff's operative complaint for failure to comply with Local Rule 23-3. Two weeks later, Plaintiff Taylor filed a new complaint against Defendant and shared over 50 identical, or substantially identical, paragraphs of allegations. *Id.* at *2. At the time Plaintiff Taylor filed, Plaintiffs' counsel represented that there were no related cases previously filed in the same district. Defendant filed a notice of related case, and the Court issued an order transferring Taylor's case to the Court's docket as a related case pursuant to Local Rule 83-1.3.3. *Id.* at *3. The Court ordered the parties to show cause as to whether Plaintiffs' counsel should be sanctioned for representing on the Taylor submission that no related cases had previously been filed. *Id.* at *4. Local Rule 83-1.3.1 provides that at the time a civil action (including a notice of removal or bankruptcy appeal) is filed, or as soon as known thereafter, the attorney shall file and serve on all parties who have appeared a notice of related cases, stating whether any action previously filed or currently pending and the action being filed appear: (i) to arise from the same or a closely related transaction, happening, or event; or (ii) to call for determination of the same or substantially related or similar questions of law and fact; or (iii) for other reasons would entail substantial duplication of labor if heard by different judges; or (iv) to involve the same patent, trademark, or copyright, and one of the factors identified above in a, b or c was present. *Id.* at *8. Comparing the two complaints, the Court opined that that they arose "from the same or a closely related transaction, happening or event;" "call for determination of the same or substantially related or similar questions of law and fact;" and "for other reasons would entail substantial duplication of labor if heard by different judges." *Id.* at *8-9. The Court held that Defendants identified the similarities between the two

complaints, and any suggestion by Plaintiffs' counsel that the cases were not related was belied by the pleadings and proposed class definitions. *Id.* at *9. The Court found that because the claims in *Ayer* and *Taylor* were related within the meaning of Local Rule 83-1.3.1, Plaintiffs' counsel should have designated *Taylor* as related to *Ayer*. The Court noted that the omission appeared to be an effort to avoid having *Taylor* transferred to the Court, where there was a pending order to show cause why the class allegations should not be stricken from Plaintiff Ayer's complaint. *Id.* at *9. The Court stated that it did not condone efforts to evade the requirements of the Local Rules and General Order 14-03. The Court also determined that this was not the first time that Plaintiffs' counsel had violated Local Rule 83-1.3.1. *Id.* at *10. The Court had previously sanctioned Plaintiffs' counsel for misrepresenting that no related cases had been filed, despite Plaintiffs' counsel's direct involvement in a related class action. The Court imposed a $1,000 monetary sanction, but allowed Plaintiffs' counsel to satisfy the sanction by donating $750 in books or holiday presents to the children at local public schools within a five mile radius of the Courthouse. The Court found that the failure to identify *Taylor* as a related case by Plaintiffs' counsel was at a minimum grossly negligent, and at worst willful. Accordingly, the Court concluded that a $2,500 monetary sanction was appropriate for the repeated violations of the Local Rules by Plaintiffs' counsel.

***Enslin, et al. v. The Coca-Cola Co.,* Case No. 14-CV-6476 (E.D. Pa. May 9, 2017).** Plaintiff filed a Rule 37 motion for sanctions alleging that Defendants improperly withheld information from him during discovery in this class action. Plaintiff requested that Defendants produce copies of an employee handbook as it existed during Plaintiff's employment with the company from 2001 to 2007. Defendants produced the information from the 1990s and from 2008, but asserted that after a reasonable search it was unable to find the relevant policies. *Id.* at 1. Defendant submitted a certification from Defendants' counsel stating the details of the search for the documents. The Court concluded that Defendants had made a reasonable search for materials responsive to Plaintiff's request, and denied the motion for sanctions. *Id.* at 2. Plaintiff subsequently found the relevant policies available on-line through a database hosted by the "Internet Archive," a non-profit organization that has the goal of "archiving the web." *Id.* Plaintiff filed a motion for reconsideration, and the Court denied the motion. The Court found that the obligation to produce documents during discovery extends only to documents that are in a party's "possession, custody, or control." *Id.* at 3. The Court stated that the Internet Archive was not in Defendants' possession, custody, or control, and therefore they had no obligation to search a publicly available internet database to help locate documents to support Plaintiff's claims. *Id.* The Court further held that simply because some of the documents were preserved in a public database, that fact did not cast doubt on Defendants' assertion that they were unable to locate copies of the documents from files that actually were in their possession, custody, or control. *Id.* Accordingly, the Court denied Plaintiff's motion for sanctions.

***Fish, et al. v. Kobach*, 2017 U.S. Dist. LEXIS 103369 (D. Kan. July 5, 2017).** Defendant, the Kansas Secretary of State, filed a motion requesting the Court reconsider an order which directed Defendant to sit for a limited deposition, and to pay $1,000 as a sanction for making material misrepresentations to the Court. *Id.* at *2. Because the reconsideration request was based only on new arguments that could have been raised in Defendant's earlier briefs, the Court denied the motion. The Court noted that Local Rule 7.3(b) permits a party to file a motion to reconsider a non-dispositive order, but requires that any such motion "be based on: (i) an intervening change in controlling law; (ii) the availability of new evidence; or (iii) the need to correct clear error or prevent manifest injustice." *Id.* at *3. Defendant premised his motion on the third consideration, asserting that reconsideration was necessary "to prevent manifest injustice because the Court may have misapprehended the party's position with respect to the deposition matter, and because the Court may have misapprehended the facts with regard to the brief matter. *Id.* at *4. Defendant asserted, for the first time, that if he sat for a deposition he may be precluded from acting as counsel at trial under Rule 3.7(a) of the Kansas Rules of Professional Conduct, which states "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (i) the testimony relates to an uncontested issue; (ii) the testimony relates to the nature and value of legal services rendered in the case; or (iii) disqualification of the lawyer would work substantial hardship on the client." *Id.* at *4-5. Defendant conceded he did not discuss this "specific ethical problem" in his response to Plaintiffs' motion for sanctions. *Id.* at *5. The Court explained that it would not grant reconsideration based on "new arguments or supporting facts that could have been presented originally." *Id.* Plaintiffs stated that they did not seek disqualification of Defendant as counsel at trial under Rule 3.7.9. Thus, the Court determined that Defendant failed to show that manifest injustice would result if reconsideration of the deposition order was

not granted. *Id.* Defendant also argued the sanction imposed based on the Court's finding that Defendant made patently misleading representations to the Court was manifestly unjust because "there was no intent to deceive." *Id.* at *5-6. For the first time, Defendant asserted the misrepresentations made in his response to Plaintiffs' motion to compel were due to "last-minute editing to meet page limitations; which led to the deletion of language that more fully explained the point Defendant was making." *Id.* at *6. The Court rejected this explanation on the ground that this argument for reconsideration again suffered from the fact that Defendant could have, but did not, raise it earlier. The Court therefore declined to grant reconsideration based on this explanation. *Id.* Accordingly, the Court denied Defendant's request for reconsideration.

***In Re Bank Of American Corp. Securities Litigation,* 2017 U.S. Dist. LEXIS 140750 (E.D. Mo. July 26, 2017).** A class representative filed a motion to compel former class counsel to transfer the case files in this matter to new class counsel, Frank Tomlinson. *Id.* at *7. Previously, the NationsBank classes were represented by Martin M. Green, Joe D. Jacobson, and Jonathan F. Andres of Green Jacobson, P.C. The firm was no longer in existence and the individual attorneys' representation of the class was terminated. *Id.* Prior to appointing Tomlinson as new class counsel, the Court found that Green, Jacobson, and Andres, individually, had an ethical and legal obligation to retain the files of their former clients. *Id.* at *7-8. The Court additionally ruled that upon the appointment of new class counsel, Green, Jacobson, and Andres would "have the duty to transfer the safeguarded files in their custody to the new class counsel." *Id.* at *8. Tomlinson stated that he never received complete case files. In response to the motion, Jacobson explained that "approximately 40 boxes" of case files were "now located at the former offices of Green Jacobson, P.C.," that the "paper files are not in [his] possession or control" and that he "has nothing left to produce." *Id.* The Court found that Jacobson's contention was belied by the fact that, as former counsel, he had an on-going duty to safeguard the case files. *Id.* The Court held that Jacobson offered no explanation why the files were not transferred to Tomlinson, nor did he offer any explanation as to why not having the physical possession of the files absolved him of the duty to see that they were promptly transferred. *Id.* Accordingly, the Court granted the class representative's motion to compel.

***In Re Engle Cases,* 2017 U.S. Dist. LEXIS 172678 (M.D. Fla. Oct. 18, 2017).** Two attorneys filed approximately 3,700 complaints in the state and federal courts of Florida alleging personal injury, wrongful death, and loss-of-consortium claims related to cigarette smoking. *Id.* at *10. This followed the ruling in *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006), where the Florida Supreme Court decertified a class of Florida smokers after a jury verdict in their favor, and required that class members file their own individual lawsuits; however, the Florida Supreme Court determined that the original jury's findings should have preclusive effect in future individual lawsuits (so class members would not have to establish Defendants' negligence or that their cigarettes were defective or caused certain diseases). *Id.* at *16. The *Engle* class consisted of Florida citizens and residents and their survivors, who suffered or died from diseases and medical conditions caused by their addiction to cigarettes and ultimately ended in settlement of $100 million. *Id.* at *58. After the Court sent questionnaires directly to the named Plaintiffs over their attorneys' objections, it discovered that many Plaintiffs never authorized the attorneys to file suit and dozens did not meet the basic requirements for maintaining a claim (such as never having smoked). Over 500 personal injury claims were filed on behalf of Plaintiffs who had died well before counsel filed the complaints. The attorneys insisted to the Court that that they could certify in accordance with Rule 11 that the complaints were viable. The Court found that the attorneys' conduct was obstructive, deceptive, and caused the Court to appoint a Special Master and initiate Rule 11 sanctions proceedings. The Special Master found that the attorneys' conduct was willful and reckless and burdened the Court for years, and cost the Court and Defendants significant additional resources. The Court stopped short of requiring a disgorgement of all fees that attorneys received, as the Special Master recommended, and imposed a lesser monetary sanction that it found served as an adequate deterrent, and which reflected the seriousness of the attorneys' behavior. The Court opined that on "the rare occasion when attorneys undermine" the judicial process, "there must be consequences [and] this is one of those rare occasions." *Id.* at *8. As a result, the Court sanctioned both attorneys' firms $9,164,404.12 and issued a public reprimand. The Court acknowledged that the penalty was significant and possibly unprecedented, but characterized the actions of the firms and their respective principals, equally unprecedented. The Court referred the matters to the Florida State Bar for an investigation into whether the attorneys violated any other provisions of the Florida Rules of Professional Conduct by filing and maintaining frivolous and factually baseless lawsuits and making false statements of fact or law to the Court.

***Lawson, et al. v. Grubhub, Inc.,* 2017 U.S. Dist. LEXIS 137165 (N.D. Cal. Aug. 25, 2017).** Defendant filed a motion for sanctions alleging that Plaintiff publicly filed documents designated "confidential" pursuant to the parties' stipulated protection order. *Id.* at *1. The Court granted the motion, finding that counsel knew the documents were designated confidential but nonetheless filed them publicly to make the deadline for filing Plaintiff's opposition to Defendant's motion for summary judgement. *Id.* The parties stipulated protective order protected material designated by the parties as "Confidential" or "Attorney's Eyes Only." *Id.* at *2. Plaintiff's counsel filed Plaintiff's opposition to Defendant's motion for summary judgment without redaction or sealing confidential materials referenced within the pleading, even though it contained seven exhibits that Defendant produced that it had designated as "Confidential." *Id.* Plaintiff's counsel asserted that he filed the un-redacted documents because he began experiencing several computer issues and was unable to file the documents with redactions. *Id.* The Court found that Plaintiff's counsel willfully violated the stipulated protective order. The Court held that Plaintiff's counsel was more concerned with making the filing deadline than complying with the order. *Id.* at *3. The Court determined that there was no excuse for the conduct of Plaintiff's counsel and therefore sanctions were warranted. The Court found it appropriate for Plaintiff to be held responsible for the fees that Defendant incurred in fixing the error of Plaintiff's counsel, including fees in bringing the motion for sanctions. Accordingly, the Court granted Defendant's motion for sanctions.

***O'Connor, et al. v. Uber Technologies, Inc.,* 2017 U.S. Dist. LEXIS 141095 (N.D. Cal. Aug. 31, 2017).** Plaintiffs brought two class actions alleging that Defendant misclassified its drivers as independent contractors and thereby failed to pay them business expenses as required by § 2802 of the California Labor Code and failed to remit to drivers the full gratuity paid by customers in violation of § 351 of the California Labor Code. Defendant moved for sanctions against class counsel based on an email solicitation to class members. Defendant argued that the email solicitation reflected an improper use of information covered by the protective order in this matter and included misleading statements in violation of the California Rules of Professional Conduct. The protective order covered "all documents or information . . . which, in good faith, [the] designating Party . . . believes could place it at a competitive disadvantage if disclosed to anyone other than the receiving Party's counsel of record in this litigation because such documents or information contain commercially sensitive information, proprietary information, or trade secrets, the disclosure of which is likely to cause irreparable harm or significant injury to the competitive position of the designating Party." *Id.* at *6. Class counsel subsequently sent an email to 240,000 class members indicating that they were part of the on-going litigation, and that Defendant was fighting to decertify the class and compel arbitration. Class counsel described how to continue to pursue individual claims with their law firm in the event that the Court enforced Defendant's arbitration clause or decertified the class. *Id.* at *10-12. The Court found that the protective order explicitly stated that designated material may only be used "for purposes that are specifically related to the conduct of this litigation." *Id.* at *18. The Court stated that, on its face, class counsel's email did not comply with this limitation. The Court noted that had class counsel simply advised class members about the pending appeal and its potential impact on this case and on their rights, class counsel would have been well within the scope of the protective order. However, the Court determined that class counsel attempted to solicit class members as clients in separate arbitration proceedings that would be initiated outside of this litigation. *Id.* at *19. Accordingly, the Court found that class counsel violated the protective order by using the protected class list to solicit retainer agreements for individual arbitration proceedings outside of this litigation (in the event the class was decertified). *Id.* at *20. Further, the Court concluded that the email was misleading, as it stated a reasonable reader could infer that "only drivers who sign up" with class counsel would recover any money. *Id.* at *22. Additionally, the Court noted that contrary to what class counsel's email suggested, class members were not obligated to "sign up now" to "stay a part of our case." *Id.* at *23. Defendant requested that class counsel be disqualified, and the Court stated that although it would not disqualify class counsel at this time, it would not allow the violation to go uncorrected. The Court held that the sanction most appropriate to these circumstances is that which most directly addresses the harm the violation caused\. Accordingly, the Court directed class counsel to issue corrective notice to the class, pending approval by the Court.

***Pickles, et al. v. Kate Spade & Co.,* Case No. 15-CV-5329 (N.D. Cal. May 2, 2017).** Plaintiffs, a group of consumers, filed a class action alleging that Defendant's representations in outlet stores deceived reasonable consumers into believing they were purchasing merchandise at a significant savings, when in fact they were receiving inferior products at an inflated price. During discovery, Plaintiffs' counsel failed to take the requisite

Rule 30(b)(6) deposition necessary for filing a motion for class certification by the Court's deadline. The Court ordered Plaintiffs' counsel to show cause as to why they did not conduct the necessary deposition. Plaintiffs' counsel asserted that they did not realize the certification filing date was impending. At the hearing on Plaintiffs' response to the Court's order to show cause, the Court found Plaintiffs' counsel failed to prosecute the case diligently. The Court ordered Plaintiffs' counsel to pay: (i) defense counsels' fees and costs incurred in opposing Plaintiff's *ex parte* motion, including the time and expense incurred in traveling to and attending the order to show cause hearing; and (ii) $500 to the Court.

***Robinson, et al. v. The Chef's Warehouse,* 2017 U.S. Dist. LEXIS 93339 (N.D. Cal. June 16, 2017).** In this class action in which Plaintiffs alleged wage & hour violations, Defendant filed a motion for sanctions pursuant to Rule 30(d)(2) against Plaintiffs' counsel, Michael Hoffman ("Hoffman"), for his conduct at the deposition of the named Plaintiff Sharon Robinson. *Id.* at *3. The Court imposed monetary sanctions on Hoffman, but declined to preclude him from taking further depositions in the case based upon his co-counsel's representations that Hoffman was the only counsel at his firm capable of taking deposition. *Id.* at *4. The Court ordered that all depositions conducted or defended by Hoffman take place at the Oakland Courthouse where courthouse security would be present. *Id.* The day after the hearing, and after a media source published an article about the Court's order, defense counsel received a threatening anonymous voice-mail. *Id.* Defendant brought a motion to reconsider the Court's decision to permit Hoffman to take and defend depositions in the matter. *Id.* at *5. At the hearing, Defendant introduced newly discovered evidence including: (i) the threatening voice-mail left for defense counsel; (ii) evidence of Hoffman's prior misconduct, including incidents of sexual battery; and (iii) evidence that Hoffman's co-counsel were competent to take and defend depositions in this matter. *Id.* at *7. The Court granted Defendant's motion and precluded Hoffman from taking, defending, or being present at any depositions in this lawsuit. *Id.* at *32. The Court also referred Hoffman to the State Bar of California's Committee on Professional Responsibility and Conduct and ordered Hoffman to pay $9,487.50 in sanctions to Defendant. *Id.*

***Rockman Co. (USA), Inc., et al. v. Nong Shim Co*., 229 F. Supp. 3d 1109 (N.D. Cal. 2017).** In this class action, Plaintiffs filed a motion for sanctions against Defendants Nongshim and Ottogi for the alleged spoliation of evidence following the inception of an investigation in June 2008 by the Korean Fair Trade Commission ("KFTC") into allegations of price-fixing in the Korean Ramen Noodle market. Defendants opposed the motion, arguing that an obligation to preserve documents relevant to the antitrust claims arose only after the inception of the litigation in 2013, and that, if any documents were destroyed, that destruction occurred without any intent on the part of Defendants to deny Plaintiffs access to them in litigation. *Id.* at 1111. The Court determined that, although Nongshim and Ottogi may have had a duty not to interfere with or impede the KFTC's investigation, assuming the scope of that investigation was known by Defendants and that investigation imposed an affirmative duty to preserve evidence relevant to that investigation (matters that were very much in dispute), that duty ran to the KFTC and did not translate into a duty to preserve evidence that could be enforced through an award of sanctions by a Court in the United States. *Id.* at 1112. The KFTC conducted an on-site investigation at Nongshim. Plaintiffs alleged that Nongshim had adequate notice that price-fixing was the focus of the KFTC investigation in June 2008 and that Nongshim, therefore, was on notice of the government's investigation into price collusion in the ramen market. *Id.* at 1113. Plaintiffs asserted that the document preservation policy in place at Nongshim in June 2008 required retention of KFTC-related documents for 10 years, but Defendants did not begin preserving documents until 2013. Plaintiffs sought a range of sanctions against Nongshim and Ottogi, including: (i) terminating sanctions (striking the answers of Defendants and entering default); or (ii) monetary sanctions to compensate Plaintiffs for costs that Plaintiffs incurred because of the alleged spoliation. *Id.* at 1122. The Court found that the main issue was whether a duty to preserve information enforceable by Plaintiffs arose when the KFTC started its investigation in Korea. Defendants did not dispute that documents relevant to the antitrust theories asserted by Plaintiffs were destroyed in 2008. Thereafter, however, Defendants argued they were under no obligation to preserve those documents until the first lawsuit was filed in the United States. *Id.* The Court found that Plaintiffs cited no authority that would impose a duty of preservation on Defendants enforceable by a Court in the United States when a foreign government agency investigates alleged price collusion in its own domestic market and no complaints or lawsuits have been filed in the United States. *Id.* at 1123. Further, Plaintiffs failed to identify any authority that would allow Plaintiffs to move for sanctions in lawsuits pending in the United States based on Defendants' alleged violation of duties under Korean law to preserve

documents in light of a government investigation in Korea. The Court concluded that there was no litigation initiated by the government, and no evidence of complaints from potential litigants in the United States regarding the eventually challenged conduct. *Id.* at 1125. Accordingly, the Court denied Plaintiffs' motion for sanctions.

***Royal Park Investments, et al. v. U.S. Bank N.A*., 2017 U.S. Dist. LEXIS 173427 (S.D.N.Y. Oct. 19, 2017).** In this class action, Defendant moved pursuant to Rule 37(b) to preclude Plaintiff from introducing proof of damages as a sanction for failing to comply with a discovery order. Defendant also sought an order precluding Plaintiff from serving as a class representative. Defendant argued that Plaintiff's claims should be dismissed because it failed to produce documents (the "assignor documents") within the possession of entities (the "assignors") from which Plaintiff had taken assignment of the claims it asserts arising out of Defendant's obligations as trustee in connection with trust certificates (the "certificates") consisting of residential mortgage backed securities that the assignors transferred to Plaintiff. *Id.* at *2-3. Plaintiff opposed the motion and sought an award of the attorneys' fees incurred in connection with litigating this dispute. The Court denied both motions. The Court noted that the issue was whether Plaintiff failed to produce information so necessary that Defendant had suffered prejudice warranting preclusion. *Id.* at *3. The Court found that the information gap from the missing documents was not enough to provide a basis for sanctions. The Court stated that it was not apparent how the data for these certificates differed from that available for the others which, according to Defendant's expert Dr. James, was also inconsistent, but which was adequate for him to conduct an analysis. *Id.* at *12-13. The Court found that Plaintiff did appear to have produced final impairment figures through the end of 2008. Further, after 2009, according to the terms of the transfer to Plaintiff, the Court stated that any change in value would be to the benefit or detriment of Plaintiff. *Id.* at *13. Defendant also contended that without additional valuation documents, it could not ascertain the cause for the loss of value of the certificates. The Court held that although Defendant demonstrated a reasonable basis for seeking information about when the certificates lost value, it failed to explain how information exclusively in the possession of Plaintiff or the assignors would shed light on why any such losses occurred. *Id.* at *14. Defendant also contended that many of the documents that Plaintiff produced could not be authenticated. The Court opined that the solution for the problem rested with the Court's application of evidentiary principles at trial, not with the imposition of a preclusion order. Accordingly, the Court denied Defendant's motion for sanctions. The Court also denied Defendant's motion preclude Plaintiff from serving as class representative, and found that even if there were a basis for such relief, it would be inappropriate grant it while a motion for class certification was pending before the Court. *Id.* The Court also denied Plaintiff's request for attorneys' fees on the basis that the production of the assignor documents was incomplete and while there was not a sufficient basis for sanctions, Plaintiff must share the responsibility for the costs generated.

***Toney, et al. v. Quality Resources, Inc.,* 2017 U.S. Dist. LEXIS 103293 (N.D. Ill. July 5, 2017).** Plaintiffs filed an action alleging that Defendant violated the Telephone Consumer Protection Act. Defendant Cheryl Mercuris ("Mercuris") filed a motion for sanctions against Plaintiff, which the Court denied. Mercuris contended that Plaintiff's allegations were not warranted by existing law and lacked evidentiary support, and therefore sanctions were appropriate. *Id.* at *2. The Court found that Mercuris had the prospect of personal liability based on her conduct, as the sole stockholder, chief executive officer, and controller of the activities of Defendant. The Court noted that the key to evaluating a Plaintiff's pleading was whether it stated a "claim for relief" rather than the state law concept of a "cause of action" that necessitated the identification of a theory of recovery. *Id.* at *4. The Court explained that it was not a matter of whether Plaintiff identified a right or wrong theory of recovery, but whether Plaintiff advanced a claim that met the "plausibility" requirement. *Id.* at *4-5. The Court stated that Plaintiff's allegations clearly met that standard. Mercuris asserted that that the Florida statutes relied on by Plaintiff applied only to dissolved corporations, while Defendant had not been dissolved. The Court determined that although Mercuris was correct, Defendant was stripped of all assets when Mercuris shut it down and terminated all of its employees without notice. *Id.* at *5. The Court therefore opined that the challenged counts could stay in place until it is determined whether or not the Florida case law authorities have recognized *de facto* corporate dissolutions in that context. *Id.* The Court held that Plaintiff's claim for relief based on the substantive allegations in the complaint readily qualified in terms of plausibility and therefore could result in the imposition of individual liability on the part of Mercuris. Accordingly, the Court denied the motion for sanctions.

***Wick, et al. v. Twilio Inc.,* 2017 U.S. Dist. LEXIS 25724 (W.D. Wash. Feb. 23, 2017).** Plaintiff, a consumer, brought a class action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") and other Washington statutes by employing certain marketing practices. Plaintiff saw an advertisement for a free sample of a nutritional supplement. Plaintiff followed the link to the website of the supplier and entered his contact information but then discovered no free samples remained. *Id.* at *2. Plaintiff subsequently received a phone call and a text message encouraging him to divulge his credit card information and complete a transaction. The Court dismissed the complaint and found that Plaintiff had consented to receive calls and messages related to customer service. *Id.* The Court reasoned that knowingly giving one's phone number to another provided express consent for that party to call with messages that do not amount to advertisement or telemarketing. *Id.* at *3. Plaintiff filed a second amended complaint two weeks after the dismissal. Defendant moved for sanctions under Rule 11 and argued that the complaint was frivolous because it added no relevant facts to the dismissed complaint and advanced the same legal theory. Plaintiff's response to Defendant's motion included a request for attorneys' fees should he prevail on the Rule 11 motion. Plaintiff asserted that no clear authority foreclosed his new complaint and that the changes reflected in the second amended complaint were well-grounded in existing law, or the good faith extension of the law. *Id.* at *4. The Court determined that Plaintiff's second amended complaint made allegations that differed in material ways from the dismissed complaint. For instance, the Court noted that Plaintiff added allegations that the call and text message were intended to encourage Plaintiff to purchase a product. Plaintiff also alleged that the free sample was part of an auto-ship program by which the recipient's credit card is authorized to be charged a fee every month until cancelled by the recipient. *Id.* The Court found that regardless of whether the new facts would change the result of a motion to dismiss, it could not conclude the second amended complaint was legally or factually unsupportable. *Id.* at *5. Defendant argued that sanctions were appropriate because the additional facts and information in the amended complaint were irrelevant and the claims were materially identical to those in the other complaints. However, the Court noted that Plaintiff offered two declarations by academic figures in support of the opposition to sanctions. The Court was therefore satisfied that Plaintiff's amended complaint went through a sufficiently rigorous inquiry to avoid Rule 11 sanctions. *Id.* at *6. Accordingly, the Court denied Defendant's motion for sanctions. Plaintiff sought attorneys' fees as the prevailing party in the event the Court denied the motion. *Id.* at *7. The Court held that in light of the limited use of Rule 11, the availability of other methods for dismissing defective claims, and the new factual material alleged in the amended complaint, it would hold Plaintiff's request for attorneys' fees in abeyance pending the outcome of a motion to dismiss. *Id.* at *7-8.

***Zagami, et al. v. Cellceutix Corp.,* 2017 U.S. Dist. LEXIS 466682 (S.D.N.Y. Mar. 29, 2017).** Plaintiffs, a group of shareholders, filed a class action alleging securities fraud. Defendant filed a motion to dismiss, which the Court granted. Shortly thereafter Defendant moved for mandatory review under the Private Securities Litigation Reform Act ("PSLRA"), and sought a finding that the lawsuit amounted to abusive litigation and requested that the Court impose sanctions pursuant to Rule 11. The Court denied Defendants' motion for sanctions. *Id. at* *30. A short seller of Defendant's stock posted an article entitled the "Mako Research Report" on the internet that contended that Defendant was a sham company and purported to identify and explain the falsity of Defendant' representations and omissions of material fact in Defendant's public statements about its proposed drug products. *Id.* at *3. A few hours after the "Mako Research Report" was posted, Plaintiffs' counsel issued an "Equity Alert" news release, which stated that the named Plaintiff in this action authorized the filing of a securities class action complaint that day, but no complaint was in fact filed that day. Plaintiffs' counsel ultimately filed a class action complaint against Defendant that alleged violations of the Securities Exchange Act and relied heavily on the "Mako Research Report." The Court granted Defendant's motion to dismiss for failure to state a claim, and ruled that Defendant's statements in its public disclosures were appropriate and correct. With respect to Defendant's subsequent motion for sanctions, the Court denied the motion on the grounds that Plaintiffs' claims did not amount to abusive litigation. The Court ruled that the conduct of Plaintiffs' counsel was not unreasonable in bringing the claims and that the solicitation of purchasers of Defendant's securities, standing alone, did not render the litigation abusive. *Id.* at *38. Accordingly, the Court denied Defendant's motions for sanctions.

(liv) Service Awards And Costs In Class Actions

***Bailes, et al. v. Lineage Logistics, LLC*, 2017 U.S. Dist. LEXIS 86180 (D. Kan. June 6, 2017).** Plaintiff brought a class action asserting that Defendant violated the Fair Credit Reporting Act ("FCRA"). The parties

settled the matter for a total of $149,205, including: (i) attorneys' fees and costs of $49,237; (ii) settlement administrator costs of $16,500; (iii) a $5,000 incentive award for the named Plaintiff; and (iv) $78,468 to be divided equally among the 2,931 class members. *Id.* at *2. The parties filed a joint motion for preliminary settlement approval. The Court denied the motion, finding that Plaintiff provided insufficient information for approval. The Court found two characteristics of Plaintiff's proposed incentive award presented substantial concerns about the overall fairness of the proposed settlement. *Id.* at *7. The Court determined that under the proposed settlement, Plaintiff's total recovery was about 185 times greater than the recovery of the class members, represented 3.35% of the total cost of the settlement, and almost 6% of the $83,568 to be paid to Plaintiff and the class members. *Id.* The Court found that an incentive award of this dimension threatened the overall fairness of the proposed settlement. The Court noted that it apprised counsel of its concern at a fairness hearing. Plaintiff's counsel responded by representing that Plaintiff had served as a closely involved class representative, calling about once every other week to check on the case's progress. *Id.* at *8. However, the Court found that the evidence submitted did not persuade it that Plaintiff should receive nearly 6% of the total settlement devoted to class recovery. *Id.* at *9. The Court further stated that a settlement agreement that requires it to award Plaintiff a $5,000 incentive award could not be a fair, reasonable, and adequate settlement. *Id.* at *10. The Court determined that it does not mean it would approve no incentive award, but not one of the magnitude requested. The Court held that if the parties decided to reformulate the proposed settlement to make any incentive award discretionary, it would consider granting an award that comported with applicable case law precedent. *Id.* at *11. Accordingly, the Court denied the parties' motion for preliminary settlement approval.

***Gundrum, et al. v. Cleveland Integrity Services,* 2017 U.S. Dist. LEXIS 130255 (N.D. Okla. Aug. 16, 2017).** Plaintiffs, a group of pipeline inspectors, filed a collective action alleging that Defendant violated the FLSA by failing to pay overtime compensation for hours worked over 40 in a workweek. The parties ultimately settled the matter and filed a motion for preliminary settlement approval. The Court granted the motion and preliminarily approved the settlement. The settlement agreement provided for $4.5 million to be paid by Defendant. *Id.* at *4. Additionally, Defendant agreed to pay: (i) service awards of $20,000 to each of the two named Plaintiffs; (ii) service awards of $2,500 to each of five individuals who had consented in writing to participate as Plaintiffs in this case ("Opt-In Plaintiffs"); (iii) attorneys' fees of up to one-third of the settlement amount; (iv) reimbursement of costs to class counsel, anticipated not to exceed $25,000; (v) payment for the settlement administrator's services; and (vi) Defendant's share of payroll taxes applicable to any amount of the funds attributable to wages. *Id.* In analyzing the motion for settlement approval, the Court found that a *bona fide* dispute existed. *Id.* at *8. The Court stated that Plaintiffs contended that Defendant's practice of paying its pipeline inspectors a day rate without paying overtime compensation violated the FLSA and contended they have strong arguments for conditional certification of a collective action and Rule 23 class action. Defendant argued that its compensation practices complied with the FLSA and asserted several defenses that it contended would partially or entirely defeat Plaintiffs' claims. The Court held that the parties' positions on these issues indicate that a *bona fide* dispute existed between the parties, each of which faced substantial risk if the litigation were to proceed. *Id.* at *9. The Court also found that the settlement agreement provided substantial benefits to class members and suggested a reasonable compromise was made given the risks to both sides. *Id.* at *10. The negotiation efforts and the experience of Plaintiffs' counsel also led the Court to determine that the settlement agreement was fair and adequate. *Id.* at *11. The Court noted that the service awards of $20,000 each to be paid to named Plaintiffs were substantially higher than service awards in many other FLSA settlements. *Id.* However, the Court found that Plaintiffs agreed to grant broader general releases to Defendant in addition to releasing their claims under the FLSA. Plaintiffs' motion detailed the efforts Plaintiffs made to assist counsel in the litigation and the personal risk incurred as to their employment prospects by participating as representatives in this case. *Id.* Plaintiffs also represented that they have been unable to find work in the pipeline inspection industry, in which Plaintiffs believed hiring was largely based on word of mouth and reputation. *Id.* at *11-12. Therefore, the Court held that Plaintiffs demonstrated that they undertook personal risks by representing the proposed collective action members in this case. *Id.* at *12. Accordingly, the Court determined that the service awards appeared to fall within reasonable bounds. The Court also opined that the proposed attorneys' fees in the settlement agreement satisfied the requirements for preliminary approval. Accordingly, the Court found that the settlement agreement was fair, reasonable, and adequate, and granted preliminary approval.

***Melito, et al. v. American Eagle Outfitters, Inc.*, 2017 U.S. Dist. LEXIS 146343 (S.D.N.Y. Sept. 11, 2017).** Plaintiffs filed a class action alleging that Defendants violated the Telephone Consumer Protection Act ("TCPA"). The parties ultimately settled the matter and filed a motion for preliminary settlement approval. The Court conditionally certified a settlement class, preliminarily approved the class action settlement, approved the notice plan, and scheduled a final approval hearing. The Court subsequently granted final settlement approval. The proposed settlement consisted of a $14.5 million common fund for: (i) settlement class members' claims; (ii) settlement administration expenses of approximately $665,580.46; (iii) incentive awards to the four class representatives in the amount of $10,000 each; (iv) attorneys' fees in the amount of $4,832,850 (which approximated 33% of the settlement fund); and (v) costs in the amount of $110,732.71. *Id.* at *4-5. The Court found that the settlement was fair and reasonable. However, the Court declined to grant $10,000 service awards to the four class representatives. Plaintiffs argued that the award of $10,000 to each of the four class representatives was warranted on the basis that the representatives "thoroughly responded to multiple sets of written discovery and sat for depositions, requiring them to set aside work and personal obligations (and in some cases requiring them to travel out-of-state)." *Id.* at *42. Plaintiffs also asserted that the representatives "were willing and able to prosecute this case by assisting with the drafting of the complaints, providing information regarding their interactions with AEO, responding to written discovery, sitting for depositions, and testifying at trial." *Id.* at *43. The Court noted that although other final approval orders may have awarded $10,000 in service awards to class representatives, an award of $10,000 to each representative in this case would be excessive, particularly in light of the fact that the settlement resulted in a pay-out of only approximately $232 to each class member. *Id.* To the extent that the class representatives incurred any expenses in furtherance of this litigation, the Court stated that is would not be opposed to reimbursing those expenses. However, the Court found that Plaintiffs had not provided any documentation of the class representatives' expenses. In addition, Plaintiffs had neither provided documentation of the time or effort that each representative expended in furtherance of this case nor identified any personal risks or burdens incurred by the representatives. *Id.* Plaintiffs offered that each class representative searched for and produced documents, assisted in the preparation of interrogatory responses concerning their claims, and provided seven to eight hours of deposition testimony. *Id.* at *44. Based on these facts, the Court concluded that an incentive award of $2,500 to each of the class representatives – which represented a recovery of more than 10 times what class members received and reflected ample compensation for the limited time they invested – was fair and reasonable. *Id.* The Court also granted attorneys' fees of 30% of the settlement amount and awarded costs. Accordingly, the Court granted Plaintiffs' motion for final settlement approval with reductions to the requested service awards.

(lv) Settlement Administration Issues In Class Actions

***Claimant Id. 100212278, et al. v. BP Exploration & Products, Inc.*, 2017 U.S. App. LEXIS 2380 (5th Cir. Feb. 9, 2017).** In this case, Plaintiff challenged Defendant's obligations under the Deepwater Horizon economic and property damages settlement agreement. Plaintiff, an automotive parts provider, sought to obtain compensation under the settlement agreement as a tourism business. The Court Supervised Settlement Program ("CSSP") and the Appeal Panel determined that Plaintiff's stores were not a tourism businesses and denied the claims for failure to satisfy the causation requirement. Exhibit 2 to the parties' settlement agreement listed 41 North American Industry Classification System codes ("NAICS codes") identifying various categories of businesses that qualified as tourism businesses. *Id.* at *3. Plaintiff claimed that it fell under NAICS code 452990 ("All Other General Merchandise Stores"), which was listed in Exhibit 2. *Id.* The CSSP determined that Plaintiff's stores were not tourism businesses and that the appropriate NAICS code for each of the stores was 441310 (Automotive Parts and Accessories Stores), a code not listed in Exhibit 2. *Id.* at *4. The Appeal Panel affirmed the CSSP's determination. The Appeal Panel noted that the store in question advertised itself as an auto-parts store and that it did not fit the NAICS definition of "All Other General Merchandise Stores" because its auto parts line of products predominated over other product lines. *Id.* at *4-5. Plaintiff appealed the decision of the Appeal Panel to the District Court, which denied discretionary review. Plaintiff then appealed to the Fifth Circuit. Plaintiff asserted that it was engaged in "accommodating or catering to the needs or wants of persons traveling to, or staying in, places outside their home community." *Id.* at *7. Plaintiff relied on two pieces of evidence. First, Plaintiff's website displayed a list of automotive products that drivers should consider replacing before long trips. Second, Plaintiff's stores carried storage and cargo equipment primarily used by vacationers. Defendant contended that the Appeal Panel correctly determined there was insufficient evidence to show that any of the specific stores in question qualified as a tourism business. *Id.* at *8. The Fifth Circuit stated that none of

Plaintiff's stores offered evidence regarding its actual sales of cargo equipment or sales of products on the website's list and none offered evidence of sales to non-local customers as contemplated by the settlement agreement. The Appeal Panel had expressly considered the possibility that although the stores were not located in tourist areas, they might incidentally serve some tourists while pursuing their primary business as sellers of automotive parts and accessories. Notwithstanding this possibility, it determined that the totality of the circumstances did not show the stores to be tourism businesses. The Fifth Circuit found that Plaintiff failed to demonstrated that the Appeal Panel's conclusion was an abuse of discretion. The Fifth Circuit also explained that Plaintiff did not dispute that its stores advertised themselves as auto-parts stores. Moreover, the Fifth Circuit concluded that the settlement agreement directed that "the NAICS code shown on an Entity Claimant's 2010 tax return" should be considered in determining the appropriate NAICS code, and Plaintiff used code 441310 on its 2010 tax return. *Id.* at *9. The Fifth Circuit ruled that Plaintiff itself stated on appeal that it was an automotive parts provider. Thus, the Fifth Circuit determined that it was not an abuse of discretion to classify the stores under NAICS code 441310 as automotive parts and accessories stores. Accordingly, the Fifth Circuit affirmed the Appeal Panel's decision that Plaintiff was not a tourist business, and not entitled to any settlement proceeds from the class action settlement.

***In Re Deepwater Horizon Lake Eugenie Land & Development*, 858 F.3d 298 (5th Cir. 2017).** Following a settlement of class actions that provided a mechanism for presenting and processing claims for business losses caused by the April 2010 Deepwater Horizon disaster in the Gulf of Mexico, the Fifth Circuit affirmed the District Court's ruling that the settlement agreement did not require those submitting claims for certain business losses to provide evidence of causation. The District Court approved a policy adopted by the claims administrator ("Policy 495") to administer the claims. Policy 495 consisted of five methodologies pursuant to which the claims administrator is to calculate claimant compensation, including one annual variable margin methodology ("AVMM") and four industry-specific methodologies ("ISMs"). Class counsel challenged all five. The Fifth Circuit affirmed the District Court's decision as to the AVMM and reversed as to the ISMs. The settlement agreement reimbursed claimants for economic losses related to the BP oil spill. The settlement agreement grants each claimant the right to choose his or her compensation period, so long as it consists of three or more consecutive months between May and December 2010. The compensation period constituted the post-spill period, which was then subtracted from the same pre-spill period, in order to deduce the damages owed. The AVMM required the claims administrator to match all unmatched profit and loss statements. This means that prior to calculating damages, the claims administrator must ensure that costs are registered in the same month as corresponding revenue, regardless of when those costs were incurred. The Fifth Circuit found that class counsel had not presented evidence sufficient to find that the District Court's approval of the AVMM constituted clear error. *Id.* at 302. The Fifth Circuit stated that settlement agreement granted each claimant the right to choose his or her compensation period, and if claims administrator was permitted to remove revenue from the compensation period, and spread it throughout the non-compensation months, the claimant's choice no longer mattered. *Id.* at 303. The Fifth Circuit determined that was not the agreement that the parties entered into and it declined to re-write the Settlement agreement under the guise of contractual interpretation. *Id.* at 304. However, the Fifth Circuit found that ISMs infringe upon the right of claimants to choose their compensation period The Fifth Circuit explained that the ISMs required the claims administrator to move or otherwise reallocate revenue in violation of the settlement agreement. *Id.* Accordingly, the Fifth Circuit affirmed in part and reversed in part the District Court's decision and remanded for further proceedings.

***Van, et al. v. Ford Motor Co.,* Case No. 14-CV-8708 (N.D. Ill. Oct. 18, 2017).** Plaintiffs, a group of employees, filed a class action alleging that Defendant subjected them to sexual harassment, gender, and race discrimination in violation of Title VII of the Civil Rights Act. During the pendency of the case, the EEOC began investigating discrimination and harassment charges against Defendant. The EEOC and Defendant then participated in a conciliation and entered into a conciliation agreement. Defendant subsequently filed a motion to deny class certification, arguing that the conciliation agreement mooted much of the relief that Plaintiffs sought. *Id.* at 2. Plaintiffs filed an emergency motion to stay the publication of the notices from the conciliation agreement between the EEOC and Defendant. The Court noted that the issuance of a stay requires fulfillment of the same requirements as a preliminary injunction, and therefore Plaintiffs must show that: (i) they have some likelihood of success on the merits; (ii) there is no adequate remedy at law; and (iii) they will suffer irreparable harm if they Court denies the request. *Id.* The Court acknowledged the seriousness of the allegations at issues,

but stated that Plaintiffs failed to show that they met the requirements for injunctive relief. *Id.* at 2-3. Accordingly, the Court denied Plaintiffs' motion.

(lvi) Settlement Approval Issues In Class Actions

***Caligiuri, et al. v. Symantec Corp.,* 2017 U.S. App. LEXIS 7538 (8th Cir. April 28, 2017).** Plaintiffs, a group of consumers, brought a class action alleging that Defendant failed to disclose that consumers could use various free alternatives to re-download their computer software. The parties reached a settlement and filed a motion for preliminary settlement approval. The District Court approved the motion. Plaintiffs appealed the District Court's order, and on appeal, the Eighth Circuit upheld the decision of the District Court. The settlement agreement provided that Defendant would pay $60 million into a total settlement fund. *Id.* at *4. Class members who submitted an approved claim form would receive reimbursement from the net settlement fund, which consisted of the total settlement fund after subtracting attorneys' fees and expenses, administrative costs, and any amount of service awards per named Plaintiff. *Id.* at *4-5. If any funds remained after distribution to approved claimants, the remaining funds would be distributed *cy pres* to the Electronic Frontier Foundation, a non-profit digital rights group. *Id.* at *5. The District Court preliminarily approved the settlement and appointed a settlement administrator. In addition, class counsel filed a motion for attorneys' fees, expenses, and service awards. *Id.* at *6. Class counsel requested an award of attorneys' fees of one-third of the total settlement fund, or $20 million, as well as reimbursement for $738,605.19 in litigation expenses. *Id.* at *7. Class counsels' motion also requested service awards of $10,000 to each of the two named Plaintiffs. Two objectors contended that the District Court could not have determined the fairness, reasonableness, and adequacy of the settlement without knowing the exact settlement amounts. The Eighth Circuit stated that even though exact amounts were not submitted to the District Court, estimates were submitted, and as such, the District Court was entitled to rely on the estimates provided by the settlement administrator when deciding whether to approve the settlement, and there was no indication that the District Court failed to consider that information. *Id.* at *9. Further, the Eighth Circuit found that there was no requirement for the District Court to know the final amount received by the class before approving a settlement. *Id.* The Eighth Circuit noted that, according to class counsel, each approved claimant would receive approximately $49.82 per purchase, an amount still well in excess of what each claimant paid. *Id.* at *11. The objectors also argued that the District Court abused its discretion by calculating attorneys' fees based on the total settlement fund because that fund included administrative costs, which did not constitute a benefit to the class. *Id.* at *11-12. The objectors also contended that the total amount of the fee award was unreasonable. The Eighth Circuit disagreed and stated that the District Court did not err in concluding that the circumstances of this case justified a large award. The Eighth Circuit also found that the District Court verified the reasonableness of the award by cross-checking it against the lodestar method and found that the fees were well within the range of reasonableness. *Id.* at *14. The objectors also argued that the District Court abused its discretion by failing to ensure that the *cy pres* recipient would utilize any remaining funds to benefit the class. The Eighth Circuit explained that it does not require *cy pres* recipients to use funds for the direct benefit of the class. Rather, *cy pres* distributions simply "must be for the next best use for indirect class benefit, and for uses consistent with the nature of the underlying action and with the judicial function." *Id.* at *15. Finally, the objectors argued that the District Court abused its discretion in awarding service awards of $10,000 to each named Plaintiff because the awards were excessive and unfair to the class. The Eighth Circuit determined that District Courts regularly had granted service awards of $10,000 or greater. *Id.* at *17. The Eighth Circuit noted that named Plaintiffs "participated in interviews, assisted with discovery, were deposed, participated in conferences, and met with attorneys throughout the litigation process that lasted five years." *Id.* at *18. Further, the Eighth Circuit opined that their efforts "resulted in a settlement that will benefit all class members." *Id.* Accordingly, the Eighth Circuit held that the District Court did not err in granting the parties' motion for settlement agreement.

***Demarco, et al. v. Avalonbay Communities,* Case No. 16-CV-628 (D.N.J. Mar. 13, 2017).** Plaintiffs, a group of apartment residents, filed a class action seeking to recover damages resulting from a fire at Defendant's apartment complex. The parties ultimately settled the matter and Plaintiffs filed a motion for preliminary settlement approval and class certification for settlement purposes. *Id.* at 2. Counsel representing different Plaintiffs in a related state court action filed a motion asserting objections to the relief being sought. The Court rejected counsel's objections and granted Plaintiffs' motion. Counsel argued that the claims resolution process was insufficient and failed to redress the injuries suffered by the potential class members. *Id.* at 3. The Court disagreed, finding that potential class members were not required to be a part of the settlement because they

had to the option to be excluded for any reason. *Id.* at 4. Counsel further argued that approval of the class action for settlement purposes would prejudice the rights of Plaintiffs who were currently prosecuting individual lawsuits in state court because they had, in effect, already prospectively opted-out of the proposed class action. *Id.* The Court rejected this argument, stating that there was nothing prejudicial about requiring an individual to send a notice requesting to opt-out of the class action. Counsel also argued that Plaintiffs failed to meet the numerosity requirement. The Court again disagreed, finding the it was purely speculative as to how many Plaintiffs would opt-out of the class action. *Id.* at 5. Finally, counsel objected to the opt-out procedures and objections. The Court rejected this position on the grounds that the procedures were neither onerous or unusual. *Id.* at 7. Accordingly, the Court granted Plaintiffs' motion to preliminary certify the matter as a class action for settlement purposes.

Elder, et al. v. Hilton Worldwide Holdings, Inc., **Case No. 16-CV-278 (N.D. Cal. Oct. 10, 2017).** Plaintiff, a timeshare owner, brought a class action alleging that Defendant provided 10,000 prospective timeshare customers with vouchers it refused to accept at certain properties. Plaintiff alleged that he agreed to participate in Defendant's timeshare presentation on the promise of a future deeply-discounted stay at one of Defendant's hotels, but when he tried to use his voucher, he was told his certificate was valid only for a stay at certain properties. The parties subsequently settled the matter and Plaintiff filed a motion for preliminary approval of the settlement. The Court stated that it needed additional briefing to consider the motion. Because the settlement did not compensate the class in cash, but rather in new vouchers, the Court determined that it did not have enough information regarding the amount of recovery that class members would receive. *Id.* at 1. The Court held that Plaintiff should state the amount of money he believed a jury would have awarded had he prevailed at trial and the monetary value of the coupon settlement, given that: (i) the coupons could not be used as cash; and (ii) some class members would not use the coupons. *Id.* at 2. The Court further stated that Plaintiff must include a justification for compensating class members with new vouchers instead of money. The Court opined that as Plaintiff's complaint alleged that many class members suffered out-of-pocket damages by spending money they would not have otherwise spent based on Defendant's allegedly misleading representations, a coupon settlement would not remedy those injuries. *Id.* The Court also determined that Plaintiff must explain why the new certificates are still only applicable at certain properties for a limited period, despite Plaintiff's claims that the original vouchers were misleading. Accordingly, the Court ordered Plaintiff to providing additional briefing regarding his proposed settlement agreement.

Haar, et al. v. Dairy Farmers Of America, Inc., **2017 U.S. App. LEXIS 6561 (2d Cir. April 18, 2017).** Several Plaintiffs in this antitrust class action appealed the District Court's order granting settlement approval. Plaintiffs were class representatives of one sub-class and opposed the settlement, arguing that class counsel colluded with Defendants, that class members had been coerced into supporting the settlement, and that the case should proceed to trial. *Id.* at *2-3. Upon review of the record, the Second Circuit affirmed, finding no error in the District Court's decision to approve the class action settlement. With respect to Plaintiffs' claim of collusion, the Second Circuit found that counsel's willingness to negotiate in good faith toward a settlement with Defendants did not amount to collusion. *Id.* at *3. The Second Circuit stated that the District Court conducted a lengthy hearing reviewing the attorneys' conduct of negotiations and found that there was no evidence of impropriety. The Second Circuit explained that a District Court's findings of fact in connection with a settlement agreement in a class action lawsuit must be accepted unless they are clearly erroneous. *Id.* The Second Circuit reviewed the record and found no reason to overrule the District Court's finding. Plaintiffs further argued that Defendants use of representatives, to whom its farms sold their milk, to solicit the letters of support for the settlement was coercion. The Second Circuit opined that the tactic could be questionable, but even if the letters favoring the settlement were disregarded, there was clear evidence of substantial class member support for the settlement. *Id.* Further, the Second Circuit determined that the District Court's analysis of the terms of the settlement, which included substantial equitable remedies, was a reasonable compromise of the case, based on experienced counsel's reasonable conclusion that the benefits of the settlement, taken against the risks of proceeding to trial, outweighed the chances of obtaining a better result by litigating the case to conclusion. *Id.* at *4. The Second Circuit stated that by their nature, settlements are compromises that do not provide either side with all that they might have hoped to obtain in litigation. *Id.* As a result, the Second Circuit concluded that the order of settlement approval was well within the considerable discretion accorded to District Courts in reviewing class settlements. *Id.* at *5. Accordingly, the Second Circuit affirmed the District Court's order granting settlement approval.

***Hillson, et al. v. Kelly Services, Inc.*, 2017 U.S. Dist. LEXIS 8699 (E.D. Mich. Jan. 20, 2017).** Plaintiffs, a group of applicants for employment, filed a putative class action against Defendant alleging violations of the Fair Credit Reporting Act ("FCRA"). Plaintiffs allege that when they applied for employment, Defendant gave them a background check disclosure form indicating that Defendant would run a consumer report on them to assess their employability that included additional information in violation of the FCRA's requirement that the disclosure be in a stand-alone document. After discovery, the parties agreed to a class-wide settlement. Plaintiffs filed a motion to preliminarily certify the class for settlement purposes and approve the proposed settlement agreement. Defendant did not oppose Plaintiffs' motion. The Court granted Plaintiffs' motion to preliminarily certify the class and approve the proposed settlement. Plaintiffs alleged that there were 220,000 individuals who received the disclosure form when they applied for jobs with Defendant. The class was divided into two groups, including those who received favorable ratings from the background search and those who received unfavorable ratings. The proposed terms of the settlement agreement were that Defendant would create a settlement fund of $6,749,000. The agreement included incentive awards for the named Plaintiffs of $2,500 and potential class members who received an unfavorable rating would receive about $41 and those who received a favorable rating would receive about $14. Plaintiffs proposed that up to 33% of the settlement fund – approximately $2,250,000 – would go to Plaintiffs' attorneys' fees, which the Court found was is in the "ballpark" of a reasonable award. *Id.* at *7. However, the Court indicated that Plaintiffs should address in their fee motion why the loadstar method should not be utilized because the settlement was based upon an alleged statutory violation. The Court preliminarily found that the settlement was reached in a procedurally fair manner because the history of the case indicated non-collusive negotiation as the parties engaged in discovery as well as two mediation sessions before retired federal judges. The Court also found after a review of the case that the settlement was reached in a substantively fair manner because even assuming success at trial, the award at trial would be around $100 per class member. The Court noted that the inclusion of the waiver and disclaimer might have been inconsistent with the language of the stand-alone disclosure requirement as Plaintiff had alleged. However, it was also arguable that it was consistent with the purpose of that provision. Further at trial Plaintiff would have to show a willful violation of the FCRA. Accordingly, the Court preliminarily found the proposed settlement was fair. The Court also ruled that Plaintiffs met the certification requirements for Rule 23 purposes. However, the Court expressed concern as to whether Plaintiffs suffered a "concrete" injury because Plaintiffs did not claim that they did not understand the disclosure and acknowledged that they suffered no actual damages based upon the wording of Defendant's forms. However, the Court refused to fully weigh in on this issue as Defendant's did not object and the Court found that Plaintiffs did suffer at least a modicum of a risk of harm. Accordingly, the Court preliminarily certified the class for purposes of settlement.

***Hillson, et al. v. Kelly Services, Inc.,* 2017 U.S. Dist. LEXIS 127717 (E.D. Mich. Aug. 11, 2017).** Plaintiffs, a class of applicants for temporary employment, entered into a settlement agreement with Defendant based upon allegations that Defendant violated the stand-alone disclosure provisions of the Fair Credit Reporting Act. ("FCRA"). *Id.* at *2. The parties reached a settlement agreement that the Court preliminarily approved, without addressing three of the key fairness factors. *Id.* at *4. Plaintiffs petitioned the Court for attorneys' fees and representative service payments and the Court addressed the three fairness factors, and granted final approval of the settlement agreement. *Id.* at *5. The Court found that the reaction of the class members to the proposed settlement indicated that the settlement was fair, but it adjusted the attorneys' fees and class representative payments to satisfy the fairness factors, and certified the class for purposes of settlement. *Id.* at *5, 22. The Court determined that it would award attorneys' fees from the common fund. *Id.* at *7. The Court determined that the percentage-of-recovery approach was the proper common-fund method for establishing fees. *Id.* at *7. The Court considered various factors in determining that the percentage of the fund was a reasonable award, including: (i) the results counsel achieved for the class; (ii) the risks that counsel bore; and (iii) the quality of counsel's work considering the complexity of the case. *Id.* at *9. The Court found that the results that counsel achieved for the class were good, as the gross recovery was in line with the average per-class-member recovery in other settlements of stand-alone disclosure claims. *Id.* Second, Plaintiffs' counsel took on considerable, but not extraordinary, risks in the case, such as facing challenges in establishing that Defendant willfully violated the FCRA, as well as putting 950 hours into litigation and incurring $40,000 in costs. *Id.* at *11. The Court noted that the quality of work of Plaintiffs' counsel in this case was high, but the case was not very complex. *Id.* at *11. The Court found that the percentage-of-recovery awarded in other cases was critical and focused on case law from the Ninth Circuit where 25% of the fund is considered a benchmark. *Id.* at *12, 13.

The Court ruled that 25% of the settlement fund was a good starting point for what was reasonable, and then considered the collective weight of the percentage-of-recovery factors. However, the Court reasoned that because the case was not too complex, a slightly lower percentage-of-recovery was warranted. The Court ruled that the results in this case were good, class counsel undertook considerable risk in prosecuting the case, and the quality of counsel's representation was high. The Court determined that these factors suggested that a higher percentage-of-recovery would be appropriate. The Court opined that consideration of these factors suggested that counsel's request of attorneys' fees award of 25% of the settlement fund, or $1,687,250, was reasonable. *Id.* at *14. However, when the Court employed a lodestar cross-check of $370,000, it suggested that the amount requested was too high. *Id.* The amount requested resulted in a multiplier of approximately 4.56 and 25% of the settlement fund, which would mean counsel would receive over four-and-a-half times their hourly rate. *Id.* at *15. The Court ruled that a multiplier of 4 would adequately account for the risk counsel took in the case and while counsel achieved good results for the class, a multiplier higher than 4 would be reserved for exceptionally good results. *Id.* at *16. Accordingly, the Court awarded Plaintiffs' counsel the sum of $1,454,206.52 in attorneys' fees. *Id.* at *16. Plaintiffs also requested that the Court award each of the named Plaintiffs the sum of $2,500 as service awards. *Id.* at *18. The Court expressed concern regarding the size of the service awards, because had the class representatives brought their own individual lawsuits, it would have yielded them $100, and as compared to other class members' recovery, the amount requested as service awards was too high. *Id.* at *21. Accordingly, the Court awarded the representative Plaintiffs the sum of $1,200 each for their services in this case. *Id.* at *22.

***In Re Target Corp. Customer Data Security Breach Litigation,* 2017 U.S. App. LEXIS 1767 (8th Cir. Feb. 1, 2017).** Plaintiffs, a group of retail customers, filed a class action against Defendant after it suffered a security breach that compromised the payment data and personal information of Plaintiffs. The parties settled and the District Court preliminarily certified a settlement class defined as "all persons in the United States whose credit or debit card information was compromised as a result of the data breach." *Id.* at *3. The District Court preliminarily approved the parties' proposed settlement agreement that included a $10 million settlement fund for the class. Under the agreement, class members with documented losses were compensated from the fund first, and the remaining balance was to be distributed equally among class members with undocumented losses. Class members who suffered no loss received nothing. Between the preliminary and final orders certifying the class, Lief Olsen, a class member, objected to the settlement, alleging inadequate compensation and excessive attorneys' fees. Olsen was one of the members of the class who could show no loss. Olsen objected before final settlement approval order on the basis that the class should not be certified because it failed to satisfy Rule 23(a). Olsen argued that there was an intra-class conflict because no named Plaintiff was a member of the sub-class that could show no monetary loss. The District Court overruled Olsen's objection and issued an order approving final certification of the settlement in an order stating "…the Court certified a settlement class in the preliminary approval order, and will not revisit that determination here." *Id.* at *10. On Olsen's appeal, the Eighth Circuit held that the District Court abused its discretion in failing to "rigorously analyze" that certification was proper after Olsen raised challenges to the certification. The Eighth Circuit noted that the District Court should have addressed Olson's objections and determined whether an intra-class conflict existed and whether it prevented the class representatives from "fairly and adequately protecting the interests of all the class members." *Id.* at *10. Because the District Court did not conduct a meaningful analysis of class certification, the Eighth Circuit remanded back to the District Court with instructions to conduct a rigorous analysis of Rule 23(a) certification prerequisites. The District Court also imposed a $49,156 appeal bond under Rule 7 of the Federal Rules of Appellate Procedure, which Plaintiffs also challenged on appeal. Only $2,284 of the bond reflected the direct costs of appeal and the remaining $46, 872 was to cover the "financial harm the class will suffer as a result of the delay caused by the appeal". *Id.* at *10. Defendants asserted that Rule 7 does allow appeal bonds to include delay-based administrative costs. Plaintiffs argued that such costs could not be included because no applicable statute or federal rule allows for recovery of such costs. Considering this as a matter of first impression, the Eighth Circuit agreed with Plaintiffs and held that the "costs on appeal" for Rule 7 purposes include only those costs that the prevailing party can recover under a specific rule or statute. Accordingly, the Eighth Circuit reversed and remanded for the District Court to reduce the Rule 7 bond to reflect only the costs that Defendants could recover should they succeed in any issues on appeal.

***In Re Uber FCRA Litigation,* 2017 U.S. Dist. LEXIS 101552 (N.D. Cal. June 29, 2017).** Plaintiffs in these consolidated cases brought putative class actions alleging that they were denied employment or were terminated on the basis of information contained in background checks that Uber procured in violation of the Fair Credit Reporting Act ("FCRA") and related state laws. The parties settled the matter and Plaintiff filed a motion for preliminary approval of the settlement agreement. The Court granted the motion. In exchange for Plaintiffs' release of claims, Uber agreed to pay $7.5 million into a settlement fund, to be used to pay class members who submit timely claim forms. *Id.* at *5. The settlement class was defined as "all persons who were subject to a background check and/or consumer report request by Uber before January 3, 2015." *Id.* at *6. According to Uber, there were 1,025,954 potential class members. *Id.* The Court determined that the settlement class met the requirements for class certification under Rule 23. Numerosity was plainly met with over 1,000,000 potential class members. Because all members of the putative class were, by definition, subject to Uber's background checks, and because Plaintiffs alleged that Uber systematically failed to comply with the FCRA's notification requirements, all class members suffered the same deprivation of their rights under the statute and thus commonality was also met. *Id.* at *10-11. The Court further found that Plaintiffs met the typicality requirement, as the claims of the named Plaintiffs were the same as those brought on behalf of the class as a whole. The was also no evidence of any conflicts of interest between the named Plaintiffs and their counsel and the rest of the class, and the adequacy requirement was therefore met. The Court held that predominance was satisfied because all of Plaintiffs' claims arose from allegations of Uber's systemic practices and policies, and accordingly, liability could be determined on a class-wide basis. *Id.* at *13. The Court determined that a class action was superior to other methods for adjudicating the controversy, since individual actions would involve relatively small claims for damages, and thus "would prove uneconomic for potential Plaintiffs," since "litigation costs would dwarf potential recovery." *Id.* The Court found that the settlement amount was a significant discount from the possible recovery in the case. If Plaintiffs proved willful violations at trial with over 1 million class members, Uber's liability on the FCRA claims would be between $100 million and $1 billion. However, the Court determined that there were substantial risks involved in proceeding with litigation that weighed in favor of a significant discount, including: (i) 40% of the class members were subject to arbitration provisions that the Ninth Circuit had held to be enforceable; and (ii) Plaintiffs explained that discovery has revealed their case to be significantly weaker than they had believed at the outset of the litigation, since Uber had generally complied with its obligations under FCRA. *Id.* at *18-19. In light of these substantial risks and obstacles, and in light of the inevitable expense of litigating a large, complex case through trial, the Court reasoned that a substantial settlement discount was warranted. *Id.* at *22. The Court also found that the parties' settlement was the product of an arm's length negotiation, over the course of several months and included two in-person sessions with a mediator. Accordingly, the Court concluded that the settlement was sufficiently in the range of reasonableness, and it granted the motion for preliminary settlement approval.

***JWD Automotive, Inc., et al. v. DJM Advisory Group, LLC*, 2017 U.S. Dist. LEXIS 104171 (M.D. Fla. July 6, 2017).** Plaintiff brought a putative class action alleging Defendant violated the Telephone Consumer Protection Act ("TCPA") by sending Plaintiff unsolicited commercial advertisements by facsimile machine. Plaintiff alleged that these faxes caused Plaintiff and others to lose paper and toner, occupied their phone lines and fax machines, and violated their privacy interests. The parties agreed to settle and subsequently requested an order preliminarily approving the settlement agreement. Plaintiff also sought leave to amend the settlement agreement to increase the number of potential class members from 359,000 to 488,424. *Id.* at *2. Plaintiff asserted that based on an investigation and an analysis of Defendants' call records, Defendants may have attempted to send faxes to approximately 488,424 unique fax numbers and that this likely resulted in the successful delivery of facsimile advertisements to approximately 359,000 recipients. *Id.* at *3. The Court denied the request to amend the settlement agreement because unlike the 359,000 class members whose statutorily-protected right to be free from intrusive junk faxes was allegedly violated by a successful fax transmission, none of the 130,000 new class members to whom the attempted transmission failed appeared to have suffered any concrete harm, as required to confer Article III standing. *Id.* at *4. The Court also denied the request for preliminary settlement approval. The Court stated that while the settlement agreement defined the class as "[a]ll persons who were sent one or more facsimiles December 21, 2011 to the present" and further stated that "[c]laiming class members shall be paid their *pro rata* share of the Settlement Fund, up to and no more than $500.00 per fax," the proposed proof of claim form did not allow class members who received more than one fax at the same fax number to so indicate. *Id.* at *5. As a result, the Court noted that some class members may be prevented from

recovering their true *pro rata* share of the settlement fund. *Id.* at *5-6. The Court ruled that the parties must amend the agreement to either resolve this discrepancy or explain to the Court why there was, in fact, no discrepancy. *Id.* at *6. With respect to the approximately $1.167 million in attorneys' fees the parties agreed that Plaintiff's counsel could recover, the Court noted that this sum equaled 33.3% of the total $3.5 million settlement fund, and thus exceeded the 20% to 25% "benchmark" that the Eleventh Circuit has recognized as presumptively reasonable. *Id.* at *7. The Court stated that it would not approve an attorneys' fees award of that amount. Accordingly, the Court denied the parties' request to preliminary approve the settlement agreement with prejudice.

***Kaufman, et al. v. American Express Travel Related Services Co., Inc.*, 2017 U.S. App. LEXIS 24698 (7th Cir. Dec. 7, 2017).** Plaintiffs brought a class action against Defendant asserting claims for breach of contract, unjust enrichment, and statutory fraud in regards to Defendant's sale of general-use, prepaid gift cards. Approximately two years after Plaintiffs filed the class action, the parties negotiated a class settlement and sought the District Court's approval of a settlement agreement that would resolve the litigation. Almost seven years later, after multiple amended motions for approval and three rounds of notice to the class, the District Court granted final approval of the settlement. Thereafter, two Interveners ("Interveners") appealed the approval of the settlement. The Seventh Circuit affirmed the District Court's approval of the settlement agreement. *Id.* at *27. The settlement agreement provided that Plaintiffs' attorneys would receive $1,950,000 from the settlement, while class members would receive approximately $1,800,000. *Id.* at *12. On appeal, the Interveners alleged that the District Court erred: (i) by not requiring the filing of briefs in support of the settlement prior to the deadline to object to the settlement; (ii) in determining that Defendant's arbitration appeal posed a risk to the class' success; (iii) in approving the settlement given the breadth of the release; and (iv) in not awarding most, if not all, of the attorneys' fees to the Interveners' counsel. The Seventh Circuit rejected the Interveners' arguments. First, it held that there is no requirement for the filing of briefs in support of a settlement agreement. *Id.* at *15. Second, the Seventh Circuit found that the District Court did not abuse its discretion in concluding that a pending appeal concerning an arbitration provision was a significant potential bar to the success of the class claims in this action. *Id.* at *20. Third, the Seventh Circuit held that the release language in the settlement agreement was not overly broad, as Interveners had argued, since there was no admissible evidence that additional purported claims existed, and further, that the total size of the class was unknown. *Id.* at *22-23. Fourth, noting that the District Court had dealt with the parties and their counsel for nearly seven years, the Seventh Circuit opined that the District Court was in the best position to determine which parties and attorneys had contributed to the settlement and in what proportions, and therefore the District Court did not abuse its discretion. *Id.* at *26. Accordingly, while acknowledging that the District Court "did not approve a perfect settlement," the Seventh Circuit held that the District Court did not abuse its discretion, and therefore it affirmed the District Court's approval of the settlement. *Id.* at *27.

***Lucas, et al. v. Vee Pak, Inc.*, 2017 U.S. Dist. LEXIS 209872 (N.D. Ill. Dec. 20, 2017).** Plaintiffs, a group of African-American laborers, brought a putative class action against four companies alleging race discrimination in hiring and job placements in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The Defendants including Vee Pak, a manufacturing facility, and three temporary services providers who supplied laborers to Vee Pak, including Alternative Staffing, Inc. ("ASI"), Staffing Network, Inc., and MVP Staffing. After discovery, Plaintiffs reached a settlement with ASI, and moved for preliminary approval of their proposed partial class action settlement and for certification of the proposed ASI settlement class. The Court amended the proposed class definition and granted preliminary certification to the ASI class settlement. However, noting that because Plaintiffs did not provide sufficient information about the settlement agreement's proposed plan of allocation, the Court was unable to rule on the motion for preliminary approval; as a result, it directed Plaintiffs to supplement their motion. First, the Court analyzed the ASI class definition, which included the term "otherwise eligible to work at Vee Pak," but did not define or set forth the criteria for determining eligibility to work at Vee Pak. *Id.* at *12. The Court opined that because the proposed class definition did not define or explain the meaning of "otherwise eligible," it failed to identify "a particular group" that was harmed, and was therefore too vague to be ascertainable. *Id.* at *13. Accordingly, the Court amended the class definition to eliminate the "otherwise eligible" term. *Id.* at *14. Second, the Court held that the numerosity requirement was satisfied since there were approximately 2,000 individuals in the ASI class. *Id.* at *15. Third, the Court found that Plaintiffs' allegation that ASI engaged in a discriminatory practice of steering African-American laborers away from Vee

Pak assignments because of their race satisfied the commonality requirement. *Id.* at *16. Fourth, the Court held that the typicality requirement was met since the claims of the class representatives for the ASI class and the class members' claims were based on the same legal theory, *i.e.,* race discrimination in violation of § 1981. *Id.* at *19. Fifth, the Court found that the adequacy requirement was satisfied since there was no evidence of a conflict between the class representative for the ASI class and the class members' interests. *Id.* at *21. Relative to the Rule 23(b)(3) requirements, the Court held that Plaintiffs satisfied the predominance requirement by alleging a company-wide practice by ASI that affected all class members — steering African-American laborers away from Vee Pak assignments — due to their race. *Id.* at *22. The Court also held that the superiority requirement was satisfied since the ASI class members' claims involved the same alleged standardized practice by ASI, and because Plaintiffs estimated there could be approximately 2,000 class members. *Id.* at *23. Accordingly, the Court found that the amended ASI class definition met the Rule 23 requirements for certification, and it preliminarily certified the ASI class. *Id.* at *24. As to the motion for preliminary approval of the settlement, the Court opined that the settlement agreement provided very little information regarding the allocation of settlement funds. *Id.* at *40. Further, the Court noted that the settlement agreement did not explain the expected terms of the "plan for distribution of the funds." *Id.* at *40-41. The Court noted that it could not determine what information, if any, a class member would be required to provide on the claim form, whether a substantive review of that information would take place, and what such a review would entail. *Id.* at *41. As such, the Court held that while all other factors weighed in favor of preliminary approval, the lack of information regarding the claims process and the plan of allocation prevented the Court from assessing whether the proceeds of the settlement agreement would be allocated fairly among class members. *Id.* at *44. Accordingly, the Court amended the proposed class definition and granted preliminary certification of the ASI class, and directed Plaintiffs to supplement their motion for settlement approval on allocation issues. *Id.* at *49.

***Matera, et al. v. Google, Inc.,* 2017 U.S. Dist. LEXIS 37370 (N.D. Cal. Mar. 15, 2017).** Plaintiff brought a class action alleging that Defendant violated the Electronic Communications Privacy Act (the "Wiretap Act") and California's Invasion of Privacy Act ("CIPA") in its operation of Gmail by intentionally intercepting emails in order to create user profiles that provided targeted advertising. Plaintiff alleged that Defendant's terms of service ("TOS") and privacy policy made no mention of such practice, and thus Defendant failed to legally obtain the consent of Gmail users to these practices. *Id.* at *2. The parties subsequently reached a settlement. Plaintiff filed a motion for preliminary settlement approval, which the Court denied. The Court found that the parties' class action settlement for which they sought preliminary approval failed to require Defendant to amend its TOS or privacy policy to disclose the necessary information. The settlement provided for an injunction, a release of class claims, and a request for $2.2 million in attorneys' fees. *Id.* at *3. The Court determined that the proposed injunctive relief notice was difficult to understand and did not clearly disclose the fact that Defendant intercepted, scanned, and analyzed the content of emails sent by non-Gmail users to Gmail users for the purpose of creating user profiles of the Gmail users to create targeted advertising for the Gmail users. *Id.* at *4. Moreover, the Court stated that the notice did not clearly disclose the technical changes the settlement required. At the preliminary approval hearing, the parties explained that the injunction would prohibit Defendant from scanning in transit email for the sole purpose of collecting advertising data, but would allow Defendant to scan incoming in transit email for the "dual purpose" of: (i) detecting spam and malware; and (ii) obtaining information that would be "later used for advertising purposes." *Id.* at *5. However, the Court held that the "dual purpose" was not clearly disclosed in the notice to class members. *Id.* at *6. Accordingly, the Court denied Plaintiffs' motion for preliminary approval. The Court found that the notice to class members, which was the only form of disclosure that class members would receive under the settlement, was inadequate.

(lvii) Settlement Enforcement Issues In Class Actions

***Gascho, et al. v. Global Fitness Holdings, LLC*, 2017 U.S. App. LEXIS 22881 (6th Cir. Nov. 16, 2017).** Plaintiffs, a group of gym members, filed a class action alleging that Defendant misrepresented the terms of its gym memberships. The parties ultimately settled the litigation and Defendant agreed to pay: (i) $1.3 million to the class members, (ii) class counsels' fees; and (iii) the claims administrator's fees and costs. *Id.* at *2. Some of the class members objected to the settlement. After a fairness hearing, the District Court approved the agreement and ordered the parties to implement its terms. However, several objectors appealed. After a subsequent appeal to the Sixth Circuit and after filing a writ of *certiorari* to the Supreme Court, Defendant was nearly broke. The payment owed to class members had been placed in escrow under the terms of the

settlement agreement, but no provisions had been made for the fees for class counsel and the claims administrator. *Id.* at *3. Defendant notified the District Court it was out of money and could not meet its remaining obligations under the agreement. *Id.* Plaintiffs requested that the District Court hold Defendant in civil contempt. The District Court did so and ordered Defendant to pay the full amount owed to class counsel and the claims administrator, as well as statutory interest. *Id.* at *3-4. On appeal, the Sixth Circuit reversed the District Court's ruling. The Sixth Circuit stated that it was undisputed that Defendant violated a definite and specific order of the District Court by failing to pay class counsel and the claims administrator. *Id.* at *5. The Sixth Circuit determined that the question therefore was when the District Court's order to pay class counsel and the claims administrator became definite and specific. The settlement agreement provided that Defendant's obligation to pay would not become effective until the agreement was "fully and finally affirmed by the highest court" from which any party sought review. *Id.* The Sixth Circuit reasoned that while the District Court's command was specific – that Defendant had to pay – it was not definite because the timing of the payments depended on whether either party appealed. *Id.* at *6. Since the objecting class members did appeal to both the Sixth Circuit and to the U.S. Supreme Court, the decision only became final on March 21, 2017, after the time to request a rehearing expired. Accordingly, the Sixth Circuit held that until the order was "fully and finally affirmed," it was not definite, and it remained possible that attorneys' fees could be reduced or the order reversed altogether. *Id.* at *7. The Sixth Circuit thereby found that Defendant did not knowingly violate a clear and specific command of the District Court until Defendant's relevant payment obligations under the order became effective on March 21, 2017, and the District Court erred in considering any of Defendant's conduct from before that date. *Id.* at *7. As such, the Sixth Circuit reversed and remanded so the District Court could consider whether the evidence after March 21, 2017 was sufficient to support a contempt finding. *Id*.

***Trustees Of The Operating Engineers Pension Trust, et al. v. Smith-Emery Co*., 2017 U.S. Dist. LEXIS 8276 (C.D. Cal. Jan. 19, 2017).** Plaintiffs initiated a class action to collect trust fund contributions from Defendant under the ERISA. The parties ultimately settled the matter and signed a memorandum of understanding ("MOU") that provided the following: (i) a $1.6 million total settlement amount; (ii) 5% interest on the settlement amount; (iii) a 10-year payment period; (iv) an audit period between April 2015 through September 30, 2016, for testing and inspection on post-installed anchor bolt, clerical errors, and other items "consistent w/ 2010-2015 audit;" (v) a 90-day period to cure with interest on the principal to continue to accrue during any cure period; and (vi) monthly payment terms including 120 total payments at $16,970.48 per month. *Id.* at *4-5. After Defendant allegedly breached, Plaintiffs filed a motion for enforcement of the settlement and for entry of judgment. Plaintiffs argued that the MOU was an enforceable settlement agreement and requested the Court to enforce the MOU according to its terms, find that Defendant had breached the MOU by failing to make monthly payments, and enter judgment according to the stipulated judgment amounts in the MOU. *Id.* at *11. In response, Defendant argued that the MOU was unenforceable because it was uncertain or silent as to the material terms. Specifically, Defendant argued that the MOU did not include: (i) an explanation of the process surrounding any audit of Defendant's payments during the period from April 2015 to September 30, 2016, and the dispute resolution process that would govern the audit; (ii) the terms of a release; and (iii) a confidentiality provision. *Id.* at *12. The Court found that the MOU provided for an audit of Defendant's trust payments during the period between April 2015 to September 30, 2016, "consistent with the 2010-2015 audit." *Id.* at *14. The Court ruled that the term was sufficiently unambiguous to render the MOU enforceable. *Id.* at *15. Defendant also argued that the MOU lacked any release provisions and therefore was unenforceable. In response, Plaintiffs argued that "[b]y virtue of stipulating to judgments, one is agreeing to a release upon satisfaction of each judgment." *Id.* at *15-16. The Court agreed and held that a release of the claims that were or could have been asserted in both actions was implicit in the terms of the MOU. Defendant further argued that "still another absent material term is the degree of confidentiality of the alleged settlement." *Id.* at *18. However, the Court found that Defendant cited no authority for its contention that a confidentiality term is always a material term to a settlement agreement or that the parties must agree on confidentiality in order to settle an action. The Court ruled that Defendant's preference for confidentiality did not make the MOU's terms unenforceable and that a confidentiality provision was not so necessary as to render the settlement agreement a nullity. *Id.* at *19. Ultimately, the Court concluded that the MOU contained provisions for a total settlement amount, a payment schedule, and an implicit release of all claims upon payment of the total settlement amount, and Defendant did not demonstrate that the parties objectively manifested a desire for further negotiations regarding omitted and

material terms. *Id.* Accordingly, the Court concluded that the MOU was enforceable and granted Plaintiffs' motion for enforcement of the settlement.

(lviii) Special Masters In Class Actions

***Arkansas Teacher Retirement System, et al. v. State Street Bank & Trust Co.*, 2017 U.S. Dist. LEXIS 66660 (D. Mass. May 2, 2017).** The Court appointed a Special Master in this class action pursuant to Rule 53. Among other things, the Special Master was directed to investigate the accuracy and reliability of the representations made by Plaintiffs' counsel in their successful request for an award of more than $75 million in attorneys' fees and expenses, the reasonableness of the award, and whether the award should be reduced. *Id.* at *5-6. The Court authorized the Special Master to retain other individuals and organizations to assist him. The Special Master retained William Sinnott as his counsel. After the Special Master spoke and corresponded with Plaintiffs' counsel, Sinnott engaged John Toothman to assist the Special Master and him in the performance of their duties because of Toothman's experience in matters concerning the reasonableness of attorneys' fees in class actions. *Id.* at *6. Three of the eight firms that represented class members objected to the retention of Toothman. The Special Master denied their objection. The objecting counsel appealed the decision, and the Court upheld the Special Master's decision denying the objection. The Court found that the Special Master did not make an error of fact or law in retaining Toothman. *Id.* at *7. The Court noted that the Special Master wrote that "Toothman will be generally responsible for providing consulting services to assist the Special Master and his counsel in fulfilling [their] duties." *Id.* at *11. The Special Master further characterized Toothman's services as "akin to that of a technical advisor retained to educate and guide the Special Master and his counsel." *Id.* at *12. The Court noted that it gave the Special Master the discretion to "retain any firm, organization, or individual he deems necessary to assist him in the performance of his duties." *Id.* at *14. The Court found that the Special Master did not abuse his discretion in deciding that employing Toothman would help his counsel and him "perform [their] assigned duties fairly and efficiently." *Id.* at *14-15. More specifically, the Court concluded that the Special Master properly determined that Toothman was eligible to perform his defined and limited functions because his prior experience and the opinions he expressed as an expert witness did not manifest a disqualifying bias. The Court noted that the Special Master reasonably concluded that an individual with experience and specialized knowledge would be valuable in organizing the investigation and analyzing voluminous evidence and therefore would contribute to the informed and efficient discharge of the Special Master's duties. *Id.* at *16. The Court stated that the Special Master correctly concluded that Toothman was qualified to serve in that capacity. Accordingly, the Court denied the objection to the Special Master's decision.

***J.F., et al. v. Abbott Laboratories*, 2017 U.S. Dist. LEXIS 52098 (S.D. Ill. April 5, 2017).** Plaintiffs in this matter were a group of minors suing in multi-district class actions. The Court appointed a Special Master pursuant to Rule 53. The Court held that the Special Master's initial duties would be to evaluate the parties' objections to deposition designations and make recommendations and reports to the Court on these objections. *Id.* at *9. The Court also stated that it also reserved the right to expand the Special Master's duties to include: (i) evaluating any motions *in limine* and providing the Court with formal and informal recommended rulings on those motions; (ii) evaluating any other motions the parties may file, and providing the Court with formal and informal recommended rulings on those motions; (iii) providing periodic status reports to the Court; (v) making formal or informal recommendations and reports to the parties; (v) making recommendations and reports to the Court, regarding any matter pertinent to these duties; (vi) communicating and meeting with the parties and attorneys as needs may arise in order to permit the full and efficient performance of these duties; and (vi) employing staff as may be necessary to assist the Special Master in performing his duties. *Id.* at *10. The Court also stated that the Special Master may have any of the following additional duties: (i) assist with preparation for attorney conferences (including formulating agendas), court scheduling, and case management; (ii) assist with legal analysis of the parties' motions or other submissions, whether made before, during, or after trials, and make recommended findings of fact and conclusions of law; (iii) assist with responses to media inquiries: (iv) direct, supervise, monitor, and report upon implementation and compliance with the Court's orders, and make findings and recommendations on remedial action if required; (v) interpret any agreements reached by the parties; (vi) propose structures and strategies for attorneys' fee issues and fee settlement negotiations, review fee applications, and evaluate the parties' individual claims for fees; (vii) administer, allocate, and distribute funds and other relief, as may become necessary; (viii) adjudicate eligibility and entitlement to funds and other relief; and (ix) monitor compliance with structural injunctions. *Id.* at *11. The Court stated that the parties must

make readily available to the Special Master any and all individuals, information, documents, materials, programs, files, databases, services, facilities and premises under their control, which the Special Master may require to perform his duties. *Id.* at*16. Additionally, the Court ordered that all parties must make readily available to the Special Master any and all facilities, files, databases, computer programs and documents necessary to fulfill the Special Master's functions. *Id.* at *17. Accordingly, the Court appointed a Special Master to the case pursuant to Rule 53.

***In Re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices And Products Liability Litigation*, Case No. 16-MD-2738 (D.N.J. Sept. 11, 2017).** In this multi-district litigation, the Court appointed a Special Master pursuant to Rule 53. The Court ordered that the Special Master should proceed with all reasonable diligence to resolve discovery disputes. The Court further stated that the Special Master should maintain a record of the evidence considered in making or recommending findings or fact on the basis of the evidence. *Id.* at 2. The Court stated that the Special Master may communicate *ex parte* with the Court at his discretion, could not communicate *ex parte* with any attorney on substantive matters without providing notice and giving the other party the opportunity to object. *Id.* Further, a record must be kept of all *ex parte* communications. *Id.* at 3. Any objections to reports or orders filed by the Special Master must be filed within 14 days of the order. The Court held that it would review the findings of the Special Master according to the standards set forth in Rule 53(f)(3). *Id.* The Court stated that the Special Master will receive $700 per hour for his service. *Id.* at 3-4. The Court also ordered that any submissions related to any discovery motion authorized by the Special Master would be submitted directly to him in email format. *Id.* at 4. Further, the Court ordered that the Special Master would able to conduct informal procedures for resolving discovery disputes, including in-person or telephone conferences, meet and confers, submission of letters rather than briefs, or any other chosen method. *Id.* at 5. Accordingly, the Court appointed a Special Master pursuant to Rule 53.

***In Re National Football League Players' Concussion Injury Litigation*, Case No. 12-MD-2323 (E.D. Pa. Sept. 14, 2017).** 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 appointed Professor William Rubenstein as a special master to assist with complex issues relating to attorneys' fees. *Id.* at 1. Several parties requested: (i) clarification of the expert's role; (ii) argued against the appointment of a special master or for delay in the appointment; (iii) suggested alternative experts; and/or (iv) raised questions about Professor Rubenstein's potential conflicts. *Id.* The Court noted that there were three fee issues currently for review, and requested that Professor Rubenstein provide his expert opinion on: (i) whether the Court had the authority to and should order a cap on the percentage that any class member would be obligated to pay his attorney and if so, what that cap should be and how it should be implemented; and (ii) the reasonableness of requiring class members to contribute a portion of their recoveries to a common benefit fund, whether 5% was an appropriate portion, and whether the process will result in counsel being over-compensated. *Id.* at 2. The Court stated that it would decide the reasonableness of class counsels' fee request for $112.5 million based on the special master's report. *Id.* Accordingly, the Court appointed Professor Rubenstein as a special master on attorneys' fees.

***Williams, et al. v. BASF Catalysts*, 2017 U.S. Dist. LEXIS 154772 (D.N.J. Sept. 21, 2017).** Plaintiffs alleged that Defendants and their attorneys conspired to prevent thousands of litigants who claimed injuries due to asbestos exposure from attaining fair tort recoveries. Plaintiffs alleged that BASF's predecessor, Engelhard Corp. ("Engelhard"), with the help of its attorneys, destroyed or hid tests and reports that documented the presence of asbestos in Engelhard's talc. *Id.* at *3-4. The Court determined that the assistance of a Special Master in the case was necessary because the action involved very voluminous and complex issues of discovery. The Court stated that it was particularly necessary in this case because of the Court's findings regarding the potential waiver of the attorney-client privilege as it pertained to the underlying asbestos actions and the thousands of files related thereto, which might require individual analysis by the Court. *Id.* at *5. The Court ultimately appointed retired Justice Roberto A. Rivera-Soto as Special Master. *Id.* at *6. Defendants objected to the appointment of Special Master Rivera-Soto. Defendants asserted that Special Master Rivera-Soto could not serve as Special Master in this case because he was once a partner at Fox Rothschild LLP, one of the law firms representing Plaintiffs (the "Fox Rothschild objection"). *Id.* Additionally, Defendants pointed to the fact that Special Master Rivera-Soto's current law firm, Ballard Spahr, LLP, was being represented by

Williams & Connolly, LLP in an unrelated matter in Pennsylvania (the "Williams & Connolly objection"). Accordingly, Defendants believed that Special Master Rivera-Soto's involvement was inappropriate due to his conflicts of interest. *Id.* at *7. Special Master Rivera-Soto replied to Defendants' objections and noted that the Fox Rothschild objection carried no weight, since his last involvement with the firm was 13 years ago. *Id.* Special Master Rivera-Soto explained that, during his tenure with the Supreme Court of New Jersey, he had recused himself from all Fox Rothschild cases. *Id.* As to the Williams & Connolly objection, Special Master Rivera-Soto first noted that the law firm of Williams & Connolly did not appear on his conflicts search because the law firm was not listed on the docket sheet. Special Master Rivera-Soto also stated that he was unaware that Ballard Spahr had retained Williams & Connolly to represent it until it was brought to his attention and that he had no involvement in the Pennsylvania action. *Id.* at *7-8. Special Master Rivera-Soto, therefore, asserted that there was no conflict and his impartiality would not be impacted. *Id.* at *8. The Court rejected both of Defendants' objections to the appointment of Special Master Rivera-Soto. As to the Fox Rothschild objection, the Court found that the period of time that had lapsed since Special Master Rivera-Soto had any involvement with Fox Rothschild was more than sufficient to assure impartiality and negate any appearance of impropriety. *Id.* at *9. The Court was also unpersuaded by the Williams & Connolly objection, especially because Williams & Connolly's representation of Ballard Spahr had ceased. The Court held that Williams & Connolly's representation of Ballard Spahr had no impact or relation to its representation of Defendants in this action. Ballard Spahr had no interactions with any of the parties in this case, nor would the firm's interest be materially adverse to the parties herein. *Id.* at *10. Accordingly, the Court found that Special Master Rivera-Soto had no conflict of interest that would prohibit him from serving as an impartial and effective Special Master.

(lix) Standing Issues In Class Actions

***A.D., et al. v. Kevin Washburn*, 2017 U.S. Dist. LEXIS 38060 (D. Ariz. Mar. 16, 2017).** Plaintiffs, a group of children of Indian decent and pre-adoptive foster parents of non-Indian decent, filed a putative class action alleging that parts of the Indian Child Welfare Act ("ICWA") violated the U.S. Constitution and federal law, by requiring state courts to treat Indian children differently than non-Indian children in state child-custody proceedings. Plaintiffs filed a seven count complaint alleging various violations of the U.S. Constitution, including, among other things, equal protection and substantive due process violations. Plaintiffs sought declaratory and injunctive relief. *Id.* at *5. The ICWA was enacted in response to an increasing number of adoptions of Indian children by non-Indian families and was intended to promote the "best interests of Indian children" and establish minimum federal standards for the removal of Indian children from their families and encouraged placement of such children in foster or adoptive homes that reflected the Indian culture. *Id.* at *6. The ICWA included provisions to transfer cases from state to tribal court when Indian children or parents were involved, contained higher standards of proof for removal of children of Indian decent and terminating their parent's rights, and placed preferences on placement with foster parents of Indian decent. *Id.* at *17-27. Defendant moved to dismiss Plaintiffs' complaint for lack of Article III standing. *Id.* at *14. The Court dismissed all counts of the complaint, ruling that Plaintiffs lacked standing as they failed to allege facts showing that Plaintiffs suffered any concrete and particularized injury, actual or imminent, that was traceable to the ICWA. *Id.* at *31. The Court noted that Plaintiffs must assert a particularized injury as opposed to a hypothetical concern. The Court noted that legal questions that Plaintiffs were seeking to adjudicate would be remediable in state court once a child or interested adult was in fact injured. *Id.* at *32-33. Accordingly, the Court dismissed the complaint for lack of standing.

***Attias, et al. v. First Care*, 865 F.3d 620 (D.C. Cir. 2017).** Plaintiffs brought an action alleging that Defendant violated numerous state laws by failing to safeguard the personal information of approximately 1.1 million policyholders following a data breach in May 2015. *Id.* at *623. The District Court granted Defendant's motion to dismiss on the grounds that, absent facts demonstrating a substantial risk that stolen data had been or would be misused in a harmful manner, merely having personal information stolen in a data breach was insufficient to establish standing. *Id.* On appeal, the D. C. Circuit reversed and remanded, finding that the District Court gave the complaint an unduly narrow reading. The District Court did not read the complaint to allege the theft of social security numbers or credit card numbers and ruled that "Plaintiffs have not suggested, let alone demonstrated, how the hackers could steal their identities without access to their social security or credit card numbers." *Id.* at *625. The District Court found missing the requirement that Plaintiffs' injury be "actual or imminent." *Id.* The D.C. Circuit opined that the principle question was whether Plaintiffs plausibly alleged a risk of future injury that was

substantial enough to create Article III standing. The D.C. Circuit concluded that Plaintiffs had done so because there was no doubt that identity theft would constitute a concrete and particularized injury. The remaining question, the D.C. Circuit noted, was whether the complaint plausibly alleged that Plaintiffs faced a substantial risk of identity theft as a result of Defendant's alleged negligence in the data breach. The District Court determined that Plaintiffs had not demonstrated a sufficiently substantial risk of future harm stemming from the breach to establish standing, in part, because they had "not suggested, let alone demonstrated, how the hackers could steal their identities without access to their social security or credit card numbers." *Id.* at *626. However, the D.C. Circuit held that the complaint alleged that hackers would have had access to social security and credit card numbers because Defendant collected and stored its customers' personal identification information, personal health information, and other sensitive information ("PII/PHI/sensitive information"). *Id.* at *627. The complaint further stated that the cyber-attack allowed access to personal and sensitive information of Plaintiffs. *Id.* at *627-628. Therefore, the D.C. Circuit found that Plaintiffs, in the complaint, alleged that Defendant collected and stored PII/PHI/sensitive information, a category of information that includes credit card and social security numbers; that PII/PHI/sensitive information was stolen in the breach; and that the data "accessed on Defendant's servers" placed Plaintiffs at a high risk of financial fraud. *Id.* at *628. Next, the D.C. Circuit stated that the alleged injury-in-fact must also be "fairly traceable to the challenged conduct of Defendant." *Id.* at *629. Defendant contended that Plaintiffs' injury was fairly traceable only to the data thief. However, the D.C. Circuit found that Article III standing does not require that Defendant be the most immediate cause, or even a proximate cause, of Plaintiffs' injuries; rather, it requires only that injuries be "fairly traceable" to Defendant. *Id.* The D.C. Circuit assumed, for purposes of the standing analysis, that Plaintiffs would prevail on the merits of their claim that Defendant failed to properly secure their data and thereby subjected them to a substantial risk of identity theft. *Id.* at *630. Accordingly, the D.C. Circuit concluded that their injury-in-fact was fairly traceable to Defendant. The D.C. Circuit therefore reversed the District Court's order dismissing the action for lack of standing and remanded for further proceedings.

***Brinker, et al. v. Normandin's*, 2017 U.S. Dist. LEXIS 61312 (N.D. Cal. April 21, 2017).** Plaintiffs allege that Defendants violated the Telephone Consumer Protection Act ("TCPA") by placing automated calls to Plaintiffs' phones. Defendants moved to dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction The Court granted the motion on the basis that Plaintiffs lacked standing because they failed to allege a concrete injury. Plaintiffs filed a motion for reconsideration, which the Court granted. Following the grant of Defendants' motion to dismiss, the Ninth Circuit issued its opinion in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017). Plaintiffs asserted that *Van Patten* required a finding that Plaintiffs' injuries were sufficiently concrete to confer standing. *Id.* at *3-4. Plaintiff in *Van Patten* received two automated text messages from a gym where he had been a member. He claimed that the messages violated the TCPA. *Id.* at *4. Defendants contended that Van Patten did not establish a concrete injury-in-fact necessary to pursue his TCPA claim in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). *Id.* at *4-5. The Ninth Circuit acknowledged that "Article III standing requires a concrete injury even in the context of a statutory violation" and that a Plaintiff could not "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at *5. Nonetheless, the Ninth Circuit decided that "a violation" –any violation – "of the TCPA is a concrete, *de facto* injury." The Court therefore found that under *Van Patten*, Plaintiffs had alleged sufficient facts to confer standing. Plaintiffs claimed that Defendants placed unsolicited, automated calls to their phones in violation of the TCPA. *Id.* The Court held that after *Van Patten*, Plaintiffs allegations were sufficient to show that they suffered a concrete injury. *Id.* at *5-6. Accordingly, the Court granted Plaintiffs' motion for reconsideration.

***Cole, et al. v. Gene By Gene, Ltd*., 2017 U.S. Dist. LEXIS 101761 (D. Alaska June 30, 2017).** Plaintiff filed a putative class action alleging that Defendant violated the Alaska Genetic Privacy Act when it allegedly disclosed his genetic testing information on a public website. Defendant filed a motion to dismiss, which the Court denied. Plaintiff purchased a DNA testing kit from Defendant's website. After testing, participants could sign up for "projects" or on-line forums run by third-party, independent volunteers called project administrators. *Id.* at *2. Plaintiff signed up for nine projects and understood that the project administrators would have access to his name, contact information, and testing kit number. *Id.* at *2-3. However, Plaintiff alleged that when he signed up for the projects, he was not informed that some project administrators had separate websites, and nor was he informed that his full DNA test results would be disclosed on those sites. *Id.* at *3. Defendant moved to dismiss pursuant to Rule 12(b)(1) on the ground that since Plaintiff only sought statutory damages under the Genetic

Privacy Act, he failed to demonstrate the requisite injury-in-fact for Article III standing. When evaluating whether a statutory violation constitutes an injury-in-fact, the Court stated it that must consider two factors: (i) whether the alleged intangible harm caused by the statutory violation bears a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," and (ii) congressional judgment in establishing the statutory right. *Id.* at *7-8. The Court noted that Alaska's Genetic Privacy Act recognizes an exclusive property interest in one's DNA, and prohibits the unauthorized disclosure of DNA information. The Court found that the statutory entitlements bore a close relationship to the common law torts of conversion of property and invasion of privacy, which have each historically provided a basis for a lawsuit in the American judicial system. *Id.* at *8. Accordingly, the Court determined that Plaintiff's alleged injury was closely related to torts that have been recognized in both federal and Alaska state courts, and therefore met the first factor for standing. As to the second factor regarding congressional judgment, the Court noted that three considerations favored finding that the statute granted persons in Plaintiff's position a right to judicial relief, including: (i) the provision of a private right of action; (ii) the availability of statutory damages; and (iii) the substantive nature of the statutory right. *Id.* at *8-9. The Court found that each of the considerations weighed in favor of Article III standing. First, the Court explained, Alaska's Genetic Privacy Act explicitly granted a private right of action to those aggrieved by a violation of the Act. Second, the Genetic Privacy Act expressly provides for the recovery of statutory damages in addition to any actual damages suffered. Third, the Act creates a property interest in one's DNA and the results of any DNA analysis. The Court opined that by creating such an interest, the Alaska legislature did more than mandate specific procedural requirements; instead, it created a substantive right. Accordingly, the unauthorized disclosure of an individual's DNA constitutes a concrete harm that satisfies the injury-in-fact requirement under Article III. *Id.* at *9. Accordingly, the Court concluded that although Plaintiff's alleged injury may not have resulted in tangible economic or physical harm, the injury was sufficiently "concrete" so as to confer Article III standing. *Id.* Therefore, the Court denied Defendant's motion to dismiss.

***Cowen, et al. v. Larry & Lenny's,* 2017 U.S. Dist. LEXIS 169929 (N.D. Ill. Oct. 12, 2017).** Plaintiffs, a group of consumers, filed a class action alleging that Defendant's labels on its Complete Cookie product provided false and misleading nutritional information in violation of the Illinois Consumer Fraud Act and the Pennsylvania Consumer Protection Law. Plaintiffs also brought claims for breach of express warranty, breach of implied warranty, negligent misrepresentation, intentional misrepresentation, and unjust enrichment. Plaintiffs alleged that Complete Cookies' labels: (i) overstated protein content; (ii) understated the content of calories, carbohydrates, fats, and sugars; (iii) and miscalculated, and therefore overstated, the percent daily value of protein. *Id.* at *3. Defendant filed a motion to dismiss on several grounds, which the Court granted in part. First, Defendant argued that Plaintiffs lacked standing for any variety of the Complete Cookie that they did not purchase. Second, Defendant asserted that Plaintiffs could not maintain a national or multi-state class, and those claims should be denied or stricken. Finally, Defendant argued that Plaintiffs' claims failed to satisfy the particularity requirements of Rule 9(b). Defendant argued that Plaintiffs lacked Article III standing to bring claims for varieties of the Complete Cookie they did not purchase. Plaintiffs asserted that the defense was premature prior to the class certification stage, and Plaintiffs may bring claims for products that are substantially similar to those they did purchase. *Id.* at *6-7. The Court disagreed, finding that "a named Plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named Plaintiffs," because "a person cannot predicate standing on injury which he does not share." *Id.* at *7. Accordingly, the Court dismissed Plaintiffs' claims as to the products they did not purchase. Defendant also argued that Plaintiffs' multi-state and national class claims should be dismissed or stricken because Plaintiffs could not satisfy Rule 23's elements of typicality and predominance. *Id.* at *8-9. The Court noted that two of the three Plaintiffs alleged that they resided in states other than Illinois and that they purchased the Complete Cookie in their home states. *Id.* at *9. Thus, under Illinois choice-of-law rules, the laws of the states where each Plaintiff resided would govern the claims alleged in the complaint. The Court agreed that applying the warranty, unjust enrichment, and misrepresentation laws of 50 different states, or even the five states that comprised the multi-state class, was unmanageable on a class-wide basis because those states' laws conflict in material ways. *Id.* at *11. Accordingly, the Court granted Defendant's motion on these grounds and struck all claims pled on behalf of the multi-state and national classes. *Id.* at *11-12. Defendant also argued that Plaintiffs' complaint should be dismissed for failure to comply with Rule 9(b). Defendant asserted that Plaintiffs' complaint was deficient by only supplying the label of one variation of the Complete Cookie and not

explicitly alleging that the labels for the other variations are the same or sufficiently similar. *Id.* at *12. The Court declined to adopt Defendant's hyper-technical interpretation of Rule 9(b). Accordingly, the Court granted in part and denied in part Defendant's motion to dismiss.

***Eike, et al. v. Allergan, Inc.*, 850 F.3d 315 (7th Cir. 2017).** Plaintiffs brought a putative class action alleging that Defendants packaged and sold eye drops in plastic bottles that produced a drop that was too large for the eye, thereby losing some of the medication and forcing Plaintiffs to spend more money on medication in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") and the Missouri Merchandising Practices Act ("MMPA"). *Id.* at *1. According to an ophthalmologist put forward as an expert for Plaintiffs, any drop larger than an average of 5 to 15 microliters was larger than the capacity of the eye and provided more medication than necessary. Seeking money damages and injunctive relief and proposing seven total classes divided between Illinois and Missouri, Plaintiffs moved for class certification. The District Court granted class certification on the grounds that Plaintiffs satisfied Rule 23 requirements. On appeal, the Seventh Circuit held that Plaintiffs lacked standing and remanded to the District Court to dismiss the claims. Plaintiffs' claim was that Defendants' eye drops were unnecessarily large because each eye drop exceeded 16 microliters (equal to .1% of a tablespoon). Plaintiffs contended that the optimal size of an eye drop for treatment of glaucoma is 16 microliters. Therefore, Plaintiffs sought the difference between the price per drop of the eye drops at their present size, and the presumably lower price if the drops were smaller, multiplied by the number of drops that have been bought by the members of the class; that total constituted the damages the class was seeking. *Id.* at *2-3. Plaintiffs argued that the price of the eye drops was excessive because a smaller drop, costing less to produce and to package, could be sold at a lower price yet still cover the producers' costs, and therefore the only benefit of the larger drop is to the producers' profits. *Id.* at *3. Plaintiffs further alleged that the large eye drops had a higher risk of side effects and were more likely to be used up faster. *Id.* The Seventh Circuit stated that it was essentially tasked to decide a case based on dissatisfaction with a product made by multiple firms or with its price. *Id.* at *4. The Seventh Circuit determined that the only eye drops sold by Defendants for the treatment of glaucoma are larger than 16 microliters. *Id.* at *5. Defendant offered explanations for the size of the drops, including that since each eye drop consisted mostly of inactive ingredients, the active pharmaceutical ingredient that treats the glaucoma was only about 1% of the drop, and only 1% to 7% of the ingredient crossed the cornea into the eye itself. *Id.* at *5-6. Defendant asserted that the amount of fluid the eye can hold without overflowing varies from person to person often exceeded 16 microliters. The smaller the drop, therefore, the weaker its likely therapeutic effect for patients whose eyes could have absorbed a larger drop. In addition, Defendant contended that elderly patients, patients with unsteady hands, and patients who already have serious eye problems often had trouble getting eye drops into their eyes, and the smaller the drop the higher likelihood of missing. *Id.* at *6. The Seventh Circuit opined that Defendants' large eye drops were approved by the Food and Drug Administration ("FDA"), and matters regarding the effectiveness and price must be taken up with the FDA. The Seventh Circuit stated that the District Court can review a determination by the FDA, but it cannot bypass the agency and make its own evaluation of the safety and efficacy of an unconventionally-sized eye drops for treatment of glaucoma. *Id.* at *6-7. The Seventh Circuit found that even supposing a smaller eye drop would be more effective and cheaper than the ones manufactured by Defendant, the class members would still have no cause of action, because a party cannot sue a company simply alleging that a product could be better. *Id.* at*7. The Seventh Circuit reasoned that the fact that a seller does not sell the product that a consumer wants, or at the price a consumer would like to pay, is not an actionable injury. *Id.* The Seventh Circuit therefore determined that Plaintiffs lacked standing, reversed the District Court's decision, and ordered it to dismiss the case for lack of subject-matter jurisdiction.

***Ferrer, et al. v. CareFirst, Inc.*, 2017 U.S. Dist. LEXIS 110304 (D.D.C. July 17, 2017).** Plaintiffs, a group of female employees enrolled in Defendant's healthcare plans, brought an action asserting that the Affordable Care Act ("ACA") mandated coverage for lactation services as a no-cost preventive service, and that Defendant therefore must either offer in-network providers for lactation services or, in the absence of in-network providers, cover the full cost of out-of-network services. *Id.* at *2. Plaintiffs alleged that Defendant had no in-network providers for lactation services, so Plaintiffs had to go out of network for those services. *Id.* Defendant contended that there was nothing improper about requiring an insured to share the costs of out-of-network healthcare services. Defendant stated that although the ACA mandated coverage for lactation services, it did not require an insurer to cover the complete costs of such services when the insured uses an out-of-network

provider. Defendant filed a Rule 12(b)(1) motion to dismiss, asserting that Plaintiffs lacked standing because they did not suffer an injury-in-fact. The Court noted that as a general matter, a Plaintiff's standing to pursue claims rests on the theory of injury presented in the complaint and the facts alleged in support of the claim. *Id.* at *3. A Plaintiff can augment a pleading with an affidavit that contains specific facts to support standing, but a Defendant was "barred at this stage of the proceedings from attacking the claims made in the complaint." *Id.* at *4. The Court found that Defendant's motion to dismiss for lack of standing was premised entirely on evidence outside the record, including an affidavit submitted by an employee of Defendant. The Court held that Defendant's reliance on the affidavit was improper at this stage of the litigation. *Id.* at *6. Accordingly, the Court determined that Defendant's motion was fundamentally flawed because it did precisely what it cannot do with respect to the merits of the case. *Id.* The Court then conducted a standing inquiry considering only those facts alleged in the complaint. The Court stated that Plaintiffs' complaint easily established standing at the motion to dismiss stage. *Id.* at *7. The Court found that Defendant's alleged denial of full coverage resulted in each Plaintiff having to pay hundreds of dollars out of pocket for lactation services, thereby meeting the injury-in-fact requirement. Additionally, the Court noted that Plaintiffs satisfied the element of causation, because they alleged that Defendant's refusal to pay the full cost of out-of-network lactation services, when it offers no in-network providers, violated the ACA and gave rise to their economic harm. *Id.* at *7-8. Finally, the Court reasoned that Plaintiffs' alleged injuries could be redressed by a monetary award, thus satisfying the third requirement of standing. Accordingly, the Court held that Plaintiffs' complaint set forth sufficient facts that plausibly established standing for each Plaintiff. *Id.* at *8. The Court therefore denied Defendant's motion to dismiss.

***Finkelman, et al. v. National Football League,* 2017 U.S. App. LEXIS 25356 (3d Cir. Dec. 15, 2017).** Plaintiff filed a putative class action alleging that Defendant violated the New Jersey Ticket Law ("NJTL") when it withheld more than 5% of the available tickets for the Super Bowl from the general public. On Defendant's motion to dismiss, the District Court ruled that Plaintiff lacked Article III standing. On Plaintiff's appeal, the Third Circuit reversed. Defendant had a policy of withholding approximately 99% of the Super Bowl tickets from the general public and selling the remaining 1% to fans through a lottery system. Plaintiff did not enter the lottery and purchased two tickets with a face value of $800 each on the secondary market for $2,000 per ticket. *Id.* at *4. The NJTL made it unlawful for a person to withhold more than 5% of tickets from the general public. On Plaintiff's first appeal, the Third Circuit held that Plaintiff lacked Article III standing because Plaintiff failed to: (i) establish a causal connection between Defendant's actions and any injury suffered because Plaintiff failed to enter the lottery to buy face-value tickets; and (ii) sufficiently plead enough facts to demonstrate that Defendant's withholding of tickets increased the price that Plaintiff paid for tickets on the secondary market. *Id.* at *7. The District Court granted Plaintiff leave to amend his complaint, and Plaintiff subsequently alleged that an economist, specializing in sports and ticketing, concluded that Defendant's withholding of tickets resulted in fewer tickets being available on the secondary market and thus resulted in higher prices for those tickets that were available. *Id.* at *8. The District Court again granted Defendant's motion to dismiss and ruled that Plaintiff lacked standing because he did not enter the ticket lottery and the additional facts Plaintiff alleged regarding causation were conclusory. *Id.* at *9. On Plaintiff's second appeal, the Third Circuit disagreed and ruled that Plaintiff's amended complaint offered specific factual allegations that supported his theory that Defendant's ticket withholding caused a series of events that ultimately raised ticket prices on the secondary market. Specifically, Plaintiff alleged that the insiders to whom Defendant provided tickets were more likely to re-sell those tickets to third-party brokers, who in turn were more likely to charge higher prices. Conversely, Plaintiff alleged that if more tickets were available to fans, the fans were more likely to sell through direct fan-to- fan sales and the prices would likely be lower. The Third Circuit held that Plaintiff had established standing because he had alleged sufficient factual allegations to show that Defendant's ticket withholding raised the price that Plaintiff paid for tickets on the secondary market. Accordingly, the Third Circuit reversed the decision of the District Court. *Id.* at *18.

***Gubala, et al. v. Time Warner Cable*, 846 F.3d 909 (9th Cir. 2017).** Plaintiff, a cable television consumer, subscribed to Defendant's services in 2004, at which time he provided Defendant with his date of birth, home address, home and work telephone numbers, social security number, and credit card information. In 2006, Plaintiff cancelled his subscription and in 2014, he learned that all the information he had given Defendant when he subscribed a decade earlier remained in Defendant's possession. Plaintiff sought injunctive relief for alleged violations of § 551(e) of the Cable Communications Policy Act, which provides that a cable operator "shall

destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information [either by a cable subscriber, seeking access to his own information] . . . or pursuant to a court order." *Id.* at 910. The District Court found that Plaintiff lacked standing and dismissed the lawsuit. The District Court also ruled that even if Plaintiff had standing, he failed to state a claim upon which relief could be granted. On appeal, the Seventh Circuit affirmed the District Court's decision. The Seventh Circuit noted that the only allegation Plaintiff asserted was that Defendant's retention of the information, on its own, violated a privacy right or caused Plaintiff to suffer a financial loss. *Id.* at 910-11. The Seventh Circuit held that Plaintiff did not present evidence of having been "aggrieved" by Defendant's violation of § 551(e), and no allegation or evidence that in the decade since he subscribed to Time Warner's residential services any of the personal information that he supplied to the company had leaked and caused financial or other injury to him or had even been at risk of being leaked. The Seventh Circuit also addressed Plaintiff's contention that a violation of § 551(e) constituted a violation of a right of privacy. The Seventh Circuit reasoned that while violations of rights of privacy are actionable, there was no indication of any violation of Plaintiff's privacy because there was no allegation that Defendant released, or allowed anyone to disseminate, Plaintiff's personal information. The Seventh Circuit determined that if Plaintiff had reason to believe that Defendant intended to release the information or could not be trusted to retain it, Plaintiff would have grounds for obtaining injunctive relief; but he did not allege such a risk. *Id.* at 912. The Seventh Circuit determined that the absence of any evidence of any concrete injury inflicted or likely to be inflicted on Plaintiff as a consequence of Defendant's continued retention of his personal information precluded the relief sought. The Seventh Circuit therefore affirmed the District Court's judgment dismissing Plaintiff's claims for lack of standing.

***Hossfeld, et al. v. Compass Bank,* 2017 U.S. Dist. LEXIS 182571 (N.D. Ala. Nov. 3, 2017).** Plaintiff filed a class action alleging that Defendant placed unsolicited automatically dialed calls to his cellular telephone in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"). Defendant filed a motion to dismiss for lack of standing. The Court denied Defendant's motion. Defendant argued that: (i) Plaintiff has not suffered a concrete and particularized injury-in-fact, thereby precluding subject-matter jurisdiction; and (ii) even assuming Plaintiff had suffered an injury-in-fact, the injury was not traceable to any alleged violation of the TCPA and would occur anytime Plaintiff received a phone call. *Id.* at *3. Plaintiff asserted that the two calls he received were a nuisance, which briefly deprived him of the use of his phone, invaded his personal privacy, and wasted his time. *Id.* at *10. Additionally, Plaintiff asserted that he experienced a reduction in his cellular battery life as a result of Defendants' calls. *Id.* The Court found that Plaintiff asserted a personal connection to the harm claimed that was sufficient to establish this prong of the standing requirements. The Court stated that the two unsolicited calls described were made to Plaintiff's personal cell phone number and impacted him personally. *Id.* at *11. Defendant contended that Plaintiff suffered, at most, a *de minimis* injury which fell below a persistent pattern of invasive, unsolicited calling that the TCPA was designed to cover. The Court disagreed, and found that Plaintiff's allegations of at least one unauthorized phone call showed a sufficiently concrete injury. The Court held that the contact fell squarely within the scope of what the TCPA makes unlawful under § 227(b)(1)(A)(iii), *i.e.*, a non-emergency call made to Plaintiff's cell phone number without his permission using an automatic telephone dialing system. *Id.* at *16. Defendant further contended that even if Plaintiff fulfilled the particularity and concreteness standards, he still lacked standing because he could not show that his injury was traceable to the challenged conduct of Defendant. *Id.* at *28. The Court again disagreed, and determined that the use of the auto dialer to call Plaintiff's cell phone number was the direct source that led to his claimed injury. Thus, the Court concluded that Plaintiff's intrusion injury was fairly traceable to Defendant's alleged violation of the TCPA's automated-dialing provision. *Id.* at *29. Accordingly, the Court denied Defendant's motion to dismiss.

***John, et al. v. Whole Foods Market*, 2017 U.S. App. LEXIS 9770 (2d Cir. June 2, 2017).** Plaintiff filed a putative class action alleging that New York City grocery stores operated by Defendant systematically overstated the weights of pre-packaged food products and overcharged customers as a result in violation of the New York Business Law. The District Court granted Defendant's motion to dismiss Plaintiff's complaint for lack of Article III standing because he failed to allege a sufficient injury-in-fact. *Id.* at *1. On appeal, the Second Circuit concluded that Plaintiff plausibly alleged an injury-in-fact, and vacated and remanded for further proceedings. *Id.* at *2. Plaintiff included with his complaint a press release of the New York City Department of Consumer Affairs (the "DCA") entitled "Department of Consumer Affairs Investigation Uncovers Systemic

Overcharging for Pre-packaged Foods at City's Whole Foods." *Id.* at *3. The press release announced the DCA's investigation of overcharging by Defendant and its preliminary findings that Defendant's New York City stores "routinely overstated the weights of its pre-packaged products, including meats, dairy and baked goods." *Id.* The DCA's investigation leading up to the press release took place from the Fall 2014 to the Winter of 2015, the same period in which Plaintiff allegedly made monthly purchases and which included the two stores that Plaintiff patronized. The District Court granted Defendant's motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6), holding that Plaintiff lacked Article III standing because he failed to plausibly allege that he was overcharged by Defendant for a specific purchase. The District Court explained that, even if Plaintiff had standing, it would grant Defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The Second Circuit observed that to satisfy the "'irreducible constitutional minimum' of standing," a Plaintiff "must have: (i) suffered an injury-in-fact; (ii) that is fairly traceable to the challenged conduct of Defendant; and (iii) that is likely to be redressed by a favorable judicial decision." *Id.* at *6. The Second Circuit opined that the critical basis for Plaintiff's claim that he was overcharged was the DCA's press release announcement that 89% of Defendant's pre-packaged products tested by the DCA were mislabeled, and the press release's conclusion that the mislabeling was "systematic" and "routine." *Id.* at *9. The Second Circuit found that when considered together, the press release and Plaintiff's monthly purchases provided a plausible basis to conclude that Plaintiff overpaid for items during the period alleged in the complaint. *Id.* The Second Circuit explained that when a Defendant asserts a "facial" challenge to standing, District Courts should continue to draw from the pleadings all reasonable inferences in Plaintiff's favor and presume that "general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at *9-10. The Second Circuit found that the District Court did not draw all reasonable inferences in Plaintiff's favor. The District Court was also troubled by the absence of allegations describing the DCA's methodology, but the Second Circuit noted that at the pleading stage, Plaintiff need not prove the accuracy of the DCA's findings or the rigor of its methodology; instead, he need only generally allege facts that, accepted as true, make his alleged injury plausible. *Id.* at *10. The Second Circuit determined that Plaintiff's complaint thus satisfied the "low threshold" required to plead injury-in-fact. *Id.* at *11. Accordingly, the Second Circuit held that Plaintiff plausibly alleged that he suffered an injury-in-fact by pleading both the frequency of his purchases and the systematic overcharging of pre-packaged foods at the stores he patronized. *Id.* at *12. Therefore, the Second Circuit vacated and remanded the District Court's ruling dismissing Plaintiff's complaint for lack of standing.

***Medellin v. Ikea U.S.A. W., Inc.*, 672 Fed. Appx. 782 (9th Cir. 2017).** Plaintiff, a customer, brought a class action alleging that Defendant violated California's Song-Beverly Credit Card Act by asking customers to provide their ZIP codes during credit card transactions. The District Court had certified a class comprised of individuals from whom a ZIP code was requested and recorded in conjunction with a credit card transaction. Subsequently, Defendant moved for decertification of the class, which the District Court granted. On appeal, the Ninth Circuit determined that Plaintiff lacked standing to pursue her claims in the District Court. The Ninth Circuit ruled that Plaintiff conceded that she alleged only a bare procedural violation of the statute and suffered no other cognizable harm. *Id.* at 783. The Ninth Circuit held that in accordance with the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), a Plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* Therefore, the Ninth Circuit concluded that Plaintiff lacked standing. Accordingly, the Ninth Circuit vacated the District Court's judgment and remanded with instructions that the District Court dismiss the action without prejudice for lack of standing.

***Perlin, et al. v. Time Inc*., 237 F. Supp. 3d 623 (E.D. Mich. 2017).** Plaintiff, a subscriber of People magazine, filed a putative class action against Defendant alleging that Defendant violated Michigan's Video Rental Privacy Act ("VRPA") and was unjustly enriched when Defendant sold her personal information. Defendant moved to dismiss pursuant to Rule 12(b)(6) on the basis that Defendant lacked both statutory standing and Article III standing. *Id.* at 627. Defendant also asserted that Plaintiff's unjust enrichment count failed to state a claim because Plaintiff suffered no monetary loss. The Court denied Defendant's motion. *Id.* at 644. The Court rejected Defendant's argument that the recent VRPA amendment – requiring that actual damages be pled – applied retroactively. *Id.* at 629. The Court determined that retroactive application was not appropriate because the express language of the amendment did not indicate a legislative intent that the amendment was to be applied retroactively. *Id.* Further, because retroactive application would impair Plaintiff's substantive and vested rights under the VRPA, the Court declined to apply the amendment retroactively. *Id.* at 637. The Court also held

that Plaintiff had Article III standing, as a violation of the VRPA was sufficient to satisfy the injury-in-fact requirement. *Id.* at 637. The Court relied upon the plain language and legislative history of the VRPA and concluded that the statute was intended to protect consumers from disclosure of their personal information and created a right to privacy. *Id.* at 640. The Court concluded that even if a violation caused a harm that was not tangible, it still resulted in a real and concrete injury. *Id.* at 642. Thus, the Court ruled that Plaintiff had standing under the VRPA and Article III. *Id.* The Court also rejected Defendant's argument that Plaintiff must allege a monetary loss to properly state a claim for unjust enrichment, as monetary loss was not an element of the claim under state law. *Id.* at 643. Accordingly, the Court denied Defendant's motion to dismiss.

***Perry, et al. v. CNN*, 2017 U.S. App. LEXIS 7416 (11th Cir. April 27, 2017).** Plaintiff alleged that Defendant violated the Video Privacy Protection Act ("VPPA") by tracking mobile application users' location and viewing activity without their consent. The District Court held that Plaintiff failed to state a claim under both laws because he was not a statutory "consumer" and the information at issue was not "personally identifiable information." *Id.* at *2. On appeal, the Eleventh Circuit upheld the District Court's ruling. Plaintiff alleged that Defendant's proprietary App (the "CNN App") was available for download on mobile devices, including on Apple, Inc.'s ("Apple") iPhone. Through the CNN App, users can get breaking news alerts, follow stories, and watch video clips and coverage of live events. The CNN App never seeks the user's consent to disclose the user's personal data to any third-parties. *Id.* Plaintiff alleged that the CNN App, without a user's knowledge, both tracked the user's views of news articles, and videos and also collected a record of the viewing activity. *Id.* at *3. Defendant then sent the collected record of viewing activity to a company called Bango, a third-party company that conducts data analytics. *Id.* Bango is ultimately then able to compile personal information, including the user's name, location, phone number, email address, and payment information, and it can attribute this information to a single user across different devices and platforms. *Id.* Defendant argued that Plaintiff failed to allege a legally cognizable injury in the light of the U.S. Supreme Court's decision in *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016), because Plaintiff's alleged violation of a statutory right was not sufficiently concrete. The Eleventh Circuit disagreed, and stated that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury-in-fact" so that "a Plaintiff in such a case need not allege any additional harm beyond the one Congress has identified." *Id.* at *6. Accordingly, the Eleventh Circuit stated that Plaintiff satisfied the concreteness requirement of Article III standing, as he alleged a violation of the VPPA for a wrongful disclosure. *Id.* at *7. However, the Eleventh Circuit found that the District Court did not err in dismissing Plaintiff's claims because he failed to state a claim under the VPPA. The Eleventh Circuit explained that the VPPA prohibits "[a] video tape service provider [from] knowingly disclos[ing], to any person, personally identifiable information concerning any consumer of such provider." *Id.* at *9. The statute defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* In interpreting the term "subscriber," the Eleventh Circuit stated that it has previously held that the term requires an "on-going commitment or relationship between the user and the entity which owns and operates the App." *Id.* at *10. The Eleventh Circuit thus held that Plaintiff was not a subscriber because he had no on-going commitment or relationship with Defendant. *Id.* at *10-11. Accordingly, the Eleventh Circuit upheld the District Court's ruling dismissing Plaintiff's claims for failure to state a claim.

***Robins, et al. v. Spokeo, Inc.*, 2017 U.S. App. LEXIS 15211 (9th Cir. Aug. 15, 2017).** Plaintiff brought an action alleging that Defendant willfully violated the Fair Credit Reporting Act ("FCRA") by publishing inaccurate personal information about him. Plaintiff alleged that Defendant's database showed inaccurate information about him, such as that he had a greater level of education and more professional experience than he had, that he was financially better off than he actually was, and that he was married (he was not) with children (he did not have any). Plaintiff alleged that Defendant, as a consumer reporting agency, failed to "follow reasonable procedures to assure maximum possible accuracy of the information concerning" Plaintiff, and that its violation of § 1681e(b) of the FCRA was "willful." Plaintiff sought statutory damages of between $100 and $1,000 for himself, as well as for each member of a putative nationwide class. The issue of whether Plaintiff had standing to sue for the alleged statutory violation made its way to the U.S. Supreme Court, which in 2016 explained that "an invasion of a legally protected interest" that is both "concrete and particularized" is required to establish standing. *Id.* at *6. To be concrete, the alleged injury must "actually exist" and must be "real" and not "abstract." *Id.* Because the Ninth Circuit had not completed both parts of the standing analysis, the Supreme Court remanded the case for further review. On remand, the Ninth Circuit reaffirmed the threshold principle that "even

when a statute has allegedly been violated, Article III requires such violation to have caused some real – as opposed to purely legal – harm to Plaintiff." *Id.* at *8. The Ninth Circuit explained that intangible harms, such as restrictions on First Amendment freedoms and harm to one's reputation, can be concrete enough for standing, although this is a "murky area." *Id.* at *9. Accordingly, the Ninth Circuit stated that Plaintiff could not simply point to a statutory cause of action to establish an injury-in-fact. Turning to its standing analysis of Plaintiff's particular allegations, the Ninth Circuit conducted a two-step inquiry, including: (i) whether the statutory provisions at issue were established to protect Plaintiff's concrete interests (as opposed to purely procedural rights); and, if so, (ii) whether the specific procedural violations alleged in the case actually harmed, or presented a material risk of harm to, such interests. *Id.* at *11. First, the Ninth Circuit cited a long history of protections against dissemination of false information about individuals that underlies the FCRA, including common law protections against defamation and libel, to find that the interests protected by the FCRA are real and concrete. The harm alleged in the case, the Ninth Circuit concluded, "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit," even if it is not the exact historical harm itself. *Id.* at *15. In the second step, the Ninth Circuit reasoned that, in many cases, "a Plaintiff will not be able to show a concrete injury simply by alleging that a consumer-reporting agency failed to comply with one of the FCRA's procedures." *Id.* at *17. The statute may be violated, but the violation alone is not enough. Here, however, Plaintiff pointed to multiple examples of information (*e.g.*, his education level) that might be relevant to a prospective employer. The Ninth Circuit noted that it must look at the nature of the inaccuracy as part of its analysis. Even if the inaccuracy has a debatable negative impact (*e.g.*, a greater level of education could make a Plaintiff deemed to be overqualified and passed over for a job), the information is nevertheless relevant, and its dissemination is not simply a technical statutory violation. The Ninth Circuit determined that the injury alleged in this case was not speculative because the dissemination of information already had occurred. The dissemination was the harm, and further alleged harm, such as being able to point to an actual missed job, was not required. The Ninth Circuit, therefore, ruled that Plaintiff had standing to pursue his claims.

***South Carolina Clean Air Initiative, et al. v. Harbor Freight*, 2017 U.S. Dist. LEXIS 77047 (D.S.C. May 16, 2017).** Plaintiff filed a putative class action alleging Defendant violated several provisions of the Clean Air Act (the "Act"). The Act includes a citizen suit provision that allows citizens to request injunctive relief and civil penalties, payable to the United States Treasury, for the violation of any "emission standard or limitation" under the Act. *Id.* at *1-2. Specially, Plaintiff alleged that Defendant violated several provisions relating to the emissions control system ("ECS") warranty and offered an inadequate ECS warranty. Defendant is a tool and equipment discount retailer selling numerous products with small engines, including the Predator 2 cycle recreational gas generator specifically involved in this action. Defendant filed a motion to dismiss asserting that Plaintiff lacked standing because it alleged only statutory violations and not any concrete, particularized injury. Plaintiff argued that the alleged violations were substantive, not procedural, violations of the Act, and even if the violations were deemed procedural, Defendant had caused both concrete and particularized injuries. *Id.* at *5. Specifically, Plaintiff argued that Defendant committed an "informational injury" by failing to provide the warranty information required by the Act. *Id.* at *6. In regard to a particularized injury, Plaintiff contended that its injuries were particularized from every single citizen in the country because it held a defective warranty. *Id.* As to the concrete element, Plaintiff argued that the alleged ECS warranty violations were an "invasion of a legally protected interest sufficient to support standing" and the concrete harm had already occurred. *Id.* at *10. The Court held that Plaintiff's only allegations were statutory violations, as Plaintiff did not allege that the generator it purchased was defective, required any repairs, or exceeded any permissible emissions levels. *Id.* at *11-12. The Court therefore found that Plaintiff alleged mere violations of the Act, and had not alleged an injury-in-fact. While the Court did not suggest that a failure by a Defendant to comply with a statutory method of disclosure or other statutory requirements can never rise to the level of an injury sufficient to confer standing, it found that more must be alleged than in Plaintiff's complaint. Accordingly, the Court determined that Plaintiff lacked standing, and granted Defendant's motion to dismiss.

***Susinno, et al. v. Work Out World Inc*., 862 F.3d 346 (3d Cir. 2017).** In this class action, Plaintiff alleged that she received an unsolicited pre-recorded telephone call and voice-mail to her cellular phone in violation of the Telephone Consumer Protection Act ("TCPA"). *Id.* at *348. Defendant filed a motion for summary judgment. The District Court granted the motion, finding that: (i) a single solicitation was not "the type of case that Congress was trying to protect people against;" and (ii) Plaintiff's receipt of the call and voice-mail caused her no concrete

injury. *Id.* On appeal, the Third Circuit reversed and remanded the District Court's ruling. The Third Circuit found that Plaintiff's appeal posed two distinct questions, including: (i) does the TCPA prohibit the conduct alleged by Plaintiff; and (ii) if it does, was the harm alleged sufficiently concrete for Plaintiff to have standing to sue under Article III. *Id.* Defendant argued that the TCPA does not prohibit a single pre-recorded call to a cell phone if the phone's owner was not charged for the call. Plaintiff disagreed, and claimed that it does. Defendant asserted that when Congress prohibited pre-recorded calls to cell phones in the TCPA, it primarily was concerned with the cost of those calls. *Id.* at *349. The Third Circuit stated that § 227(b)(2)(C) of the TCPA provides that the Federal Communications Commission ("FCC"): may, by rule or order, exempt from the requirements of paragraph (b)(1)(A)(iii) of this sub-section calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights the law is intended to protect. *Id.* The Third Circuit opined that if it were the case that cell phone calls not charged to the recipient were not covered by the general prohibition, there would have been no need for Congress to grant the FCC discretion to exempt some of those calls. *Id.* at *350. Accordingly, the Third Circuit held that the TCPA provided Plaintiff a cause of action for the conduct she alleged. The Third Circuit examined whether Plaintiff alleged a sufficiently concrete injury to establish constitutional standing to sue. *Id.* The Third Circuit noted that it previously had held that if one sues under a statute alleging the very injury the statute is intended to prevent, and the injury "has a close relationship to a harm . . . traditionally . . . providing a basis for a lawsuit in English or American courts," a concrete injury has been pleaded. *Id.* The Third Circuit therefore found that that all intangible injuries that meet this standard are concrete. Consistent with this legal standard, the Third Circuit held that the TCPA provided Plaintiff with a cause of action, and that her injury satisfied the concreteness requirement for constitutional standing. *Id.* Accordingly, the Third Circuit vacated the District Court's order dismissing her case and remanded for further proceedings.

***Tanner-Brown, et al. v. Zinke*, 2017 U.S. App. LEXIS 25070 (D.C. Cir. Dec. 12, 2017).** Plaintiffs brought a putative class action asserting that the U.S. Department of the Interior ("DOI") must account for oil and gas revenues that may have been due a century ago to Black Freedmen members of formerly slaveholding Indian tribes. *Id.* at *1. Plaintiff Tanner-Brown's claimed interest in the case arose through her grandfather, George Curls, the son of former Cherokee slaves who owned 60 acres of land in Nowata County, Oklahoma. Plaintiff, the Harvest Institute Freedman Federation ("Federation"), sought redress as an organization that has "conducted research" and "provided financing and required legal resources, including counsel, to advocate on behalf of Freedmen." *Id.* at *2. A 1908 statute lifted restrictions on Freedmen buying and selling land allotments, and created conditions under which speculators swindled many of the new landowners. *Id.* at *2-3. Plaintiffs contended that the protections spelled out in the 1908 Act gave the DOI a fiduciary duty to monitor and control any leasing activity on minor Freedmen's allotments, and specifically to keep records of any oil and gas royalties derived therefrom. *Id.* at *3. Plaintiffs alleged that the DOI failed to abide by its fiduciary responsibilities and therefore owed an accounting to Tanner-Brown and other similarly-situated descendants. *Id.* The District Court held that both Tanner-Brown and the Federation lacked standing, and dismissed the claims. On appeal, the D.C. Circuit affirmed the decision, finding that the District Court correctly held that Tanner-Brown failed to allege an injury-in-fact because: (i) any injury Curls might have suffered did not confer standing on Tanner-Brown; and (ii) Tanner-Brown failed to allege that Curls suffered harm from the DOI's alleged accounting failures. *Id.* at *4-5. The D.C. Circuit determined that Tanner-Brown could not establish her standing to seek the particular relief at issue under her stated legal theory. Even when read generously, the D.C. Circuit found that the complaint and the submissions Tanner-Brown incorporated by reference did not identify any facts to support her theory that her grandfather was owed but not afforded an accounting. Finally, even assuming her grandfather suffered a concrete injury, Tanner-Brown failed to allege how she was thereby injured. *Id.* at *8. The D.C. Circuit also held that the Federation lacked standing. The D.C. Circuit reasoned that whether any Federation member had individual standing followed Tanner-Brown's claim of injury, because the complaint identified no other member or interest and made only conclusory assertions about other members' standing. *Id.* at *9. The D.C. Circuit also reasoned that the Federation offered only generalized assertions that suit would not require the participation of its individual members. The D.C. Circuit held that such conclusory pleadings could not establish standing. Accordingly, the D.C. Circuit affirmed the District Court's ruling dismissing the claims for lack of standing.

***Valdez et al. v. National Security Association*, 2017 U.S. Dist. LEXIS 4133 (D. Utah Jan. 10, 2017).** Plaintiffs, a group of individuals who lived or worked in Salt Lake City during the Salt Lake City Winter Olympic

Games, filed suit against Defendants claiming that they violated their constitutional, statutory, and common law rights by conducting a warrantless surveillance program and sought declaratory and injunctive relief. Plaintiffs asserted that their email, text messages, and telephone communications were intercepted when Defendants unlawfully intercepted and stored their electronic communications. Defendants moved to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis that Plaintiffs failed to allege facts sufficient to establish Article III standing. Defendant asserted that Plaintiffs had not plausibly alleged that their communications were subject to National Security Association ("NSA") surveillance and that Plaintiffs also failed to plausibly allege that Defendants retained the communications. The Court denied Defendants' motion to dismiss, ruling that Plaintiffs met their burden of establishing standing under Article III of the U.S. Constitution. Rule 8(a)(1) requires only that a complaint contain "a short and plain statement of the grounds for the Court's jurisdiction." *Id.* at *12. The Court rejected Defendants' argument that it must assess the plausibility of the facts alleged in ruling on Defendants' motion. Instead, the Court held that it is sufficient to just generally allege the facts establishing standing at the pleading stage. To establish standing under Article III, Plaintiffs must allege that they have suffered an injury-in-fact, that there is a causal connection between the injury and the conduct in question, and that the injury is likely to be redressed by a favorable decision. The Court denied Defendants' motion to dismiss because the allegations in the Plaintiffs' complaint were sufficient as they were not "legal conclusions, bare assertions of the elements of standing, or sufficiently fantastic on their face as to defy reality." *Id.* at *27. Therefore, the Court held that it was required to accept Plaintiffs' allegations as true when assessing Defendants' motion to dismiss. Accordingly, the Court denied Defendants' motion to dismiss.

***Vilcek, et al. v. Uber USA, LLC,* 2017 U.S. Dist. LEXIS 113845 (E.D. Mo. July 21, 2017).** Plaintiffs, a group of drivers, brought a putative class action alleging that Defendants' direct, unlawful competition with the drivers interfered with their present and expected future business relationship with current prospective customers. Plaintiffs asserted a claim of tortious interference. Defendants had previously moved to dismiss Plaintiffs' claims, which the Court granted. Plaintiffs filed an amended complaint, and Defendants again moved to dismiss. The St. Louis Metropolitan Taxicab Commission ("MTC") regulates taxis, drivers, and the taxicab companies operating in St. Louis City and County, and the governing procedures were stated in MTC's Vehicle For Hire Code ("Taxi Code"). *Id.* at *2. Under the Taxi Code, individuals may not operate a taxicab without first obtaining an MTC driver's license. *Id.* at *2-3. In September 2015, the MTC voted to allow Uber to operate in St. Louis City and County, but directed that the Uber drivers be fingerprinted and possess a Class E Missouri chauffeur's license, *i.e.*, the same as all other taxicab drivers. Uber, however, disregarded the MTC's authority and rules and requirements, and launched its services in St. Louis City and County using drivers who did not comply with the Taxi Code licensing requirements for taxicab drivers. *Id.* at *3. Uber's entry into the taxicab business in St. Louis City and County was in violation of the MTC's rules, and the Taxi Code, and since then, Plaintiffs and the members of the class experienced decreases in revenue of 30% to 40% compared to the comparable time period in 2014 resulting from a decrease in passenger calls. *Id.* at *4. Plaintiffs alleged that when Uber began operating its ride sharing service in St. Louis City and County, its drivers became direct competitors with Plaintiffs and the class, and that this competition was unlawful because it was in violation of the Taxi Code and the MTC's regulations, as well as in violation of the statute creating and enabling the MTC. The Court granted Defendant's motion to dismiss. Defendants argued that Plaintiffs have failed to sufficiently allege a tortious interference claim. The Court noted that under Missouri law, a claim of tortuous interference with a contract or valid business expectancy required several elements, including: (i) a contract or valid business expectancy; (ii) Defendant's knowledge of the contract or relationship; (iii) intentional interference by Defendant inducing or causing a breach; (iv) absence of justification; and (v) damages resulting from Defendant's conduct. *Id.* at *9-10. The Court stated that a business expectancy is a "probable future business relationship that gives rise to a reasonable expectancy of financial benefit." *Id.* at *10. Further, the business expectancy must be "reasonable and valid" and not show just a "mere hope of establishing a business relationship." *Id.* The Court explained that a regular course of similar prior dealings suggested a valid business expectancy, and liability could not be predicated on "speculation, conjecture, or guesswork" and essential facts cannot be inferred without a "substantial evidentiary basis." *Id.* at *11. The Court found that Plaintiffs' amended complaint failed to satisfy the business expectancy element of a claim for tortious interference. Rather than setting out a valid and reasonable business expectancy in obtaining customers for their taxi business, the Court reasoned that Plaintiffs' claims were based on the mere hope that they will have customers for their taxis in the future. The allegations of a regular course of similar prior dealings with specific customers with whom it could be said Defendants interfered

were merely vague references to passengers; there were no specific customers set out, nor any facts to establish that any "regular" customers indeed exist. *Id.* As there were no concrete allegations giving rise to a reasonable and valid business relationship, the Court held that Plaintiffs' allegations were nothing more than speculation, conjecture, and guesswork without a substantial evidentiary basis. Accordingly, the Court granted Defendants' motion to dismiss.

***White Glove Staffing, Inc., et al. v. Methodist Hospitals Of Dallas*, 2017 U.S. Dist. LEXIS 144706 (N.D. Tex. Sept. 7, 2017).** Plaintiff, a staffing company, brought suit against Defendants alleging employment discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, the Texas Commission on Human Rights Act ("TCHRA"), and 42 U.S.C. § 1981. Defendants moved to dismiss arguing that Plaintiff lacked standing to bring such discrimination and retaliation claims. The Court granted Defendants' motion. Plaintiff began contract negotiations to provide servers, prep cooks, dishwashers, and set-up crews for Defendants. During these negotiations, Defendants allegedly informed Plaintiff that the head chef preferred Hispanic employees. *Id.* at *2. Plaintiff then provided Defendants an African-American prep cook, Carolyn Clay. After a few days, Defendants asked Plaintiff to send someone else. Plaintiff could not find another prep cook on short notice and sent Clay back to Defendants the following day. Defendants subsequently told Clay to go home and ultimately ceased contract negotiations with Plaintiff. First, the Court held that Plaintiff lacked standing to bring a claim pursuant to Title VII because Plaintiff and Defendants did not have an employer-employee relationship. *Id.* at *5. The Court found that, instead, Plaintiff and Defendants were negotiating a contract under which Plaintiff would act as an independent contractor. *Id.* at *5-6. As an independent contractor, Plaintiff did not have an employment relationship with Defendants, and therefore lacked standing to bring Title VII discrimination and retaliation claims. *Id.* at *6. Second, the Court noted that, with wording similar to Title VII, the TCHRA prohibits an employer from refusing to hire an individual or from discriminating against an individual in a manner that affects the individual's compensation or benefits based on the individual's race. Under the TCHRA, for both discrimination and retaliation claims, Plaintiff must have sought an employment relationship with Defendants. The Court determined that, because federal cases guide the interpretation of the TCHRA, an independent contractor is not an employee under the TCHRA. *Id.* at *6-7. The Court therefore concluded that the parties did not have an employment relationship sufficient to give Plaintiff standing under the TCHRA. *Id.* at *7. Third, § 1981 protects an individual's right to make and enforce contracts free from discrimination. To successfully plead claims under § 1981, Plaintiff must show that: (i) he or she is a member of a racial minority; (ii) Defendants had an intent to discriminate on the basis of race; and (iii) the discrimination concerned one or more of the activities enumerated in the statute. *Id.* at *7-8. The Court held that because Plaintiff was a corporation without a racial identity, it was not a member of a racial minority. As a result, the Court concluded that Plaintiff did not have standing to bring a discrimination claim under § 1981. Plaintiff argued that, even if it did not have standing as the direct target of discrimination, it should have standing derived from its non-Hispanic employees who would have filled the staffing positions with Defendants. The Court found that Plaintiff failed to cite any case law authorities supporting the notion that an employer could bring a § 1981 discrimination claim based on its relationship with minority employees. *Id.* at *9. The Court therefore granted Defendants' Rule 12(b)(6) motion to dismiss Plaintiff's claims.

(lx) Statute Of Limitations Issues In Class Actions

***Evans, et al. v. Arizona Cardinals Football Club,* 2017 U.S. Dist. LEXIS 51736 (N.D. Cal. May 15, 2017).** Plaintiffs, a group of retired football players, brought an action against football clubs in the National Football League alleging that each club concealed facts concerning medication given to Plaintiffs, concealed the illegality of their actions, and intentionally misrepresented that they cared about and prioritized Plaintiffs' health and safety. *Id.* at *15. Plaintiffs' first theory of liability was that "the Clubs concealed material facts relating to the medications." *Id.* Plaintiffs alleged at length that the clubs dispensed medication to them without making legally required disclosures, *i.e.*, about side effects, risks, or appropriate directions. The Court found that even if Plaintiffs' insinuation that they suffered from an unusual array of such ailments proved true, Plaintiffs were carefully chosen from a pool of over a thousand putative class members. The Court stated that they should not be mistaken for a representative sample indicating some causal nexus between use of medication in the NFL and subsequent "internal organ" problems. *Id.* at *17. The Court opined that even assuming that Plaintiffs and their various ailments were a representative sample of the overall population of NFL retirees, that alone would still be insufficient to plead causation. Statistically, in any population as large as NFL retirees, some incidence of

tumors and other organ-related ailments is to be expected, so the mere presence of such ailments did not speak to etiology. *Id.* at *20. The Court reasoned that additional factual allegations were required to indicate causation. The Court further noted that Plaintiffs' second amended complaint claimed that musculoskeletal injuries sustained in the NFL can cause obesity and related "internal" ailments, further undermining any suggestion that the mere presence of such ailments among NFL retirees implied etiology tracing back to excessive use of medication. *Id.* at *21-22. The Court therefore held that the second amended complaint failed to plead allegations showing causation as to any suggested theory of liability based on "internal organ claims." *Id.* at *22. Plaintiffs' second theory of liability was that "the Clubs concealed material facts relating to . . . the illegality of their scheme" *Id.* Plaintiffs alleged that the clubs' handling and distribution of controlled substances violated various laws and regulations and that the clubs knew their actions were illegal and took steps to conceal those illegal actions. *Id.* at *22-23. The Court determined that Plaintiffs failed to allege that this concealment would have made them behave differently had they known that a club's actions violated some law or regulation. *Id.* at *23. Therefore, Plaintiffs also did not properly plead any claim for relief based on a club's alleged concealment of the illegality of their scheme. Plaintiffs' third theory of liability was that: (i) the clubs represented that they cared about and prioritized players' health and safety but acted to the contrary; (ii) Plaintiffs took medication and continued playing while injured in reliance on the clubs' fraudulent conduct, and (iii) Plaintiffs suffered their alleged damages as a result. *Id.* Defendants also move for summary judgment as to most claims surviving dismissal on the basis that those claims were time-barred. Both sides agree that Maryland law applied, and that the applicable limitations period was three years. *Id.* at *29. Plaintiffs filed this action in May 2015, and therefore the Court stated that their claims were time-barred unless they accrued after May 2012. The Court found that with two exceptions, Plaintiffs' claims were time-barred, as they were predicated on damages supposedly attributable to musculoskeletal injuries sustained prior to 2012. *Id.* at *30.

(lxi) Stays In Class Action Litigation

***Collins, et al. v. NPC*, 2017 U.S. Dist. LEXIS 176926 (S.D. Ill. Oct. 25, 2017).** Plaintiffs, a group of delivery drivers for Pizza Hut restaurants, filed a collective and class action alleging that Defendant under-reimbursed its delivery drivers for vehicular wear and tear, gas, and other driving-related expenses, effectively paying drivers well below the minimum wage in violation of the FLSA and various state wage & hour laws. *Id.* at *2-3. Plaintiffs moved to conditionally certify a collective of all drivers. *Id.* at *3. Defendant moved to compel individual arbitration pursuant to an arbitration agreement signed by each named Plaintiff, or in the alternative, to stay all proceedings until the U.S. Supreme Court decided the legality of the class action waivers contained in the arbitration agreements. *Id.* at *4. The arbitration agreement signed by Plaintiffs required them to use binding individual arbitration for any claims and expressly prohibited Plaintiffs from acting on behalf of or as a part of any purported class, collective, representative, or consolidated action. *Id.* The Seventh Circuit held in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), that mandatory arbitration provisions precluding employees from seeking any class, collective, or representative remedies to wage & hour disputes are unenforceable because they interfere with employees' rights to engage in concerted activity under the National Labor Relations Act ("NLRA"). The Ninth Circuit held likewise in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). The Second, Fifth, and Eighth Circuits have all held, however, that employee arbitration agreements containing class waivers are enforceable in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), and *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). *Id.* at *5. The Supreme Court granted the petition for *certiorari* in *Lewis* and consolidated the case with *Morris* and *Murphy Oil.* Defendants argued that because the Supreme Court's decision in *Lewis* would have a direct impact on this case, an immediate stay would simplify the issues in question, streamline the proceedings, and thus reduce the burden of litigation on the parties and the Court. *Id.* at *6-7. Defendant asserted that a stay would preserve both the resources of the Court and the parties in briefing, arguing, and determining pending and future motions. The Court agreed and held that a stay would simplify the issues in question, streamline the trial, and reduce the burden of litigation. *Id.* at *7. The Court stated that conditionally certifying a collective action and permitting class discovery, only to later decertify the collective action a few months later (if the Supreme Court reversed the Seventh Circuit in *Lewis*) would defeat the purpose of judicial economy. *Id.* at *8. The Court opined that the ruling in *Lewis* would have a direct impact on the issues in the case. Accordingly, the Court found that staying the case was "reasonable and prudent." *Id.* at *9. Accordingly, the Court granted Defendant's motion for a stay pending the Supreme Court's ruling in *Lewis*.

***Gesten, et al. v. Burger King,* 2017 U.S. Dist. LEXIS 154733 (S.D. Fla. Sept. 22, 2017).** Plaintiff, a consumer, filed a class action alleging that Defendant printed transaction receipts revealed more than the last five digits of a consumer's debit or credit card number in violation of the Fair and Accurate Credit Transactions Act ("FACTA"). Defendant filed a motion to dismiss the complaint for lack of subject-matter jurisdiction. Defendant then moved to stay the proceedings pending resolution of the motion to dismiss. Defendant argued that resolution of the motion to dismiss could dispose of the entire matter, and Plaintiff served "overly broad, burdensome, and unnecessary discovery requests that would force Defendant to expend considerable time and resources." *Id.* at *2. At the outset, the Court stated that to evaluate the likelihood that a dismissal motion would be granted, it must take a "preliminary peek" at the merits of the motion. The Court explained that it must weigh "the harm produced by a delay in discovery" against "the likely costs and burdens of proceeding with discovery." *Id.* at *3. Upon review of the current record, the Court stated that there was such a strong likelihood that the motion to dismiss would be granted and that it outweighed Plaintiff's need to conduct discovery and the potential case management and scheduling problems that could result from a stay. *Id.* at *4. The Court noted that at the same time that Defendant requested the stay, Defendant also requested a 30-day extension of time to respond to Plaintiff's discovery requests. Defendant then filed an unopposed motion to extend all scheduling order deadlines by 30 days. *Id.* at *5. The Court granted the motion to extend all deadlines, which relieved some of the burden on Defendant while the Court considered the motion to dismiss. The Court opined that if Defendant had legitimate concerns that Plaintiff's discovery requests were overly broad, burdensome, or unnecessary, Defendant should raise the issue in the appropriate manner before the Magistrate Judge. Accordingly, the Court denied Defendant's motion for a stay pending a ruling on Defendant's motion to dismiss.

***Metter, et al. v. Uber Technologies, Inc.,* 2017 U.S. Dist. LEXIS 58481 (M.D. Fla. Oct. 25, 2017).** Plaintiff, a rider, filed a class action alleging that Defendant's cancellations fees were arbitrarily imposed against riders who were not informed in advance of contracting for a ride that such fees, including the specific amount of the fees, may be automatically charged to their credit cards. *Id.* at *2. Defendant filed a motion to compel arbitration, claiming Plaintiff agreed to Defendant's terms of service, which mandated arbitration of the dispute. Plaintiff argued that Defendant's motion to compel arbitration should be denied because he never agreed to Defendant's terms and conditions, which were the source of the arbitration provision Defendant sought to invoke. *Id.* at *6. When Plaintiff registered his on-line account, he was required to click "REGISTER" to complete his sign-up process on a page displaying the alert: "BY CREATING AN UBER ACCOUNT, YOU AGREE TO THE TERMS OF SERVICE & PRIVACY POLICY." *Id.* The alert is a clickable hyperlink to Defendant's terms of service, which contain the arbitration provision. Defendant argued that Plaintiff affirmatively assented to its terms of service by clicking "REGISTER" in the face of the alert. *Id.* at *7. Plaintiff alleged that a pop-up keypad enabling him to enter his credit card information blocked the terms of service alert, preventing him from seeing it and thereby preventing him from assenting to the terms of service. *Id.* at *8. Defendant did not dispute that such an obstruction occurred, but it argued that the obstruction was irrelevant because Plaintiff could have seen the alert when he first reached the payment and registration screen, before he began entering his credit card information, and that the alert itself would have been visible to Plaintiff while the pop-up keypad was visible had Plaintiff scrolled down to the bottom of the screen. *Id.* at *8-9. The Court found Defendant's assertions were not sufficient to obviate any dispute of fact as to whether Plaintiff was on notice of Defendant's terms of service and thereby assented to them. *Id.* at *9. Given the functioning of the Defendant's app's registration process, and the reasonable doubts and inferences that must be drawn in Plaintiff's favor, the Court held that Plaintiff's declaration that he never saw the terms of service alert was credible and consistent with the functioning of the app. *Id.* at *11. Accordingly, the Court found that Plaintiff raised a genuine issue of material fact concerning his notice of, and assent to, Defendant's terms of service. The Court concluded that it would be improper to conclude as a matter of law that Plaintiff had actual notice of Defendant's terms of service, or that he was on notice of the terms of service and affirmatively assented to them. Therefore, the Court denied Defendant's motion to compel arbitration.

(lxii) TCPA Class Actions

***Blow, et al. v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017).** Plaintiff brought a class action under the TCPA alleging that Defendant used an automated dialer to send mass marketing text messages to cellular telephones with Illinois area codes. The Court had previously granted Plaintiffs' motion for class certification, and the parties subsequently filed cross-motions for summary judgment. The District Court ultimately granted summary

judgment in favor of Defendant after concluding that Plaintiff had failed to demonstrate that Defendant used an automatic telephone dialing system in violation of the TCPA. *Id.* at 794. On appeal, the Seventh Circuit affirmed the judgment of the District Court, although on different grounds. The Seventh Circuit reviewed an argument from Defendant that was not discussed in the District Court, namely that Defendant was entitled to summary judgment independent of the auto dialer question because Plaintiff consented to the text messages. The Seventh Circuit noted that the TCPA's prohibition on using an auto dialer applies only "absent the express consent" of the recipient. *Id.* at 803. The Seventh Circuit explained that the Federal Communications Commission ("FCC") stated in its 1992 Order that "persons who knowingly release their phone number have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *Id.* In elaborating, the FCC explained that "telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *Id.* The Seventh Circuit held that the record demonstrated that Plaintiff gave her cell phone number to Defendant on several different occasions, she signed up for a "frequent buyer card," and she had a "VIP" Card and an "CLIENT LIST" card with her name and cell phone number. *Id.* Both cards contained the following disclaimer: "Information provided to Akira is used solely for providing you with exclusive information and special offers." *Id.* The record also contained notes reflecting Plaintiff's request for a sales associate to call her when a pair of shoes arrived back in stock. Finally, the record established that Plaintiff texted Defendant in order to opt-in to Defendant's text program. *Id.* Defendant sent Plaintiff numerous texts, which had a disclaimer and instructions on how to unsubscribe. Plaintiff never followed the instructions to unsubscribe in these texts or otherwise attempted to opt-out of receiving texts from Akira. *Id.* at 804. Plaintiff argued that she never consented to Defendant's texts because she "provided her phone number to [Defendant] to receive discounts," but not to receive "mass marketing text messages." *Id.* The Seventh Circuit was unpersuaded that there was a distinction of legal significance between the two in terms of Plaintiff's consent. The Seventh Circuit opined that Plaintiff's attempt to parse her consent to accept some promotional information from Defendant while rejecting "mass marketing" texts construed "consent" too narrowly. *Id.* The Seventh Circuit therefore found that Plaintiff consented to the message, where she admittedly provided her cell phone number not on a generic form, but specifically in order to receive discounts. *Id.* The Seventh Circuit therefore concluded that Plaintiff provided prior express consent for the text messages, and granted Defendant's motion for summary judgement on her claims.

***Cordoba, et al. v. DirecTV, LLC,* 2017 U.S. Dist. LEXIS 125486 (N.D. Ga. July 12, 2017).** Plaintiff brought a putative class action against Defendant pursuant to the Telephone Consumer Protection Act ("TCPA") alleging that Defendant made unsolicited calls marketing its products and services to people who placed their phone numbers on a national do not call ("NDNC") list as well as an internal do not call ("IDNC") list. Plaintiff moved for certification of two classes, and the Court granted Plaintiff's motion. Defendant also moved for leave to amend its answer to include an established business relationship ("EBR") affirmative defense. *Id.* at *15. Defendant argued that that the IDNC class lacked Article III standing because Plaintiff did not allege that the class members requested to be placed on Defendant's IDNC list and, therefore, they did not suffer an injury-in-fact. *Id.* at *21. The Court rejected this argument and concluded that Plaintiff had alleged a sufficiently particularized and concrete injury-in-fact – *i.e.*, the invasion of privacy caused by the unwanted calls – to confer Article III standing on the IDNC class members. The Court noted that a majority of case law authorities have held that the mere receipt of telemarketing calls in violation of the TCPA constitutes a sufficient harm for purposes of Article III standing. *Id.* at *25. The Court ruled that the proposed class was ascertainable and rejected Defendant's argument that it was not ascertainable because Plaintiff could not adequately identify those class members who received calls for purposes of selling Defendant's services. The Court opined that certification should not be precluded because the list was over-inclusive, and Defendant should not be immunized from class liability because of its failure to keep adequate records in violation of the TCPA. *Id.* at *34. Defendant also argued that Plaintiff's proposed classes were not ascertainable because some class members were Defendant's customers who were subject to arbitration agreements or had an EBR with Defendant. The Court agreed with Plaintiff that the EBR was an affirmative defense for which Defendant had the burden of proof, and it remained an open question whether Defendant's customers could participate as class members. *Id.* at *36. The Court also rejected Defendant's argument that the class was not ascertainable because Plaintiff had not attempted to ascertain which of the telephone numbers belonged to residential or business subscribers, as the TCPA section at issue only prohibited calls to residential numbers. The Court concluded that the record did not indicate that there were

many calls to businesses or that they were difficult to identify. *Id.* at *39. Accordingly, the Court granted Plaintiff's motion for class certification and granted Defendant leave to amend its answer. *Id.* at *49.

***Dolemba, et al. v. Kelly Services, Inc.*, 2017 U.S. Dist. LEXIS 13508 (N.D. Ill. Jan. 31, 2017).** Plaintiff brought a putative class action alleging violations of the Telephone Consumer Protection Act ("TCPA") and the Illinois Consumer Fraud Act ("ICFA"). Plaintiff alleged that Defendant violated the TCPA and ICFA by calling her cellular telephone using an automatic telephone dialing system ("ATDS") without her express consent. Defendant moved to dismiss Plaintiff's claims and strike the class allegations, and the Court granted the motion to dismiss and dismissed the class allegation as moot. In 2016, Plaintiff received a call on her cellular phone from Defendant using an ATDS. Plaintiff did not answer the call, and Defendant left a voice-mail message that solicited individuals for employment as machine operators. Plaintiff had previously applied for employment with Defendant in March 2007, and indicated interest in positions using office skills. In signing the application, Plaintiff provided her cell phone number and authorized Defendant to collect, use, store, transfer, and purge the personal information provided for employment-related purposes. *Id.* at *2. Plaintiff did not receive any communications from Defendant between the end of 2007 and February 2016. *Id.* at *3. Defendant argued that Plaintiff provided her cellular phone number to Defendant in her employment application and, in the same application, expressly consented to Kelly using that phone number for "employment-related purposes." *Id.* at *4-5. Plaintiff did not dispute that she provided her cellular number to Defendant in her employment application, but she argued that the call she received exceeded the scope of her consent and that her consent expired long before she received the call in 2016. *Id.* at *5. The Court held that since Plaintiff did not have further communications with Defendant after consenting to receive employment-related communications, her consent remained valid at the time she received the automated call. *Id.* at *6. The Court found that the call Plaintiff received clearly related to an employment opportunity. The Court stated that although the opportunity was not specifically tailored to the exact job interests Plaintiff indicated in her application, it still fell within the broad consent that she gave to Defendant to use her cellular phone number to contact her generally for employment-related purposes regardless of whether that job matched her job interests. *Id.* at *7. Therefore, the Court granted Defendant's motion to dismiss Plaintiff's TCPA claims. Plaintiff also alleged that Defendant engaged in unfair acts and practices by making the allegedly unauthorized robo-call to her cellular phone, in violation of §§ 2 and 2Z of ICFA. The Court stated that it already concluded that Plaintiff consented to receive phone calls from Defendant, meaning that no TCPA violation occurred. The Court also opined that receiving one pre-recorded message did not rise to the level of an oppressive practice. The Court held that Plaintiff's claims that she suffered damages such as "loss of time and loss of battery life" were so negligible from an economic standpoint as to render any damages unquantifiable. *Id.* at *11. The Court therefore also dismissed Plaintiff's ICFA claims. Finally, the Court stated that since it dismissed Plaintiff's claims, it declined address Defendant's arguments regarding the propriety of a class action, and dismissed the motion as moot.

Editor's Note: The ruling in *Dolemba* is believe to be the first TCPA class action brought against an employer for recruiting and hiring activities.

***G.M. Sign, Inc., et al. v. Stealth Security Systems,* 2017 U.S. Dist. LEXIS 132178 (N.D. Ill. Aug. 18, 2017).** Plaintiff, a sign company, brought a class action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited faxes. Defendant had contracted with Profax to send out faxes to a given list of customers twice in 2006, once to a group of 21,291 fax numbers and successfully received by 13,518 and a second to 50,267 fax numbers, of which 37,215 were successful. *Id.* at *2. Plaintiff filed a motion for class certification pursuant to Rule 23(b) of "all persons who were successfully sent a fax advertisement from March 2006 through October 2006" that advertised the security services of "Security Alert specializing in all your security needs" for whom Defendant, Stealth Security Systems, Inc. "cannot prove evidence of prior express permission or invitation for the sending of such faxes." *Id.* at *3. Defendant contended that Plaintiff's proposed class failed the implicit requirement of ascertainability because Plaintiff was not a member of the proposed class, there was no objective method of identifying potential class members, and the proposed class was not definite. *Id.* at *4. The Court found Defendant's first contention frivolous as Plaintiff's corporate designee testified in a deposition that the company received the fax at issue. Defendant contended that the class was not ascertainable because there was no objective means of identifying members of the class. The Court stated that the Seventh Circuit has previously found that the ascertainability inquiry goes to "the adequacy of the class

definition itself," not to "whether, given an adequate class definition, it would be difficult to identify particular members of the class." *Id.* at *5. A class definition satisfies the "objective criteria" standard if it is based on non-subjective criteria that identify a particular group, harmed during a particular time-frame, in a particular location, in a particular way. The Court found that Plaintiff's class definition met the standard as it defined the putative class as the group of persons who received during a specific time period fax transmissions from a specific party relating to specific services, without vagueness or subjectivity. *Id.* To the extent that Stealth argued that the proposed class was not ascertainable because there was no objective means of actually determining whether someone was a class member, that was not a basis to deny class certification. The Court noted that there was a list of over 1,700 individuals who in response to Stealth's fax advertisement requested not to be contacted. *Id.* at *6. The Court stated that even if no one beyond those individuals was ever identified, this was more than adequate, as classes as small as 40 people are sufficient to warrant class adjudication. *Id.* Finally, Defendant also objected to the class definition as non-ascertainable because it defined a "fail-safe" class. The Court found that as proposed, Plaintiff's class definition constituted a fail-safe class, for class membership would be predicated on Defendant's liability. *Id.* at *8. The Court opined that it could remove the phrase "for whom Defendant, Stealth Security Systems, Inc. cannot prove evidence of prior express permission or invitation for the sending of such faxes" from the class definition to remedy the problem. *Id.* at *9. Accordingly, the Court granted Plaintiff's motion for class certification subject to the modified class definition.

***Golan, et al. v. Veritas Entertainment, LLC*, 2017 U.S. Dist. LEXIS 6684 (E.D. Mo. Jan. 18, 2017).** Plaintiffs brought a putative class action alleging violations of the Telephone Consumer Protection Act ("TCPA"). Plaintiffs alleged that Defendants engaged in an advertising campaign for a movie which included telephone calls to approximately four million residential telephone numbers throughout the United States. *Id.* at *3. Plaintiffs asserted they received two telephone calls with a pre-recorded voice to their residential telephone number, without their consent. Plaintiffs claimed that Defendants violated § 227(b)(1)(B) of the TCPA, which prohibits persons from initiating calls to residential telephone lines using a pre-recorded voice to deliver a message without the called party's prior express consent. Plaintiffs sought to certify a class of all persons in the United States to whom Defendants initiated one or more telephone calls using a pre-recorded voice as part of the movie campaign. *Id.* The Court found that Plaintiffs established numerosity, as they provided deposition transcripts from Defendants that stated that Defendants called four million residential telephone numbers as part of the campaign. *Id.* at *7. Defendants argued that determining if a class member consented was an individual inquiry and could not be determined on a class-wide basis. The Court, however, noted that Plaintiffs submitted evidence showing that the issue could be resolved on a class-wide basis, including deposition testimony stating that none of the four million individuals called had consented to receiving future calls about movies for commercial purposes. *Id.* at *9-10. The Court further determined that there was no evidence that class members consented in other ways so as to require an individualized analysis. *Id.* at *10. Defendants also asserted that Plaintiffs could not prove injury with class-wide proof. Defendants contended that Plaintiffs could not establish a concrete injury, and therefore did not have standing because their injury was a bare procedural violation. *Id.* at *11. The Court reasoned that unwanted calls caused a risk of injury due to interruption, distraction, and invasion of privacy, which were concrete injuries and not just bare procedural violations. *Id.* at *13. The Court therefore held that Plaintiffs had standing to pursue their claims. The Court also found that common questions of law and fact predominated over individual questions. Common questions included whether Defendants initiated the phone calls using an artificial or pre-recorded voice to deliver a message to residential telephone lines for commercial purposes, if Defendants knowingly and willingly violated the TCPA, if these calls constituted "telephone solicitation," if Plaintiffs were entitled to damages, the amount of damages, and if Plaintiffs were entitled to injunctive relief. *Id.* at *14. Defendants argued that Plaintiffs' experiences were not typical of the class. Defendants asserted that other class members may have consented to the calls, been at home at the time the calls were made, answered the phone, and suffered a concrete injury-in-fact, unlike Plaintiffs. The Court rejected Defendants' points, and ruled that the class members did not have to have the same exact experience and course of conduct as the named Plaintiffs to establish typicality. *Id.* at *15. The Court also stated that Plaintiffs' previously relationship with counsel did not create a conflict of interest, as Plaintiffs' counsel were respected attorneys who had handled litigation of this magnitude in the past. The Court therefore ruled that Plaintiffs and their counsel were adequate representatives of the class. *Id.* at *17. Finally, as to superiority, the Court found that it was clear that a class action was the superior method of adjudication, as it would be efficient, conserve

judicial resources, and allow for consistent rulings for all class members. *Id.* at *18. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Holtzman, et al. v. Turza*, 2017 U.S. App. LEXIS 22799 (7th Cir. Nov. 14, 2017).** In this almost a decade old class action alleging violations of the Telephone Consumer Protection Act, the Seventh Circuit held that the class prevailed on the merits but remanded for further proceedings concerning the remedy. The District Court had found that class counsel was entitled to a third of each class member's award as a contingent fee, but only if the class member collected the recovery ($500 per unauthorized fax), and that any remainder went back to Defendant. *Id.* at *1. The District Court then approved a mailing to class members asking each whether he or she wanted to claim the recovery (with a non-response implying consent) and to update any details necessary to ensure that checks reached the correct addresses. Defendant appealed again, arguing that the notice should have directed each class member to verify, under penalty of perjury, that he or she: (i) used a particular fax number from 2006 through 2008; (ii) received at that number a "Daily Plan-It" from Defendant; (iii) had not authorized Defendant to send the faxes; and (iv) agreed to the retention of class counsel and payment of the one-third contingent fee. *Id.* at *2. The Seventh Circuit noted that Defendant's first three requests concerning the notice essentially disputed the decision it already reached in 2013 holding: (i) that the record established to what telephone number the faxes had been sent and what the faxes contained; (ii) whose fax numbers those were was established from electronic records and did not depend on personal recollection; (iii) that it did not matter whether any class member remembered receiving the "Daily Plan-It;" and (iv) that any given recipient's consent was irrelevant because the faxes omitted the opt-out notice required by law. *Id.* at *2-3. The Seventh Circuit noted that Defendant's fourth requests implicitly disagreed with its decision in 2016, which concluded that class counsel was entitled to receive a third of the award to any class member who claims the money. To the extent Defendant contended that the ethics rules of Illinois precluded such a result, the Seventh Circuit found it just a form of disagreement with its 2016 decision, and further, was inconsistent with previous case law holding that federal rather than state law supplied the procedures used to administer class actions in federal court. *Id.* at *3. The Seventh Circuit thereby affirmed the District Court's ruling.

***Katz, et al. v. American Honda Motor Co., Inc.*, 2017 U.S. Dist. LEXIS 116191 (C.D. Cal. June 29, 2017).** Plaintiff, a consumer, brought an action alleging that Defendant violated the Telephone Consumer Protection Act ("TCPA") by placing automated telephone calls to his cellular phone after he purchased a new car. Plaintiff filed a motion for class certification, which the Court denied. Plaintiff's proposed class consisted of all individuals in the United Stated whose cellphone numbers were called by or on behalf of Defendant between October 16, 2013 and the present. *Id.* at *3-4. The Court first noted that Plaintiff met the numerosity requirement because Plaintiff submitted evidence of call logs demonstrating Defendant made calls to approximately 1.6 million telephone numbers between June 2011 and July 2016. *Id.* at *4. The Court also found that common questions of law or fact existed that were capable of class-wide resolution, including: (i) if Defendant placed calls to the class members' cellphone numbers; (ii) if the calling system Defendant's vendor used to place the calls was an automatic telephone dialing system under the TCPA; and (iii) if the telephone calls made constituted "telemarketing" under the TCPA. *Id.* at *5. Therefore, the Court ruled that Plaintiff met commonality. However, the Court determined that Plaintiff failed to meet the typicality requirement. The Court noted that Plaintiff did not provide prior express written consent to receive calls from Defendant. Defendant, however, offered evidence of prior express written consent by some putative class members, and therefore Plaintiff's claims were not typical to those of the class he sought to represent. *Id.* As to Rule 23(b)(3)'s predominance requirement, the Court opined that Defendants offered evidence demonstrating: (i) approximately 225,138 customers leased vehicles from Defendant from October 2013 to the present; (ii) there were different versions of lease agreements used by car dealers during the class period with different language regarding a customer's consent to receiving calls; (iii) the "vast majority" of 2015 lease agreements signed by customers were in paper form and housed in regional offices located throughout the United States; and (iv) only a "small percentage" of the 2015 lease agreements had been scanned and were electronically available, but even those agreements available electronically would need to be individually reviewed to determine which version of the agreement was signed by the customer. *Id.* at *8. The Court held that the evidence demonstrated that it would be required to make individualized inquiries – such as whether each class member signed a 2015 lease agreement, which version of the 2015 lease agreement was used, whether the language in the agreement included the requirements for prior express written consent, when the lease agreement was signed, and when calls were received – in order to determine

whether each class member gave prior express written consent before receiving calls from Defendants. *Id.* at *8-9. Moreover, the Court opined that Plaintiff failed to demonstrate consent could be established through class-wide proof. Accordingly, the Court denied Plaintiff's motion for class certification.

***Legg, et al. v. TPZ Insurance Agency*, 2017 U.S. Dist. LEXIS 131020 (N.D. Ill. Aug. 15, 2017).** Plaintiffs brought a class action under the Telephone Consumer Protection Act ("TCPA") alleging that Defendant placing unsolicited "advertising robo-calls" and telemarketing calls to Plaintiffs' cellular phones. Defendant moved to strike Plaintiffs' class allegations and Plaintiffs moved to certify moved for class certification. The Court granted Defendant's motion and denied Plaintiffs' motion. Defendant, through its subsidiaries, offered consumers various services related to pet adoption and pet insurance. Once service offered by Defendant in conjunction with pet adoptions was an initial 30-day free gift of pet health insurance. The 30-day free gift was offered to pet adopters at Defendant's partner animal shelters. The shelters used software provided by Defendant to gather information from adopters during the adoption process for the purpose of providing the 30-day free gift. To receive the free gift, the adopter must provide a valid email address and "opt-in" to receiving communications from Defendants via email. *Id.* at *3. During the adoption process, the adopters fill out paper work providing the shelter with their name, address, email address, and telephone numbers. The paperwork provided that unless they opt-out they may be sent information and special offers by mail or email regarding products or services that may be of interest, and that their personal information may be shared with third-parties so those third-parties may "contact you by mail or email for their own marketing purposes." *Id.* at *5. Plaintiffs proposed certification of two classes, including: (i) an "advertisement class" of all persons in the United States who Defendant called on their cell phone using an artificial or pre-recorded voice message where the person did not provide signed express written consent to receive automated pre-recorded calls from October 16, 2013 to the present; and (ii) a "robo-call" class of all persons in the United States who Defendant called on their cell phone using an artificial or pre-recorded voice message where the recipient did not give prior express consent to Defendants to receive automated calls from October 16, 2013 to the present. *Id.* at *5. The Court found that Plaintiffs met the requirements of Rule 23(a). However, the Court held that Plaintiffs failed to meet the predominance requirement of Rule 23(b)(3). Defendant argued that during the adoption process, adopters agreed to receive communications from Defendant and expected to receive such communications by phone in addition to email. Thus, Defendant argued that the question centered around what happened during each individual adoption process. *Id.* at *10. The Court noted that if an adopter expressly agreed and expected to receive calls from Defendant, and did receive those calls, the adopter had not been injured in any way, even if Defendant technically violated a procedural requirement of the TCPA. *Id.* at *11. The Court determined that the evidence showed that the trial in this case would be consumed and overwhelmed by testimony from each individual class member, and the shelter employee who assisted that member in the adoption process, to analyze whether the class member consented to receive the calls in question. *Id.* at *12-13. In short, the Court reasoned that the trial would involve hundreds, if not thousands, of mini-trials on the issue of consent alone. Given the evidence presented by Defendant, the Court held that Plaintiffs failed to establish that common questions predominated. Accordingly, the Court denied Plaintiffs' motion for class certification and granted Defendant's motion to strike the class allegations.

***Mejia, et al. v. Time Warner Cable, Inc*., 2017 U.S. Dist. LEXIS 120445 (S.D.N.Y. Aug. 1, 2017).** Plaintiffs in two consolidated cases filed class actions alleging that Defendant improperly placed unsolicited telephone calls to cellular phones in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff Mejia alleged that Defendant called her repeatedly using an auto-dialer. Mejia petitioned the Court to join her case with a lawsuit filed separately by Plaintiffs Hunter and Villa, in which they claimed to have received and answered several of Defendant's calls despite requesting that Defendant stop calling them. Plaintiffs alleged that they were connected to a live representative after a pause, and therefore that an auto-dialer was used to make the calls. Defendant moved for summary judgment, arguing that Plaintiffs failed to put forward sufficient proof that Defendant violated the TCPA by calling them with an auto-dialer or by playing an artificial or pre-recorded voice during unsolicited calls. The Court was also presiding over a related case, which alleged that Plaintiff Johnson received calls from Defendant made using an interactive voice response calling system that violated the TCPA. Defendant moved for judgment on the pleadings in both cases, arguing that recent amendments to the TCPA creating exemptions for government-sent messages regarding debts, while punishing private companies that send similar messages, had created a law that favors certain speakers, content and viewpoints in violation of the

First Amendment. *Id.* at *34. The Court rejected Defendant's contentions that the law violated the First Amendment. The Court stated that the TCPA held up to strict scrutiny because it serves the government's interest in protecting the privacy rights of telephone subscribers and was narrowly tailored to achieve that interest. *Id.* at *44. The Court opined that the narrow exception, and the provision as a whole, were well-designed to further the interests that Congress sought to pursue with the TCPA. *Id.* at *48-49. However, the Court granted Defendant's motion with respect to the first calls placed to Plaintiffs Hunter and Villa, holding that Plaintiffs did not establish that the calls they received from Defendant were made for telemarketing purposes. However, the Court rejected Defendant's arguments that Plaintiffs lacked standing and that it was immune from liability because it was trying to reach its customers. The Court also denied Plaintiffs' motion for partial summary judgment, and rejected the position that an interactive voice response system the company used when placing calls constituted an auto-dialer under the TCPA. Accordingly, the Court granted in part and denied in part Defendant's motion and it denied Plaintiffs' motion.

***Reyes, et al. v. Lincoln Automotive Financial Services*, 861 F.3d 51 (2d Cir. 2017).** Plaintiff brought a putative class action alleging Defendant violated the Telephone Consumer Protection Act ("TCPA") by repeatedly calling him after he defaulted on his car lease after he revoked his consent to be called. The District Court granted Defendant's motion for summary judgment, on the basis that: (i) the evidence of consent revocation was insufficient; and (ii) the TCPA does not permit revocation when consent is provided as consideration in a binding contract. *Id.* at 53. As a condition of his lease agreement with Defendant, Plaintiff consented to be contacted by Defendant using manual calling methods, pre-recorded or artificial voice messages, text messages, emails, and/or automatic telephone dialing systems. *Id.* At some point after the lease was finalized, Plaintiff stopped making his required payments, and as a result, on multiple occasions Defendant called Plaintiff in an attempt to cure his default. Plaintiff asserted that he mailed a letter to Defendant in which he wrote: "I would also like to request in writing that no telephone contact be made by your office to my cell phone." *Id.* at 54. Defendant contended that it never received Plaintiff's letter, or any other request to cease its calls and therefore it continued calling him. On appeal, Plaintiff contended: (i) that he introduced sufficient evidence to create a triable issue of fact as to whether he placed Defendant on notice of his revocation of consent; and (ii) that the TCPA, construed in light of its broad remedial purpose to protect consumers from unwanted phone calls, permits a party to revoke consent to be called, even if that consent was given as part of a contractual agreement. *Id.* at 54-55. As a preliminary matter, the Second Circuit agreed with Plaintiff that the District Court's finding that he did not revoke his consent to be contacted by telephone was improper on summary judgment. The Second Circuit stated that a genuine issue of material fact was in dispute and Plaintiff raised a jury question. *Id.* However, the Second Circuit agreed with the District Court that the TCPA did not permit Plaintiff to unilaterally revoke his consent. *Id.* at 55. The Second Circuit stated that Plaintiff's consent to be contacted by telephone was not provided gratuitously; it was included as an express provision of a contract to lease an automobile from Defendant. *Id.* at 57. Under such circumstances, the Second Circuit explained that "consent" is not revocable. *Id.* The Second Circuit noted that the common law is clear that consent to another's actions can "become irrevocable" when it is provided in a legally binding agreement. *Id.* Plaintiff argued that his consent to be contacted was revocable because that consent was not an "essential term" of his lease agreement with Defendant. *Id.* The Second Circuit disagreed and opined that in contract law, "essential terms" are those terms that are necessary in order to lend an agreement sufficient detail to be enforceable, but a contractual term does not need to be "essential" in order to be enforced as part of a binding agreement. *Id.* at 58. The Second Circuit found that a party who has agreed to a particular term in a valid contract cannot later renege on that term or unilaterally declare it to no longer apply simply because the contract could have been formed without it. *Id.* The Second Circuit concluded that it was well-established at the time that Congress drafted the TCPA that consent becomes irrevocable when it is integrated into a binding contract, and it found no indication in the statute's text that Congress intended to deviate from this common law principle in its use of the word "consent." *Id.* Accordingly, the Second Circuit affirmed the District Court's decision dismissing Plaintiff's claims.

***Telephone Science Corp., et al. v. Asset Recovery Solutions*, 2017 U.S. Dist. LEXIS 1637 (N.D. Ill. Jan. 5, 2017).** Plaintiff filed a class action against Defendant for violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff operated a service called "Nomorobo," which it designed to help consumers avoid incoming computerized telephone calls, calls made with either an automatic telephone dialing system ("ATDS"), or with a prerecorded or artificial voice. *Id.* at *2. In order to provide the Nomorobo service to consumers, Plaintiff

maintained a honeypot group of telephone numbers, from which Plaintiff gathered data related to inbound calls. Nomorobo analyzed calls placed to Plaintiff's honeypot numbers using a specialized algorithm, and then either blocked or allowed an end-user call based on its data analysis. *Id.* Individuals and businesses subscribe to Nomorobo's call-blocking services for a fee. *Id.* at *3. According to Plaintiff, around March 2014, Defendant began calling telephone numbers in the honeypot using a predictive dialer. Plaintiff alleged that, between March 2014 and February 2016, Defendant placed approximately 12,240 calls to Plaintiff's honeypot numbers, of which 747 were answered. The Court previously had granted Defendant's motion to dismiss Plaintiff's complaint with prejudice, for failure to satisfy the zone-of-interests test under 47 U.S.C. § 227(b) of the TCPA. Plaintiff subsequently filed a post-judgement motion for an order: (i) to alter the Court's opinion pursuant to Rule 59(e); and (ii) to grant Plaintiffs leave to file an amended complaint pursuant to Rule 15(a)(2). The Court denied Plaintiff's motion. The Court read 47 U.S.C. § 227(b)(1)(A)(iii) "as guarding against the receipt of, and payment for, unwelcome robo-calls," particularly those which "threaten public safety and inappropriately shift marketing costs from sellers to consumers." *Id.* at *4. The Court had held that Plaintiff's interests fell outside of this zone of interests. In particular, the Court had observed that the sole reason Plaintiff subscribe "to 'thousands' of honeypot numbers is to gather a 'large quantity' of data in order to 'detect high frequency robo-calling patterns' and to 'distinguish' between callers for its Nomorobo customer-service offerings." *Id.* at *5. Plaintiff asserted that Defendant's robo-calls served no useful purpose to Plaintiff and therefore, were unwanted and a nuisance. Plaintiff further alleged that the continued calls had an adverse effect on Plaintiff's business and interstate commerce in general. *Id.* at *14. Ultimately, that Court determined that even accepting these allegations as true and drawing all reasonable inferences in Plaintiff's favor, as a telecommunications service provider interested in commercial data collection for customer-service offerings, Plaintiff did not fall "within the class of Plaintiffs whom Congress has authorized to sue" under the TCPA. *Id.* The Court held that Plaintiff's supplemental allegations did not change its prior recognition that the only reason for the volume of calls to Plaintiff was due to the nature of Plaintiff's business, which was providing telecommunications services. *Id.* Furthermore, as the Court had previously held, Plaintiff's alleged damages – the per-minute charges incurred when answering known robo-calls in May 2015 – were not of the vexatious and intrusive nuisance nature sought to be redressed by Congress in enacting the TCPA, but rather were indirect, economic, and inherent to its business. *Id.* at *15. Accordingly, the Court denied Plaintiff's motion to alter its prior opinion pursuant to Rule 59(e) and to grant leave to file an amended complaint pursuant to Rule 15(a)(2).

***The Backer Law Firm, et al. v. Costco*, 2017 U.S. Dist. LEXIS 107981 (W.D. Mo. April 27, 2017).** Plaintiff, a law firm, filed an action alleging that Defendant sent an unsolicited facsimile in violation of the Telephone Consumer Protection Act ("TCPA"). Plaintiff filed a motion for class certification pursuant to Rule 23, and sought to certify a class of all persons or entities to whom Defendant sent one or more facsimiles promoting its products, services, or memberships between April 2, 2011 and April 2, 2015. *Id.* at *2. Defendant argued that Plaintiff had not proven that every class member actually received an unsolicited fax advertisement to demonstrate class-wide standing. *Id.* at *5. However, the Court stated that the plain language of the TCPA merely prohibits the "use [of] any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." *Id.* at *6. In support of class certification, Plaintiff provided a list (the "class list") of approximately 1,552 persons and/or entities to whom Plaintiff contended Defendant sent one or more advertisement faxes between April 2, 2011, and April 2, 2015. *Id.* at *7. The class list was distilled from a report of at least 10,000 entries ("MAP list"), generated to capture all entries referencing "faxes and faxing" associated with Defendant locations between April 2, 2011, and January 20, 2016. *Id.* at *7-8. The Court found that Plaintiff demonstrated that the class was ascertainable by using "objective criteria" to determine the membership of the proposed class by having pared down the MAP list and by producing the class list, which allowed the class to be ascertained with certainty. *Id.* at *9. The Court held that Plaintiff demonstrated that the putative class faced common questions of law and fact relating to Defendant's compliance with the TCPA, the determination of the truth or falsity of which would lead to the class-wide resolution of the matter. *Id.* at *11. The Court stated that, as to typicality, it was satisfied that Plaintiff's claims had the same characteristics as the claims of the class at large, because the complaint was premised on the transmission of unsolicited fax advertisements by Defendant, which was the same course of conduct at issue for all members of the proposed class. *Id.* at *12. The Court also determined that the adequacy requirement was met because Plaintiff had the same interest and injury of TCPA violations as the class, had no currently discernable interests antagonistic to the interests of other class members, and was being represented by competent class counsel. *Id.* at *14. The

Court further found that Plaintiff met the requirements of Rule 23(b). As to predominance, the Court noted that whether Defendant violated the TCPA by transmitting unsolicited fax advertisements to the class was a common question that predominated over any inquiries affecting only individual members raised by Defendant, such as the exact times at which the faxes were sent, which employee sent the faxes, and which machine was used to send the faxes. *Id.* at *15-16. Moreover, the Court concluded that class treatment was a superior form of adjudication in this matter, as individual treatment of all 1,552 potential claims that involved common issues presented by all members would be unrealistic and unnecessarily repetitive. *Id.* at *17-18. Accordingly, the Court granted Plaintiff's motion for class certification

(lxiii) The Adequacy Of Representation Requirement For Class Certification

***Henderson, et al. v. Bank Of New York Mellon*, 2017 U.S. Dist. LEXIS 156021 (D. Mass. Sept. 25, 2017).** Plaintiffs filed a class action alleging that Defendant, the trustee for thousands of trusts, breached its fiduciary duties to its trust beneficiaries by imprudently investing trust assets in poorly performing proprietary and affiliated investment vehicles and by charging unauthorized fees for the preparation of tax returns. *Id.* at *1-2. Plaintiffs filed a motion for class certification, and Defendant moved to strike named Plaintiff Ashby Henderson on the basis of inadequacy. *Id.* at *2. Defendant argued that Henderson did not meet the adequacy requirement of Rule 23(a)(4) because: (i) she did not have a sufficient understanding of the case to protect the interests of the class; and (ii) rather than meaningfully participating in the case, Henderson had abdicated control of the case to Brian McTigue, a lawyer who Defendant argued was unfit to represent the interests of the class. *Id.* at *5. Defendant further argued that Henderson's reliance on McTigue created a conflict with the class because the Court already had refused to appoint McTigue as class counsel. *Id.* The Court stated that, in actions such as this one involving complex financial matters, a named Plaintiff is not required to have expert knowledge of the details of the case and may properly place a great deal of reliance on counsel. *Id.* The Court found that Henderson demonstrated sufficient knowledge of her claims to serve as class representative because at her deposition she was able to explain the essential nature of her claims, at least to the extent that is reasonable to expect from a layperson class representative in a complex financial case. *Id.* at *6. Defendant further argued that Henderson was inadequate because she failed to attend or call in to the parties' mediation. *Id.* at *7. The Court, however, determined that the evidence in the record showed that the mediator permitted Henderson to participate by phone. *Id.* at *7-8. Plaintiffs' counsel represented to the Court that Henderson was available by phone and that she conferred with counsel telephonically multiple times during the course of the mediation. The Court also concluded that Henderson had not ceded control of the litigation to McTigue. The Court was previously made aware of discord among Plaintiffs' counsel that resulted in McTigue firing the other Plaintiffs' counsel. The Court denied McTigue's motion to be appointed interim lead class counsel upon finding that his conduct during the litigation was "deeply disturbing," "contumacious," and "uncivil." *Id.* at *8. Plaintiffs' counsel came to an agreement whereby Bailey & Glasser LLP and the Howard Law Firm would serve as interim co-lead counsel and McTigue's firm would serve on an executive committee under the direction of the co-lead counsel. The Court confirmed that Henderson understood that, even if McTigue served as her contact person, the whole team of Plaintiffs' lawyers were representing the putative class. *Id.* Defendant claimed that, notwithstanding this formal arrangement, Henderson continued to rely solely on McTigue while ignoring other Plaintiffs' counsel. The Court found that the arrangement was not problematic so long as Henderson understood that she was being represented by the whole team of interim class counsel. *Id.* at *10. Moreover, Henderson testified that she worked with other Plaintiffs' counsel in preparation for her deposition. In sum, the Court held that Henderson demonstrated adequate knowledge of the case to serve as class representative, that she has not ceded control of the case to unfit class counsel, and that her interests did not conflict with the interests of the class. *Id.* at *11. Accordingly, the Court denied Defendant's motion.

***Kurtz, et al. v. Kimberly-Clark Corp.,* 2017 U.S. Dist. LEXIS 27388 (E.D.N.Y. Feb. 27, 2017).** Plaintiffs, groups of consumers in three related class actions, alleged that the moist toilet wipes sold by the retailer Defendants, produced by the manufacturer Defendants, and marked "flushable" were defective in labelling because they were not really flushable. *Id.* at *1. Plaintiff filed three related class actions, including the *Kurtz* action, the *Belfiore* action, and the *Honigman* action. Plaintiffs in the *Honigman* action had not moved for class certification. Plaintiff in the *Belfiore* action moved to certify a class of everyone who purchased Charmin Freshmates, a flushable wipes product, in New York. Plaintiff in the *Kurtz* action based his complaint on separate claims under New Jersey and New York state law. On the Court's suggestion that the same Plaintiff

could not represent a New York class and a New Jersey class, Plaintiff in *Kurtz* agreed not to seek certification of a New Jersey class. *Id.* at *3. The Court therefore considered Plaintiff's motions to certify a nationwide class and two New York sub-classes of everyone who purchased the Kimberly-Clark flushable wipes product and the Kirkland Signature flushable wipes product in New York. The Court noted that it indicated at a previous hearing that classes based on New York purchasers and on New York law claims would be certified. *Id.* at *6. However, the Court denied certification of a national class. The Court held that Plaintiff failed to demonstrated the financial or other capacity to adequately represent a national class of consumers who purchased flushable wipes manufactured by Defendants. *Id.* at *7. Plaintiff had expressed reluctance to conduct a scientific survey of consumers to determine a reasonable consumer's understanding of the term "flushable." *Id.* The Court opined that conducting such a survey on a national scale would be costly. *Id.* The Court determined that limiting certification to two New York sub-classes and denying certification of a nationwide class was appropriate as the events underlying his claim took place in New York and discovery was largely confined to New York. Additionally, class discovery conducted beyond the New York branch was very limited. *Id.* The Court therefore certified three classes – one in the *Belfiore* action and two in the *Kurtz* action – each of which involved different Defendants and a different product, but all of which relied on New York law and purchases in New York.

***Mooradian, et al. v. FCA US, LLC,* 2017 U.S. Dist. LEXIS 205877 (N.D. Ohio Dec. 14, 2017).** Plaintiffs filed a putative class action alleging defects in Defendant's automobiles relating to casting sand used in the engine parts that allegedly seeped into the vehicles' radiators and created a sludge, which resulted in heating and cooling issues. Defendant moved for sanctions for spoliation of evidence. The Court granted the motion in part. During discovery, Defendant requested that a putative class representative produce his vehicle at an authorized dealership of Plaintiffs' choice for inspection. After that request, the named Plaintiff White, one of the class representatives, took his vehicle to an unauthorized automobile service location and had the coolant in his radiator flushed upon his counsel's request and without notice to Defendant; a video was taken of the process. White received two unlabeled, unsealed jugs of liquid that purportedly came from his radiator. Thereafter, White left the jugs in his car during a 12-hour work shift and later in the breezeway of his mother's house for about three weeks. He then picked them up and brought them to his deposition. White also received several low-quality videos that purported to show his vehicle being serviced. Neither White and his counsel, nor any representative of Defendant observed the making of the videos. The Court found that the factors for imposing sanctions for spoliation of evidence were satisfied because: (i) White had control over the evidence; (ii) the evidence was destroyed with a culpable state of mind; and (iii) the destroyed evidence was relevant to the party's claim or defense. At the outset, the Court noted that the motion for sanctions concerned perhaps the most important piece of evidence in the case. The Court rejected Plaintiffs' arguments against sanctions, including that: (i) Defendant's request for inspection was ambiguous; (ii) Defendant had extracted fluid from the radiator of another Plaintiff's vehicle; and (iii) White did not destroy or alter evidence. The Court determined that sanctions were appropriate even though the Court noted that it could not determine if the spoliation was a product of maliciousness or simply incompetence. *Id.* at *8. The Court further ruled that White's actions made him an atypical member of the class and gave Defendant numerous defenses against him that would not apply to the class as a whole. As such, the Court disqualified White from serving as a class representative, but declined to decide whether he could later participate as a class member if a class was certified. In addition, the Court prohibited Plaintiffs from supporting their motion for class certification with any evidence stemming from the liquid drained from White's vehicle, or any work done on that vehicle during the service at issue. The Court also barred Plaintiffs from using such evidence in dispositive motions or at trial. Finally, the Court declined to disqualify the Plaintiff's counsel from acting as class counsel, but opined that Defendant could raise counsel's potential disqualification again at the class certification stage. Accordingly, the Court granted Defendant's motion for sanctions in part, and disqualified White from serving as a class representative. *Id.* at *10.

(lxiv) The *Cy Pres* Doctrine In Class Actions

***Dial Corp, et al. v. News Corp.*, 2017 U.S. Dist. LEXIS 196637 (S.D.N.Y. Nov. 20, 2017).** Plaintiffs filed a class action accusing Defendant of antitrust violations by working to shut would-be rivals out of the market for in-store advertising services like coupon dispensers and shopping cart advertisements. The parties ultimately settled the matter and the Court authorized the distribution of a $250 million settlement fund. Lead counsel issued all claimant checks and $1.97 in accrued interest remained undistributed. The Court noted that this sum was "so miniscule that attempting to distribute it among class claimants *pro rata* would be akin to splitting the atom." *Id.*

at *5. The Court noted that the efforts of lead counsel and the claims administrator to shepherd the distribution process offered a paradigm for smooth and efficient claims administration. The Court stated that if only all class action settlements could end on such a high note, the nettlesome problems inherent with *cy pres* distributions might disappear. *Id.* This Court commended lead counsel and authorized the claims administrator "to keep the change." *Id.*

***Mateo-Evangelio, et al. v. Triple J Produce, Inc.,* 2017 U.S. Dist. LEXIS 135580 (E.D.N.C. Aug. 24, 2017).** Plaintiffs, a group of packing house employees, filed a class and collective action alleging that Defendant violated various provisions of the FLSA, the North Carolina Wage & Hour Act ("NCWHA") and the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). The parties ultimately settled the matter and resolved all claims. The settlement agreement provided for payments totaling $328,920 to the named Plaintiffs and class members based on the class action and collective action claims asserted in the complaint. The Court granted final approval of the settlement and final class notice. Notice was send to 306 potential class members. Only four claims had been submitted at that time for the FLSA fund, three claims had been submitted for the NCWHA fund, and 21 claims had been submitted for the AWPA fund, of which 11 had been determined "invalid" by the class action settlement administrator. *Id.* at *6. Plaintiffs subsequently filed a motion for *cy pres* award of AWPA funds and Defendant filed a motion for reversion of the remaining FLSA and NCWHA funds. The Court granted Plaintiffs' motion in part and denied Defendant's motion. The Court first noted that to the extent there were any remaining NCWHA and FLSA settlement funds upon filing of joint final report of the parties, it directed such funds be distributed in the aggregate with the remaining AWPA funds, upon final accounting of valid claims, to the designated *cy pres* recipient. *Id.* at *7. The Court stated that given the statutory provisions at issue in the AWPA class claims, the statute reflects more particularly an objective in those provisions to ensure that farm workers are employed and paid in accordance with statutory wage, record-keeping, and disclosure requirements. The Court explained that a *cy pres* recipient in this instance should be an organization whose interests and purposes align with farm worker interests in receiving correct wages and disclosures that are the subject of the lawsuit, and with the purposes of the AWPA in protecting those interests of farm workers. *Id.* at *11. The Court found that Plaintiffs' proposal of the Student Action With Farm Workers of Duke University ("SAF") was the best match to have interests and purposes closer than the others to the lawsuit, farm workers, and the AWPA. *Id.* at *12. Accordingly, the Court granted that all unclaimed funds be paid to the SAF. Accordingly, the Court granted Plaintiffs' motion regarding designation of *cy pres* recipient in part, and denied Defendants' motion.

(lxv) The Numerosity Requirement For Class Certification

***Mulvania, et al. v. Sheriff Of Rock Island County*, 850 F.3d 849 (7th Cir. 2017).** Plaintiff brought an action against Defendants, alleging that four male correctional officers assaulted her as she was being booked into the jail on investigation of domestic violence charges, in violation of her Fourth and Fourteenth Amendment rights. Plaintiff further alleged that the assault induced a seizure that required her to be hospitalized. Plaintiff amended her complaint three times, and eventually brought class claims to challenge Defendant's policy of requiring incoming female detainees to remove non-white underwear and underwire bras. Plaintiff filed a motion to certify the proposed class, which the Court denied. Plaintiff appealed the ruling and argued that the District Court erred when concluded that she failed to meet the predominance and numerosity requirements of Rule 23. On appeal, the Seventh Circuit agreed that the District Court incorrectly applied the predominance requirement, but found no error in its ruling on numerosity. *Id.* at 858. The District Court concluded that common issues did not predominate in the underwear claim because the damages would vary for individual class members based on factors such as how long a detainee was deprived of her underwear, whether she was on her menstrual cycle or pregnant, and other considerations. *Id.* at 859. The Seventh Circuit stated that case law authorities in every circuit have uniformly held that the Rule 23(b)(3) predominance requirement could be satisfied despite the need to make individualized damage determinations. The Seventh Circuit found that in cases like this, where damages must be assessed individually, a District Court may "bifurcate the case into a liability phase and a damages phase." *Id.* The Seventh Circuit held that the District Court therefore erred when it ruled that class certification was precluded based on the need for damages to be assessed individually. However, the Seventh Circuit found that the error was harmless because Plaintiff's proposed class did not meet the numerosity requirement and therefore class certification was properly denied. Plaintiff estimated that the class would have 41 members. The Seventh Circuit noted that the District Court had identified several problems with Plaintiff's

calculation and overall numerosity argument, yet Plaintiffs failed to address most of these problems on appeal. *Id.* at 860. First, Plaintiff did not address the impracticability of joinder in the amended motion in support of class certification. Second, Plaintiff did not explain critical ambiguities in how the potential class size was calculated. Third, the District Court disagreed with Plaintiff's class start date of November 15, 2008, which was two years before Plaintiff's first complaint. *Id.* Plaintiffs addressed only the third issue on appeal. The District Court calculated that a class of 29 members existed based on a class start date of April 24, 2010, two years before Plaintiff filed the third amended complaint (which first alleged the underwear class claims). *Id.* Plaintiff argued that this class start date was incorrect because, under Rule 15(c), the third amended complaint "related back" to the initial complaint filed on November 15, 2010. *Id.* However, the Seventh Circuit noted that Plaintiff cited no authority that supported this argument. The Seventh Circuit therefore determined that the District Court did not err by basing its start date for the numerosity calculation on the third amended complaint, which was when the underwear class allegations were first introduced. The Seventh Circuit held that Plaintiff's proposed class did not met the numerosity requirement of Rule 23(a). Accordingly, the Seventh Circuit affirmed the District Court's ruling denying class certification.

(lxvi) The Predominance Requirement For Class Certification

***In Re Class 8 Transmission Indirect Purchaser Litigation*, 2017 U.S. App. LEXIS 2328 (3d Cir. Feb. 9, 2017).** Plaintiffs brought a putative antitrust class action alleging a conspiracy among manufacturers of heavy-duty trucks and a supplier of transmissions to maintain the supplier's monopoly in the heavy-duty truck transmissions market. Plaintiffs alleged that this conspiracy resulted in their paying artificially inflated prices for trucks that contained the transmissions at issue. *Id.* at *2-3. After Plaintiffs moved for class certification, the District Court found that Plaintiffs failed to meet the predominance requirement of Rule 23(b)(3). On appeal, the Third Circuit affirmed the District Court's ruling. Plaintiffs alleged that manufacturers of Class 8 trucks took orders from customers to build trucks customized to the customers' needs and then purchased component parts from suppliers. Plaintiffs were four manufacturers of Class 8 trucks and Eaton Corp., the primary supplier of Class 8 transmissions. *Id.* at *3-4. Plaintiffs were "indirect" purchasers of Class 8 transmissions, as they purchased trucks containing Eaton transmissions from authorized agents or dealers of the truck manufacturers. *Id.* at *4. Plaintiffs alleged that the truck manufacturers conspired among themselves and with Eaton to secure Eaton's monopoly in the Class 8 truck transmission market by entering individually into long-term agreements with Eaton in 2000 to 2001. Plaintiffs asserted that, as a result of the agreements and market competition foreclosure, they paid supra-competitive prices for Class 8 trucks and the transmissions. *Id.* at *5. Plaintiffs moved for class certification, and the District Court concluded that Plaintiffs failed to establish the threshold Rule 23(b)(3) predominance requirement that common evidence could prove that all or nearly all of the proposed class members (*i.e.*, indirect purchasers) had paid a higher price than they would have absent the alleged conspiracy. The District Court stated that Plaintiffs needed to demonstrate that common evidence could prove that: (i) Eaton overcharged the truck manufacturers for Class 8 transmissions; (ii) the truck manufacturers passed on this overcharge to direct purchasers; and (iii) direct purchasers passed on the overcharge to Plaintiffs. *Id.* at *8. Plaintiffs primarily relied on the expert report and testimony of Dr. Russell Lamb, an economist, who analyzed each requirement through regressions. *Id.* at *9. Plaintiffs argued that the District Court abused its discretion by faulting their expert economist's class-wide impact analysis for excluding certain data and failing to consider their expert's revised rebuttal report that included additional data. The District Court found that Dr. Lamb's regression did not test class-wide impact because it was based solely on a portion of line haul transmission sales data, excluding performance transmission sales, and excluded data from two truck manufacturers, whose sales comprised over 40% of the line haul trucks. *Id.* at *10. The District Court determined that the other regression analysis was based on less than 1% of total truck sales from only California. *Id.* at *11. The District Court therefore concluded that Plaintiffs failed to show that common issues predominated as to the entirely of the class that Plaintiffs sought to certify. The Third Circuit agreed and stated that, if Plaintiffs were seeking to certify a class across several states covering hundreds of thousands of sales, the District Court properly concluded that Dr. Lamb's analysis was insufficient to demonstrate class-wide impact. *Id.* at *11-12. The Third Circuit concluded that the District Court conducted a rigorous analysis of Plaintiffs' theory of class-wide impact and all the available evidence, and the District Court did not abuse its discretion in its analysis. *Id.* at *12. The Third Circuit therefore upheld the District Court's denial of class certification.

***Landeros, et al. v. Pinnacle Recovery, Inc.,* 2017 U.S. App. LEXIS 9419 (11th Cir. May 30, 2017).** Plaintiffs, individually and on behalf of all similarly-situated individuals, filed a complaint against Defendant alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Plaintiffs asserted that Defendant attempted to collect a debt through a false, misleading, or deceptive communication. Plaintiffs filed a motion for class certification of a proposed class of all persons in the United States who received a form collection letter from Defendant. *Id.* at *2. Following discovery, the parties settled, and thereafter sought the District Court's approval of a class action settlement and proposed class certification under Rule 23(b)(3). The District Court denied the motion for preliminary certification of the class. On appeal, the Sixth Circuit affirmed the District Court's order. The FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* at *5. The Sixth Circuit stated that the District Court properly determined that Plaintiffs did not satisfy the predominance requirement in Rule 23. The Sixth Circuit concluded from the record that the District Court correctly declined to certify the class because whether the contents of the letter were false, deceptive, or misleading turned to the unique factual circumstances of each individual who received the letter. Furthermore, Defendant's letter made no unqualified or incomplete statement about what the law required. The Sixth Circuit stated that a determination about whether the contents of Defendant's letter violated the FDCPA was not possible without an inquiry into the factual circumstances of each recipient's indebtedness and the intentions of Defendant as to that particular recipient. Accordingly, the Sixth Circuit found that the District Court properly denied class certification because the predominance requirement was not met. Plaintiffs urged the application of the "least sophisticated consumer" standard in order to salvage their FDCPA class action claim and negate the individualized inquiry. *Id.* at *8. Plaintiffs contended that under this standard, the least sophisticated consumer would be deceived by the letter regardless of the factual circumstances applicable to each recipient of the letter and that the District Court erred by not employing this standard. The District Court found that this standard did not apply in this case because whether the letter was false or misleading turned on the factual circumstances particular to each recipient. The Sixth Circuit agreed that the least sophisticated consumer standard did not apply because the consumer's sophistication here was irrelevant, as the merits of Plaintiffs' FDCPA claims did not turn on the sophistication of the person who read the letter. Rather, the Sixth Circuit explained that the merits of the claims depended on the objective factual circumstances unique to each recipient's indebtedness. Thus, the potential falsity or tendency to deceive depended solely upon objective facts or the intentions of Defendant, which varied from class member to class member. *Id.* at *10. As such, the Sixth Circuit held that the least sophisticated consumer standard did not apply in this case. Accordingly, the Sixth Circuit found that the District Court did not abuse its discretion in denying the parties' joint motion for class certification and mooting their joint motion for approval of a settlement agreement. *Id.* at *10-11.

***Slade, et al. v. Progressive Insurance Co.,* 2017 U.S. App. LEXIS 8229 (5th Cir. May 9, 2017).** Plaintiff, an insured of Defendant, alleged that Defendant improperly calculated the value of total loss vehicles in Plaintiff's insurance policy. The District Court had previously certified a class of insured individuals asserting common law fraud claims. On appeal, the Fifth Circuit reversed the District Court's ruling. *Id.* at *1-2. The Fifth Circuit stated that it has held consistently that "a fraud class action cannot be certified when individual reliance will be an issue." *Id.* at *12. The Fifth Circuit reasoned that fraud actions that require proof of individual reliance cannot be certified as Rule 23(b)(3) class actions because individual, rather than common, issues will predominate. *Id.* at *13. The Fifth Circuit determined that Plaintiff's class claim was a common law fraud claim, which requires proof of reliance under Louisiana law. The Fifth Circuit concluded that showing reliance would necessitate individual inquiries because Defendant's loss-payout process allowed claimants to individually negotiate their claims. Because Plaintiff failed to show that class issues predominated, the Fifth Circuit held that Plaintiff's common law fraud claim should not have been certified.

***Webb, et al. v. Exxon Mobil Corp.,* 2017 U.S. App. LEXIS 8433 (8th Cir. May 11, 2017).** Plaintiffs, a group of landowners, brought a putative class action alleging that Defendant damaged their properties by failing to maintain Defendant's pipeline. The District Court initially certified Plaintiffs' class claims. After some discovery, the District Court decertified the class, finding that Plaintiffs failed to meet the predominance requirement of Rule 23(b)(3). Approximately 70 years ago, Defendant entered into a series of easement contracts with landowners in Texas, Arkansas, Illinois, and Missouri for the purpose of constructing a pipeline that would transport oil from Texas to Illinois. Decades later, the successors-in-interest to those easement contracts alleged that Defendant breached the easement contracts by failing to reasonably operate, maintain, and repair the pipeline. Plaintiffs

asserted that they were entitled to rescind the easements and force Defendant to remove the pipeline or replace it or, alternatively, that they were entitled to recover damages resulting from the breach of contract and diminished value of their properties. *Id.* at *4. Defendant argued that the Pipeline Safety Act ("PSA") preempted Plaintiffs' claims and that the class was not ascertainable because identifying its members would require individual title searches of thousands of parcels of land. *Id.* at *5. The District Court initially disagreed. The District Court concluded that the PSA did not preempt Plaintiffs' claims because Plaintiffs sought to enforce private easement agreements and it certified a narrowed class of individuals "who currently own real property subject to an easement for the Pegasus Pipeline and who have pipeline physically crossing their property." *Id.* at *6. After additional discovery, Defendant moved for reconsideration of the District Court's class certification decision and for summary judgment on the grounds that Plaintiffs could not prove breach of the easement contracts because Defendants did not owe any affirmative duty of maintenance or repair under Arkansas law. *Id.* The District Court granted Defendant's motion. The District Court ruled that class certification was improper, that the PSA preempted Plaintiffs' claims, and that Plaintiffs' claims otherwise failed under Arkansas law. *Id.* at *6. On appeal, the Eighth Circuit affirmed. The Eighth Circuit held that the District Court did not abuse its discretion in decertifying the class because, even if it assumed that Plaintiffs could demonstrate commonality, Plaintiffs could not demonstrate predominance. The Eighth Circuit reasoned that, although Plaintiffs could assert all of the pipe was bad, demonstrating breach was far more complicated and required consideration of several individualized issues, including evaluation of each property's unique features and conditions, the presence of groundwater, possible mitigating factors, and complicated assessments of diminution in value. These considerations were unique to each class member's property and complicated any class-wide resolution. The Eighth Circuit, therefore, concluded that individual issues predominated over common issues. *Id.* at *11. Further, the Eighth Circuit noted that, although the easements may be similar or identical, the proposed class would join claims arising out of the contract, property, and tort law of four states, *i.e.,* Arkansas, Illinois, Texas, and Missouri. *Id.* The Eighth Circuit, therefore, concluded that proceeding as a class action was not the preferable method of adjudication because it "would potentially invite the application of multiple conflicting state laws." *Id.* at *11-12. The Eighth Circuit also agreed that summary judgment was appropriate as to Plaintiff's claims for breach of easement contracts under Arkansas law because no express contractual provisions imposed duties of maintenance or repair and no such duty could be implied. *Id.* at *12-17. Accordingly, the Eighth Circuit affirmed the District Court's orders that decertified the class actions claims and granted summary judgment.

(lxvii) The Typicality Requirement For Class Certification

***Corcoran, et al. v. CVS Health*, 2017 U.S. Dist. LEXIS 143327 (N.D. Cal. Sept. 5, 2017).** Plaintiffs brought a putative class action alleging Defendants knowingly overcharged millions of insured patients by submitting falsely inflated drug prices to pharmacy benefit managers ("PBMs") and third-party payor insurance providers ("TPPs"), which resulted in higher co-payment obligations for Plaintiffs. *Id.* at *2. Plaintiffs raised claims under the laws of 11 states: (i) each state's statutory laws proscribing unfair and deceptive acts and practices ("UDAP"); and (ii) common law claims for fraud, negligent misrepresentation and unjust enrichment. After the initial denial claims of their motion for class certification, Plaintiffs filed a renewed motion for class certification, which significantly narrowed the classes and issues that they sought to certify. Plaintiffs sought to certify 11 state classes composed of individuals who "have filled prescriptions for generic drugs at CVS pharmacies using coverage provided by their TPP plans." *Id.* at *3. Defendants' HSP program provided discounted pricing on hundreds of generic prescription medications. Plaintiffs alleged that the price Defendants charged under the HSP program for the HSP generics was the true U&C price for those drugs. However, Defendants continued to submit to insurance amounts higher than the HSP price for all HSP generics (rather than the HSP program price) as the U&C price to TPPs and PBMs. *Id.* at *8. As a result, in some instances, Plaintiffs alleged they paid co-payments that exceeded the HSP price or the "true U&C price." Defendants asserted that Plaintiffs could not meet the typicality requirement of Rule 23. Defendants argued that each class representative was atypical with respect to other potential class members whose claims were adjudicated by a different PBM. For instance, Plaintiff Clark was the sole representative of the California class, and he claimed that he was overcharged on purchases adjudicated by PBM Caremark. Defendants explained that Clark would be atypical of other California class members whose claims were adjudicated by PBMs ExpressScripts, Medco, MedImpact, or Optum. *Id.* at *15-16. The Court agreed, and stated that the classes must necessarily be limited in scope to the PBMs, which adjudicated the class representative's claims. However, the Court held that the necessary limits would not require denial of Plaintiffs' motion for class certification. Rather, to the extent that the proposed classes satisfied

the remaining requirements for class certification, the Court narrowed each class to the specific PBMs, which adjudicated the claims of the class representatives. *Id.* at *17. The Court also determined that Defendants offered evidence demonstrating that the named Plaintiffs for the Arizona and New York class members had no transactions adjudicated by any of the five PBMs at issue for purposes of class certification Accordingly, the Court found that neither was typical of the classes which they sought to represent and denied class certification as to the Arizona and New York classes. The Court thereby granted Plaintiffs' motion for class certification in part.

***Morrow, et al. v. City Of San Diego*, 2017 U.S. Dist. LEXIS 86041 (N.D. Cal. June 5, 2017).** Plaintiffs brought a class action alleging that Defendant prosecuted only residents in low to moderate income neighborhoods pursuant to the it's "CDBG Pro-active Code Enforcement Project" *Id.* at *3. Plaintiffs claimed Defendants only investigated and prosecuted code violations "reactively," but with respect to certain census tracts only, Defendants investigated and prosecuted these code violations "pro-actively." *Id.* at *3-4. Plaintiffs alleged that by targeting residents for pro-active enforcement only in certain census tracts, Defendant denied Plaintiffs and all the members of the putative class equal protection of the laws. Plaintiffs filed a motion for class certification, which the Court denied. In response to Plaintiffs' motion, Defendant submitted the declaration of Michael Richmond, the Deputy Director for the Code Enforcement Division, who stated that the code enforcement related to grading violations in Plaintiffs' lots and others' lots, enforcement of which was not ever funded by the CDBG Pro-active Code Enforcement Project. *Id.* at *5. The Court found that Plaintiffs therefore could not meet the typicality requirement of Rule 23. The Court stated that Plaintiffs sought to certify a class of individuals subjected to the CDBG Pro-active Code Enforcement Project, but Defendant had raised questions as to whether the named Plaintiffs were subjected to this Project. Richmond submitted a declaration that Plaintiffs' zoning problems were never the result of any pro-active code enforcement. In response, Plaintiffs offered no evidence to contradict the declaration. *Id.* at *8-9. The Court held that because Plaintiffs necessarily would have unique factual circumstances that would require them to meet defenses that are not typical of other potential class members, their claims were not typical. As a result, the Court denied the motion for class certification.

(lxviii) Trial And Post-Trial Issues In Class Action Litigation

***Barfield, et al. v. Sho-Me Power Electric Cooperative,* 2017 U.S. Dist. LEXIS 160694 (D.N.H. Mar. 27, 2017).** Following a jury trial in this class action, judgment was entered on the jury's verdict for $129,211,337 in actual damages and $1,300,000 in punitive damages. Pursuant to Rule 59(d), the Court vacated the judgment and *sua sponte* ordered a new trial. The Court noted that Rule 59(d) provides, "no later than 28 days after the entry of judgment, the Court, on its own, may order a new trial for any reason that would justify granting one on a party's motion." *Id.* at *2. The Court concluded that the amount of damages awarded by the jury was against the weight of the evidence. The jury was required to determine the fair market rental value of the easement that Plaintiffs could obtain from a third-party. Plaintiffs' expert, Dr. Kilpatrick, presented evidence that the fair market rental value of the easement would be $129,211,337. *Id.* at *3. The jury relied on the expert evidence to reach a verdict in exactly the same amount. However, Defendants presented evidence, including their actual records, to show costs the Defendants incurred to operate their commercial telecommunications company. *Id.* The Court noted that the costs were nearly equal to the income purportedly earned by Defendants. The Court stated that although there could be a dispute about the allocation of costs between Defendants and the actual amount of profits Defendants in fact earned, even when viewed in the light most favorable to the verdict, the record did not support a finding that a third-party or Defendants would be willing to rent an easement from Plaintiffs in excess of $129 million, absent a profit sufficiently clear to off-set not only the $129 million in rent, but also to off-set the reasonable operating costs of their telecommunications company. *Id.* at *4. Accordingly, the Court found that the damages award did not make sense as a whole, and ruled that the verdict could not stand. The Court therefore vacated the judgement of over $130 million and ordered a new trial.

(lxix) Venue Issues In Class Actions

***Panitch, et al. v. Quaker Oats Co.,* 2017 U.S. Dist. LEXIS 51737 (E.D. Pa. April 5, 2017).** Plaintiffs, a group of consumers, brought five putative class actions alleging that the "100% Natural" labels on certain Defendant products were false and misleading because the oats contained detectable quantities of the herbicide glyphosate. *Id.* at *2. Plaintiffs in other cases – the *Jaffee, Daly*, and *Cooper* cases – agreed to transfer their

cases to the U.S. District Court for the Northern District of Illinois for consolidation. The cases were consolidated with another pending case – the *Gibson* case – and on August 11, 2016, Plaintiffs filed their consolidated amended complaint. Defendant removed another pending case – the *Kinn* case – to the U.S. District Court for the Western District of Washington, but then moved to transfer *Kinn* to the Northern District of Illinois. The Court granted Defendant's motion to transfer. All the earlier-filed cases were pending in the Northern District of Illinois in one consolidated proceeding. *Id.* at *3-4. Plaintiffs Oren Panitch, Gina Davis, and Margie Rizika filed a new complaint and brought claims on behalf of the nationwide putative class for breach of express warranty, breach of implied warranty, unjust enrichment, negligent misrepresentation, and injunctive relief. Defendant moved to transfer this case to the Northern District of Illinois under both the "first-filed rule" and 28 U.S.C. § 1404(a) or, in the alternative, to stay the case pending the resolution of *Gibson*. The Court found that Plaintiffs' complaint was substantially identical to the consolidated amended complaint in *Gibson*, with many paragraphs copied verbatim. The factual allegations underlying the claims were the *same* as in *Gibson*. The Court found that in both cases, the named Plaintiffs allege that the same Defendant (Quaker Oats) made the same claims (*e.g.*, "100% Natural," "100% Natural Whole Grain," and "heart healthy,") respecting the same three products (Quaker Oats Old-Fashioned, Quaker Oats Quick 1-Minute, and Quaker Steel Cut Oats) across the *same* geographic region (nationwide), and that these claims misled the public for the *same* reason (products "are not 100% natural, but instead contain the chemical glyphosate"). *Id.* at *9-10. The Court stated that Plaintiffs here and in *Gibson* sought to represent identical nationwide classes of all persons "who have purchased the Products, for personal use, and not for resale, within any applicable limitations period until Notice is provided to the class." *Id.* at *10. The Court held that Plaintiffs filed their complaint months after the other six actions were initiated and after four of those actions had been consolidated in Illinois. In these circumstances, the Court opined that Plaintiffs appeared to be forum shopping, and Defendant's desire to litigate in one forum all the identical class claims filed against it was entirely understandable. *Id.* at *13. The Court therefore found that sound judicial administration and comity weighed strongly in favor of transfer under the first-filed rule. The Court also determined that all factors weighed strongly in favor of transfer. Accordingly, the Court granted Defendant's motion to transfer venue to the Northern District of Illinois.

***Pontrelli, et al. v. Monavie, Inc*., 2017 U.S. Dist. LEXIS 178824 (D.N.J. Oct. 27, 2017).** Plaintiff filed a class action alleging that Defendants' claims regarding its products did not provide the health benefits purported in their advertising in violation of the New Jersey Consumer Fraud Act. Following dispositive motion practice, and prior to the close of discovery and class certification briefing, the Court entered an agreed order staying the case pending settlement negotiations in a companion action involving Defendant's marketing of its juice products – a case entitled *Harbut v. MonaVie, Inc.,* Case 12-CV-1983 (C.D. Cal.) ("*Harbut*"), then pending in the Central District of California. Plaintiff and the class representative in *Harbut* moved before the U.S. Judicial Panel on Multi-District Litigation ("MDL Panel") under 28 U.S.C. § 1407 to authorize an MDL in the District of Utah where an important declaratory judgment action – entitled *Starr Indemnity & Liability Co. v. MonaVie, Inc. Inc.*, Case No. 14-CV-393 (D. Utah) ("*Starr*") – was pending. *Id.* at *3. Defendant then filed a motion to withdraw stating that its assets "were foreclosed upon" and that it was "no longer in business." *Id.* at *4. The Court granted the motion. Plaintiff then moved to transfer venue to the District of Utah. Subsequent to the filing of the instant motion, the Central District of California transferred *Harbut* to the District of Utah. Plaintiff argued that MonaVie's foreclosure and total lack of funds made the case nearly impossible to resolve in the District of New Jersey because the only assets from which Defendants could pay anything were insurance policies, which were the subject of the *Starr* litigation in Utah. *Id.* at *5. Plaintiff contended that a disposition in *Starr* would have a direct implication on the instant case to the extent it determined whether the policies were available to pay for the defense, and settlement or judgment in this case. *Id.* Plaintiff also contended that the majority of MonaVie's now former employees who Plaintiff sought to depose, and who may be called to testify at trial, were based in Utah. *Id.* at *6. Plaintiff maintained that transfer would reduce the cost of litigation for MonaVie, which was headquartered in Utah, as well as make it more convenient for the parties. Finally, Plaintiff noted that she has moved to intervene in *Starr* in an effort to prevent the entry of a declaratory judgment by default against MonaVie and hoping to preserve insurance policies at issue to satisfy any judgment or pay for counsel in this case. The Court found that the interests of justice would be better served by transfer of the case to the District of Utah given that any remnants of MonaVie were in Utah. *Id.* at *8-9. The Court held that in light of the factually similar *Harbut* action recently having been transferred to Utah, and given that *Starr* was also pending in Utah, transfer would likely promote judicial efficiency, conserve judicial resources, and eliminate expense if all three

matters are litigated there. *Id.* at *9. In sum, upon consideration of the totality of the circumstances, the Court concluded that the District of Utah was the most appropriate forum for litigation of this case. Accordingly, the Court granted Plaintiff's motion to transfer venue.

***Preston, et al. v. American Honda Motor Co*., 2017 U.S. Dist. LEXIS 181635 (N.D. Ill. Nov. 2, 2017).** Plaintiff brought a putative class action against Defendant alleging breach of express warranty, breach of implied warranty, violation of the Magnusson-Moss Act, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (the "ICFA"). Defendant filed a motion to dismiss or, in the alternative, to transfer venue to the U.S. District Court for the Central District of California. Plaintiff alleged that Defendant's manufacture of Accords with soy-based wiring and subsequent failure to cover repairs violated state and federal warranty laws. Plaintiffs in two related cases had filed class action lawsuits in the Central District of California, both of which were subsequently dismissed without prejudice. The Court found the case suitable for transfer because the Central District of California was familiar with the facts and law underlying the case, and therefore better situated to decide Defendant's motion to dismiss. To transfer an action to another venue, the Court must find that: (i) venue was proper in the district where the case was brought; (ii) venue and jurisdiction were proper in the transferee district; (iii) the transferee district was more convenient for both the parties and witnesses; and (iv) transfer would serve the interest of justice. The Court determined that the first three factors were relatively neutral. Defendant argued that the fourth factor – the interests of justice – favored transferring the case. The Court noted that a decision to transfer venue under § 1404(a) relies heavily on the interests of justice, which "may be determinative in a particular case, even if the convenience of the parties and witnesses might call for a different result." *Id.* at *18. In determining which venue was more likely to effectuate swift administration of justice, the Court considered: (i) ensuring a speedy trial; (ii) trying related litigation together; (iii) the relationship of communities to the litigation; and (iv) having the trial before a judge who was familiar with the applicable law. First, the Court found that it took almost 75% as long for cases to proceed from filing to disposition and twice as long for cases to proceed from filing to trial in the Northern District of Illinois than in the Central District of California. *Id.* at *18-19. As such, the possibility for a speedier trial counseled in favor of transferring the case. *Id.* at *19. The Court further stated that judicial economy counseled in favor of relying on the Central District of California's greater familiarity with the factual and discovery issues implicated by Plaintiff's claims. *Id.* at *20. Further, the Court opined that, because California was the situs of material events, and Illinois had no greater interest than California in adjudicating the litigation, this factor also favored transfer of the case. *Id.* at *23. The Court therefore held that the interests of justice clearly favored transferring the case to the Central District of California. The Court determined that the Central District of California could more speedily resolve the dispute, was vastly more familiar with the facts of the case, and had at least as compelling an interest in adjudicating this litigation. *Id.* at *24. Accordingly, the Court granted Defendant's motion to transfer venue.

(lxx) WARN Class Actions

***Bystry, et al. v. Royal Oak Industries,* 2017 U.S. Dist. LEXIS 155425 (W.D. Mich. Sept. 22, 2017).** Plaintiffs, a group of terminated employees, filed a class action alleging that Defendant terminated a group of over 200 employees without providing 60-days' notice or pay as required by the WARN Act. Plaintiffs filed a motion for class certification pursuant to Rule 23, which the Court granted. First, the Court noted that the estimated class size was approximately 200 members, and joinder was therefore impracticable. Moreover, the Court stated that the members of the proposed class had limited financial resources and the size of their individual claims made individual suits financially unfeasible (*e.g.*, Plaintiff asserted a claim of less than $8,000 not including benefits). *Id.* at *5-6. The Court determined that Plaintiff met the commonality requirement, as Plaintiff alleged that he and the other class members were terminated as part of a common plan stemming from Defendant's decision to terminate the putative class members. *Id.* at *6. Additionally, the factual and legal questions stemmed from a common core of facts regarding Defendant's actions and a common core of legal issues regarding every class member's rights under the WARN Act. *Id.* at *7. The Court also found that Plaintiff suffered the same type of injury as the rest of the class and his claims had the "same essential characteristics as the claims of the class at large." *Id.* Further, the terminations of Plaintiff and the putative class members resulted from the same course of events, and they all allegedly suffered the same type of injury as a result of Defendant's alleged failure to comply with the WARN Act. *Id.* at *7-8. Therefore, Plaintiffs also satisfied typicality. The Court opined that the circumstances of Plaintiff's employment and termination rendered his interests the same as those of putative class members, because all must prove that they were entitled to and not given adequate notice of their

terminations and all must show that Defendant was not protected by the WARN's statutory exceptions. *Id.* at *8. Further, the Court noted that the record established that Plaintiff's counsel were well-qualified and experienced, and there was no doubt that they would vigorously prosecute the interests of the class. *Id.* at *8-9. As to Rule 23(b)(3), the Court found that Plaintiffs met the predominance requirement because there were common liability issues under the WARN Act as to all class members. *Id.* at *9. Further, the Court opined that a class action was the superior method of resolving the WARN dispute because many of the claims were quite small, making individual lawsuits impracticable. Further, the Court held that it was in the interest of judicial economy to consolidate as many as 200 potential claims into a single action, which would allow the common questions of law and fact to be consistently and efficiently determined. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Carlberg, et al. v. Guam Industrial Services*, 2017 U.S. Dist. LEXIS 33466 (D. Guam Mar. 7, 2017).** Plaintiffs filed a class action alleging that Defendant violated the Worker Adjustment and Retraining Notification Act ("WARN Act"). Plaintiffs filed a motion for class certification, which the Court granted. Plaintiffs were former full-time employees of Guam Shipyard and worked at a ship repair facility in Guam. A Military Sealift Command ("MSC") provided notice that it intended to issue a ship repair solicitation under which the repair facility would be provided as government furnished property. Plaintiffs allege that Defendant failed to "inform, warn, discuss, or otherwise communicate to Plaintiffs that their continued employment was at risk due to the issuance of the solicitation." *Id.* at *10. MSC awarded the solicitation number to another facility rather than Defendant, and Plaintiffs subsequently received written notices advising them that they were terminated effective immediately. *Id.* Plaintiffs asserted that most non-essential personnel did not receive that day's wage and were given approximately one hour to remove their personal belongings from the premises. As to the Rule 23 requirements, Defendants did not challenge that Plaintiffs met the numerosity requirement. The Court found that Plaintiffs' claims presented numerous common questions of law and fact, including whether each putative class member could show that Guam Shipyard was subject to the WARN Act, that each class member was employed by Guam Shipyard, that they were terminated in connection with a mass lay-off without proper notice and without cause, and that Guam Shipyard failed to pay the required 60-days of wages and benefits. *Id.* at *14-15. Additionally, the Court determined that the Plaintiffs' common legal and factual issues were typical of the putative class members' WARN Act claims against Guam Shipyard because they shared identical claims under the WARN Act against the same employer, as well as the same alleged termination date, and the same alleged lack of 60-day advance notice required under the WARN Act. *Id.* at *15-16. The Court found Plaintiffs to be adequate representatives and class counsel to be adequate in terms of their representation. *Id.* at *16. The Court also held that, based upon the class definition and the terminated employees list, the proposed class was ascertainable. As to the Rule 23(b) requirements, the Court reasoned that common questions of fact predominated because there were identical issues for each employee allegedly terminated by Guam Shipyard without notice as to the damages suffered by each member of the proposed class. *Id.* at *17. Moreover, the Court noted that each proposed class member would be defined under the same statutorily defined compensation scheme under the WARN Act. As Defendant did not argue that Plaintiffs' WARN Act claims failed the superiority inquiry, all factors for superiority weighed in Plaintiffs' favor; based on the record, the Court held that class certification was superior to other methods available for adjudicating the proposed class claims. *Id.* at *24. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Czyzewski, et al. v. Jevic Holding Co.*, 137 S. Ct. 973 (2017).** Plaintiffs, a group of former truck drivers, alleged that Defendant terminated them without providing the proper notice required under the Worker Adjustment and Retraining Notification Act ("WARN"). A private equity firm, Sun Capital Partners ("Sun"), purchased Defendant in a leveraged buy-out using monies borrowed from third-party CIT Group ("CIT"). In the buy-out, both Sun and CIT used Defendant's stock as collateral to finance the purchase. Two years after the buy-out, Defendant declared Chapter 11 bankruptcy. Immediately prior to filing for bankruptcy, Defendant informed its employees that it was terminating their employment without the notice required under WARN. Plaintiffs filed a lawsuit, and the Bankruptcy Court entered a $12.4 million judgment in their favor. *Id.* at 980. The Bankruptcy Court determined that $8.3 million of the $12.4 million was owed for priority wage claims. *Id.* Plaintiffs argued that Sun was also liable for this judgment as a joint employer with Defendant. The Bankruptcy Court ultimately found that Sun was not their employer. During the bankruptcy, other unsecured creditors sued Sun and CIT, arguing that they were the beneficiaries of preferential transfers of Defendant's assets. *Id.* at 981.

While this lawsuit was pending, Defendant's assets were depleted to $1.7 million in cash, subject to a lien by Sun, and the preferential transfer lawsuit. *Id.* Sun, CIT, Defendant, and the other unsecured creditors decided to settle the fraudulent transfer lawsuit. At the time the case was settled, Plaintiffs' joint employer case was still pending, so Sun insisted that any settlement could not include a payment to the Plaintiffs or their counsel, as Sun feared Plaintiffs' counsel would use the payments to fund litigation against Sun. *Id.* Under the settlement agreement, CIT agreed to pay $2 million to cover the legal fees and administrative expenses of the other unsecured creditors, while giving Defendant's remaining $1.7 million to pay taxes, administrative expenses, and *pro rata* distributions to the other unsecured creditors. *Id.* Pursuant to the settlement, Defendant agreed to dismiss its Chapter 11 Bankruptcy Case. Sun, CIT, Defendant, and the unsecured creditors petitioned the Bankruptcy Court to approve the settlement and dismiss the Chapter 11 case. *Id.* Plaintiffs opposed, arguing that the settlement violated the normal priority rules by giving other unsecured creditors priority over the WARN creditors. *Id.* While the Bankruptcy Court agreed that the settlement violated standard priority rules, it found that because it was dismissing the Chapter 11 case rather than approving a Chapter 11 plan, it did not have to follow the priority rules contained in Chapter 11. *Id.* at 982. It found authority to do so in Chapter 11's dismissal provision, § 349(b)(1), which provides that, with dismissal, parties are restored to the *status quo ante* unless a bankruptcy judge, "for cause, orders otherwise." *Id.* Further, the Bankruptcy Court ruled that, regardless of the settlement, Plaintiffs would not receive any distributions, while the settlement left the other unsecured creditors in a better position than they would be absent the settlement. On appeal, both the District Court and Third Circuit agreed. *Id.* Plaintiffs sought *certiorari*, which the U.S. Supreme Court granted. The Supreme Court reversed the decision. The Supreme Court began its analysis by considering Defendant's argument that Plaintiffs lacked standing because they would not have recovered anything if the settlement was not approved. The Supreme Court found this argument relied on two questionable propositions, including: (i) that without violation of the ordinary priority rules, there would be no settlement and; (ii) that the fraudulent conveyance lawsuit had no value. *Id.* at 983. With respect to the first argument, the Supreme Court found it unpersuasive given that Sun ultimately won on the joint employer issue. *Id.* With respect to the second, the Supreme Court found the assumption – that the fraudulent conveyance lawsuit had no value – inherently flawed, as the claim was settled for $3.7 million. *Id.* The Supreme Court thus concluded that Plaintiffs had something to lose if the settlement was approved, and therefore had standing to challenge it. *Id.* The Supreme Court then turned to the question of whether a Bankruptcy Court can dismiss a Chapter 11 plan in a way that does not follow the ordinary priority rules without the affected creditors' consent. *Id.* First, the Supreme Court observed that the distribution scheme contained in the Bankruptcy Code is "fundamental to the Bankruptcy Code's operation," and that one would expect more than "statutory silence" to authorize departures from the scheme. *Id.* at 983-84. Second, the Supreme Court concluded that § 349(b)(1) of Chapter 11, in providing that the parties are restored to the *status quo ante* in a dismissal unless a bankruptcy judge, "for cause, orders otherwise," only allows a bankruptcy judge to "make appropriate orders to protect rights acquired in reliance on the bankruptcy case," which approval of the settlement did not do. *Id.* at 984. Finally, the Supreme Court reasoned that the consequences of allowing a departure from the normal distribution scheme were "potentially serious," including "changing the bargaining power of different classes of creditors" and "risks of collusion." *Id.* at 986-87. For these reasons, the Supreme Court reversed the Bankruptcy Court's settlement approval order allowing payment to general unsecured creditors while overlooking Plaintiffs' claims.

***Elkins, et al. v. Mail Transportation Services, LLC*, 2017 U.S. Dist. LEXIS 171309 (M.D. Pa. Oct. 2, 2017).** Plaintiff filed a class action alleging that Defendants failed to provide 60 days advance notice of a plant closing or mass lay-off in violation of the Worker Adjustment and Retraining Notification Act ("WARN Act"). Plaintiff filed a motion for class certification, which the Court granted with Defendants' requested modifications. Plaintiffs sought to certify a class of all former employees of Defendants who: (i) worked anytime in September through December 2015, but were not paid their earned wages and accrued vacation leave balances when Defendants stopped their trucking operations in October 2015; and/or (ii) whose employment was terminated in October or November 2015 without 60 days advance written notice satisfying the requirements of the WARN Act. *Id.* at *2. Defendants did object to class certification, but requested that Plaintiff's class definition be altered in various ways, including: (i) to define the class as former employees of BJ Trucking, not all Defendants; (ii) to replace the term "terminated" with the phrase "terminated without cause" to accordance with the WARN Act more precisely; and (iii) to replace the language "satisfying the requirements of" the WARN Act with language that tracked its requirements more granularly. *Id.* at *3. The Court found that Plaintiff's proposed class met the requirements of

Rule 23(a), as the class contained over 100 members; the members suffered the same alleged injuries; Plaintiff alleged that his co-workers were subject to the same policies as he was and suffered the same harm he suffered; Plaintiff would fairly and adequately represent the class; and his counsel was competent to undertake the litigation. *Id.* at *5. The Court held that Plaintiff's proposed class also met the requirements of Rule 23(b)(3). Defendants admitted that the employees in question were not paid for the relevant pay periods and that they were given less than 60 days' notice of the plant closing. The Court opined that liability hinged on a number of issues surrounding Defendants' status under the WARN Act and state law, and these questions were common to all employees. *Id.* Finally, the Court determined that proceeding with a class action was superior to bringing individual lawsuits, because the employees' injuries were so similar, and their interest in individually controlling the prosecution of separate actions was weak. *Id.* at *6. The Court also was unaware of any lawsuits filed against Defendants that involve the same injuries, and the Court was unaware of any special difficulties of managing this class action. *Id.* at *7. At the same time, the Court accepted Defendants' changes to Plaintiff's proposed class definition. Accordingly, the Court granted Plaintiff's motion for class certification with Defendants' requested modification.

***Garner, et al. v. Behrman Bros. IV, LLC*, 2017 U.S. Dist. LEXIS 93184 (S.D.N.Y. June 16, 2017).** Plaintiffs filed a putative class action against Defendants seeking recovery of unpaid wages and benefits under the Worker Adjustment and Retraining Notification Act ("WARN Act"). Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) and 12(b)(7), which the Court denied. Plaintiffs were "nominally employed" by Atherotech, Inc. and Atherotech Holdings, Inc. (collectively, "Atherotech"), and worked at Atherotech facilities until the facilities closed in 2016. After a failed attempt at a sale, Defendants decided to shut down Atherotech and have Atherotech file for bankruptcy. *Id.* at *4. Plaintiffs alleged that they were not given 60 days advance written notice and did not receive wages and other employee benefits covering the 60-day period after termination. The Court explained that to survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* Defendant argued that Plaintiffs did not state a claim because they failed to allege sufficient facts as to the third, fourth, and fifth factors of liability under the WARN Act (unity of personnel policies, dependency of operations, and *de facto* control). *Id.* at *10. Defendants claimed that Plaintiffs' pleadings as to these three elements were conclusory and therefore insufficient to allege that Defendant was a "single employer" with Atherotech. *Id.* at *11. The Court stated that viewing the factors established by the U.S. Department of Labor ("DOL") together, the Court found that Plaintiffs' complaint alleged "facts which, if true, would permit a jury to find Defendant liable for violation of the WARN Act notice provisions." *Id.* at *12. The Court found that four of the five factors, under the facts alleged, favored liability, including the *de facto* control factor. *Id.* Accordingly, the Court found that Plaintiffs' allegations would support a jury finding of Defendant's liability for WARN Act violations, and therefore denied Defendant's motion to dismiss under Rule 12(b)(6). Further, the Court explained that a party may seek dismissal under Rule 12(b)(7) for failure to join a necessary party under Rule 19. *Id.* at *19. Rule 12(b)(7) requires a Court to "dismiss an action where a party was not joined only if: (i) an absent party is required; (ii) it is not feasible to join the absent party; and (iii) it is determined 'in equity and good conscience' that the action should not proceed among the existing parties." *Id.* at *20. Defendant challenged Plaintiffs' failure to join Atherotech, which Defendant contended was a necessary and indispensable party under Rule 19. *Id.* at *22. The Court disagreed, holding that Defendant itself was alleged to have violated the WARN Act through its own conduct, *i.e.*, its own decisions to shut down Atherotech, to fire Atherotech's employees, and not to give those employees proper notice. *Id.* The Court determined that Defendant cited no authority that, in such a context, Atherotech was a necessary party. Accordingly, the Court denied Defendants' motion to dismiss.

***May, et al. v. Blackhawk Mining, LLC*, 2017 U.S. Dist. LEXIS 50295 (E.D. Ky. April 3, 2017).** Plaintiffs, a group of former employees, alleged that Defendant terminated them and approximately 200 others without providing the proper notice required under the Worker Adjustment and Retraining Notification Act ("WARN Act"). Plaintiffs filed a motion for class certification pursuant to Rule 23, which the Court granted. First, the Court determined that the class was sufficiently numerous with approximately 200 members. *Id.* at *4. The Court also found that Plaintiffs met the commonality requirement because they claimed that they and other potential class members were terminated as part of a common plan stemming from Defendants' decision to idle operations at the relevant mining complex and that Defendants would be liable as a "single employer" under the WARN Act. The Court agreed with Plaintiffs that the factual and legal questions stemmed from a common core of facts

regarding Defendants' actions and legal issues regarding every class member's rights. *Id.* at *5. Plaintiffs and the potential class members allegedly suffered injury beginning on or about December 11, 2015, when they lost their jobs without 60 days' notice and were not compensated due to a violation of the WARN Act by Defendants. *Id.* at *9. The Court also opined that Plaintiffs would fairly and adequately protect the interests of the class. *Id.* at *10. The Court determined that the circumstances of Plaintiffs' employment and terminations rendered their interests the same as those of putative class members because all must prove that they were entitled to and not given adequate notice and all must show that Defendants are a single employer and are not protected by WARN Act's statutory exceptions. The Court stated that Plaintiffs' counsel and proposed class counsel spent time investigating the facts, continued to investigate the matter since filing this case, and briefed the Court with respect to various matters. *Id.* Plaintiffs' counsel also cited its prior certification as class counsel in WARN Act matters and had demonstrated extensive experience in WARN Act class action litigation. Finally, the Court determined that Plaintiffs met the requirements of Rule 23(b)(3). There was no allegation or suggestion that any of the potential class members were treated differently with respect to the issues in the case. Further, the Court found that class certification was the superior method of resolving this dispute under the WARN Act because many of the claims were small, making individual lawsuits impracticable. *Id.* at *12. Plaintiffs' claims and the proposed class claims would not be economically viable if brought independently and therefore the class claims were superior to adjudication individually. The Court explained that it was in the interest of judicial economy and efficiency to consolidate as many as 200 claims into a single action that would permit resolution of common questions of law and fact to be determined all at once. *Id.* at *13. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Meadows, et al. v. Latshaw Drilling Co., L.L.C.,* 866 F.3d 307 (5th Cir. 2017).** Defendant terminated Plaintiff, an oil drilling rig worker, and 397 other employees when a decrease in oil prices depressed demand for its services. *Id.* at *308. Plaintiff filed a class action on behalf of himself and others similarly-situated, alleging that Defendant conducted a plant closing or mass lay-off without providing advanced notice in violation of the Worker Adjustment and Retraining Notification Act ("WARN Act"). Plaintiff moved for class certification, and Defendant moved for summary judgment. Before ruling on Plaintiff's class certification motion, the District Court granted Defendant's motion for summary judgment. On appeal, the Fifth Circuit affirmed the District Court's ruling. *Id.* at *309. Defendant conducted its business by contracting with third-parties, known as operators, to drill wells on lands the operators have leased. Defendant had 39 drilling rigs, which it had used in project locations spread across Texas, New Mexico, Oklahoma, Arkansas, and Kansas. *Id.* at *310. As oil prices began to drop, fewer operators requested Defendant's services. Defendant therefore started stacking its drilling rigs, and, without advanced written notice, began laying-off its employees. Over approximately six months, Defendant laid off 398 employees. Defendant moved for summary judgment on the basis that each drilling rig, each yard, and its corporate office were separate sites of employment that could not be treated collectively as one single site of employment under the WARN Act. *Id.* Because these sites each had less than 50 employees, Defendant claimed that neither a plant closing nor a mass lay-off could have occurred. The District Court granted Defendant's motion, concluding that Plaintiff had failed to raise a genuine dispute of material fact as to whether there had been an employment loss for at least 50 people within the requisite period at a single site of employment as required by the WARN Act. *Id.* at *311. On appeal, Plaintiff requested the Fifth Circuit to consider whether Defendant's drilling rigs could be aggregated as a single site of employment as defined by 20 C.F.R. § 639.3(i)(3) and whether the District Court entered summary judgment on a ground not raised in Defendant's summary judgment briefing. The Fifth Circuit found that Plaintiff failed to argue the merits of his main arguments of whether drilling rigs are operational units within a single site of employment within the meaning of 20 C.F.R. § 639.3(b) with respect to his plant closing theory, whether Defendant's employees are out-stationed employees within the meaning of 20 C.F.R. § 639.3(i)(6), or whether Defendant was a "truly unusual organizational situation" within the meaning of 20 C.F.R. § 639.3(i)(8). *Id.* at *312. Instead, Plaintiff asserted that he "could have presented evidence" to the District Court regarding these theories. Because Plaintiff also failed to present evidence or brief the application of these theories on appeal, the Fifth Circuit held that it would not overturn the District Court's judgment that Plaintiff did not present a genuine dispute of material fact with respect to these aspects of the case. *Id.* at *314. Accordingly the Fifth Circuit affirmed the District Court's ruling granting summary judgment to Defendant.

***Mercer, et al. v. Patterson-UTI Drilling Co., LLC*, 2017 U.S. App. LEXIS 26768 (5th Cir. Dec. 27, 2017).** Plaintiffs, a group of former oil rig employees, filed a class action alleging that Defendant violated the Worker Adjustment and Retraining Notification Act ("WARN Act") by terminating their employment without providing them with 60 days' advance written notice. Plaintiffs asserted that the drilling rigs within each of Defendant's eight operational area should be considered a "single site of employment" for purposes of the WARN Act because the drilling rigs satisfied the "reasonable geographic proximity" test under 20 C.F.R. § 639.3(i)(3). *Id.* at *4. Plaintiffs argued in the alternative that each operational area should be treated as a single site of employment under three other U.S. Department of Labor ("DOL") regulations. Defendant sought summary judgment, and argued that Plaintiffs could not prevail on their WARN Act claims because an employer is only required to provide advanced notice under the WARN Act before a "mass lay-off" or "plant closing," as those terms are defined in the statute. *Id.* The District Court granted summary judgment in favor of Defendant, concluding that there was "no basis to aggregate the drilling sites to form a single site of employment" and that "none of the exceptions apply." *Id.* The District Court also awarded costs to Defendant. On appeal, the Fifth Circuit affirmed the District Court's ruling. Plaintiffs argued that they created a genuine issue of material fact because they presented evidence showing that Defendant's employees could drive to another drilling rig and back "within a short time period" and could "see other rigs in the [operational area] from the rig on which they were working." *Id.* at *10. The Fifth Circuit, however, stated that without offering evidence of the distance between any relevant grouping of drilling rigs, Plaintiffs failed to create a genuine issue of material fact that the drilling rigs were within reasonable geographic proximity. *Id.* Plaintiffs also asserted that the District Court erred in granting summary judgment on two alternative theories of liability pled by Plaintiffs but not briefed in Defendant's motion for summary judgment. The Fifth Circuit held that Defendant's motion focused on the argument that neither a mass lay-off nor a plant closing had occurred because Plaintiffs' employment losses were not a part of an employment loss of 50 or more people at a single site of employment. *Id.* at *11. Thus, the Fifth Circuit concluded that it was not erroneous for the District Court to grant summary judgment on Plaintiffs' alternative theories of liability because Defendant's briefing should have put Plaintiffs on notice to come forward with all of their evidence and arguments. *Id.* Finally, Plaintiffs contended that the District Court abused its discretion in awarding costs to Defendant because the WARN Act is a remedial statute. The Fifth Circuit explained that the WARN Act was not the basis for the award of costs; instead, the basis was Rule 54(d)(1). *Id.* at *12. The Fifth Circuit reasoned that Plaintiffs failed to cite any case supporting their position that a District Court abuses its discretion when it awards costs to a party under Rule 54(d)(1). Accordingly, the Fifth Circuit affirmed the District Court's ruling.

***Molina, et al. v. Ace Homecare, Inc.,* 2017 U.S. Dist. LEXIS 151039 (M.D. Fla. Sept. 18, 2017).** Plaintiffs, a group of nurses and home healthcare aides, filed a class action alleging that Defendant shut down its facilities without paying compensation or providing at least 60 days' advance notice in violation of the Worker Adjustment and Retraining Notification Act ("WARN Act"). Plaintiffs sought certification of a class of all employees in Florida who were not given a minimum of 60 days' written notice of termination and whose employment was terminated as a result of a "mass lay-off" or "plant closing." *Id.* at *2. Defendant did not contest class certification, and the Court found that class certification was appropriate under Rule 23. *Id.* at *5. The Court noted that all of the potential 400 class members were terminated in April 2016 without notice, pay, and other employee benefits as part of plant shutdowns. *Id.* at *5-6. The Court held that Plaintiffs were entitled to receive appropriate notice under the WARN Act and did not. *Id.* at *6. The Court found that the class was sufficiently numerous; that joinder of all members would be impracticable; there were questions of fact and law common to the class; the claims of the class representative were typical of the claims of the unnamed members; and the named representative was able to represent the interests of the class adequately and fairly. *Id.* The Court also stated that questions of law or fact common to class members predominated over any questions affecting only individual members, and a class action was superior to other available methods for fairly and efficiently adjudicating the controversy. Accordingly, the Court granted Plaintiffs' motion for class certification.

***Ross, et al. v. Catalina Restaurant Group Inc.*, Case No. 15-CV-2626 (C.D. Cal. Feb. 15, 2017).** Plaintiffs filed a putative class action against Defendant alleging that Defendant violated the WARN Act and California's WARN Act ("CWA") when it failed to provide 60 days' notice of impending lay-offs at its restaurants. Defendant moved for summary judgment on the basis that the terminations at issue did not meet the minimum 50-employee requirement to invoke the WARN Act. *Id.* at 5. The Court granted Defendant's motion. Defendant

operated restaurants in California, Nevada, and Arizona and maintained a headquarters in California. *Id.* at 3. Defendant closed 75 units across California, Nevada, and Arizona in one month. *Id.* at 3. Each unit employed between nine and 41 employees. *Id.* at 3. In the same month, Defendant also laid off 46 people from its corporate headquarters. Plaintiffs did not contest that each closure affected less than 50 employees, but maintained that there was a triable issue of fact of whether the groups of units could be aggregated to constitute a "single site of employment." *Id.* at 5. The Court did not determine whether some units were geographically close enough to constitute one site. *Id.* at 8. Instead, the Court considered whether the units shared staff and equipment in determining that the units could not be aggregated to constitute a single site of employment. *Id.* Defendant submitted evidence that each unit had a separate budget and an individual manager who oversaw the daily operations of their unit. *Id.* The units did not share staff, inventory, or equipment. *Id.* However, when one unit was short on labor or inventory it could purchase the labor or inventory from another unit in emergencies. *Id.* The costs would come out of the purchasing unit's budget and each unit could decline purchase requests. Defendant stated that less than 2% of total labor performed was purchased from another unit. *Id.* Plaintiffs presented declarations of employees and attempted to establish that Defendant shared staff and inventory enough to constitute a single site of employment. *Id.* The Court ruled that no reasonable jury could find that the units were a single site of employment because the evidence submitted by Plaintiffs did not contradict Defendant's assertion that inventory and staff were shared only in emergencies. *Id.* at 9. The Court noted that each unit was responsible for its own budget and the work done by employees at a site other than their home site was less than 2% of the work performed. *Id.* Further, Plaintiffs failed to establish that there were rotations between two or more specific sites that could be combined to constitute a single site of employment. *Id.* at 10. Plaintiffs conceded that corporate headquarters did not lay-off 50 people and could not be aggregated with any unit to create a single site of employment. *Id.* at 10. Furthermore, because the CWA does not allow for aggregation to reach the 50-employee threshold, Plaintiffs' CWA claim failed. *Id.* at 11. Accordingly, the Court granted Defendant's motion for summary judgment.

(lxxi) Workplace Antitrust Class Actions

***Buy-Low Market v. Palacios, et al*., 2017 NLRB LEXIS 25 (NLRB Feb. 3, 2017).** Nesked Palacios, a worker of Buy-Low Markets, brought a class action alleging wage & hour violations under state law. The employer moved to compel arbitration of Palacios' wage & hour claim on an individual basis pursuant to the parties' arbitration agreement. The trial court granted the motion to compel and dismissed the class action. Thereafter, Palacios filed a charge with the National Labor Relations Board ("NLRB") alleging that the employer violated § 8(a)(1) of the National Labor Relations Act ("Act") by maintaining and enforcing the arbitration agreement. The administrative law judge ("ALJ") found that the employer violated § 8(a)(1) of the Act, which the NLRB affirmed. The employer asserted that the agreement was not unlawful because signing the agreement was not a mandatory condition of employment. The NLRB rejected this argument on the basis that Palacios signed the agreement on or about his first day of employment and because the agreement did not clarify whether it was mandatory or optional. The NLRB noted that it would be unlikely that an employee would refuse to sign an agreement on the first day of employment. In addition, the NLRB held that pursuant to *D.R. Horton, Inc.,* 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), an employer violates the Act if it forces employees to waive their § 7 rights, even if the agreement is voluntary. The employer asserted that the agreement did not expressly preclude class or collective actions and therefore was not unlawful. The NLRB rejected this argument and concluded that an employer cannot have it both ways and argue that a class or collective action is not expressly precluded after it argued in another forum that the agreement did not explicitly permit a collective or class action. The ALJ found that in practice the agreement required employees to relinquish their right to file class and collective actions. On this basis, the NLRB affirmed the judgment of the ALJ that the agreement was unlawful.

***Frost, et al. v. LG Electronics, Inc.*, 2017 U.S. Dist. LEXIS 61262 (N.D. Cal. April 21, 2017).** Plaintiffs, a group of former employees, alleged that Defendants engaged in an unlawful conspiracy to fix and suppress compensation for their employees, and thereby violated § 1 of the Sherman Act, the Cartwright Act, § 16720 of the California Business & Professions Code, and the New Jersey Antitrust Act. Defendants filed a motion to dismiss, which the Court granted. The Court found that the complaint failed to adequately allege an actionable conspiracy because the allegations were vague and lodged against all Defendants as a group. *Id.* at *3. First, Plaintiffs relied on the allegations that Defendant LG and Defendant Samsung entities were operated by a

"chaebol," or "a collective of formally independent firms under the single common administrative and financial control of one family." *Id.* However, the Court stated that Plaintiffs' assertions failed to allege the role "each Defendant played in the alleged harm" so that one could make a plausible inference that there was unlawful agreement between the relevant parties. *Id.* at *4. The Court explained that the existence of a "chaebol" does not automatically provide sufficient pleading of a conspiracy among the member subsidiary companies. *Id.* Plaintiffs further relied on allegations from a recruiter's statement, an India Times article, and an email from a finance manager. The Court opined that while notable, these allegations did not "answer the basic questions: who, did what, to whom (or with whom), where, and when." *Id.* The Court stated that it was mindful that adequately pleading a conspiracy claim against a particular corporate Defendant does not require detailed Defendant-by-Defendant allegations, but the allegations must still be sufficient to "draw a plausible conclusion that the individual Defendant joined the conspiracy and played some role." *Id.* at *5. In contrast, the Court found that here the complaint lacked sufficient facts to support specific collusive conduct by any specific actors and whether the alleged violations occurred in the United States. *Id.* Additional factual allegations would be necessary to support a "plausible conclusion that the individual Defendant joined the conspiracy and played some role." *Id.* Plaintiffs requested leave to conduct jurisdictional discovery. The Court found that that it was not a foregone conclusion that discovery would be futile, as Plaintiffs provided a general outline of topics on which they sought discovery from the LG Defendants. The Court found Plaintiffs' proposal reasonable and stated that they could elicit information as to whether there was specific jurisdiction over LG Electronics and LG Display. Accordingly, the Court directed Plaintiffs and LG Defendants to meet and confer on the specifics of a plan for jurisdictional discovery. *Id.*

***Kelsey K., et al. v. NFL Enterprises, LLC*, 254 F. Supp. 3d 1140 (N.D. Cal. 2017).** Plaintiff brought a putative class action for violations of the Sherman Act and the Cartwright Act against the National Football League and 27 of its member teams. *Id.* at *1143. Plaintiff asserted that Defendants conspired "to fix and suppress the compensation of" and "to eliminate competition among them for" cheerleaders. *Id.* Defendant filed a motion to dismiss, which the Court granted. The Court noted that to state an antitrust claim, Plaintiff must plead not only "ultimate facts, such as conspiracy, and legal conclusions," *i.e.,* that Defendants agreed not to compete with each other or entered into an agreement to prevent competition, but also "the necessary evidentiary facts to support those conclusions." *Id.* at 1144. Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Further, a § 1 claim requires: (i) a contract, combination, or conspiracy; (ii) intended to unreasonably restrain or harm trade; (iii) that actually injures competition; and (iv) harms a Plaintiff via the anti-competitive conduct. *Id.* The Court concluded that Plaintiff failed to state a plausible claim under § 1 of the Sherman Act. The Court held that Plaintiff only made allegations of parallel conduct and conclusory allegations of conspiracy. *Id.* at 1145. The Court held that parallel conduct alone does not suggest a conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. *Id.* at 1146. The Court ruled that the wage-related allegations of Plaintiff's complaint barely showed minimal parallel conduct and failed to show plus factors that would support an inference of conspiracy. *Id.* at 1147. Further, the Court found that in failing to plead factual allegations of parallel conduct with plus factors sufficient to show a conspiracy, the complaint also failed to plead the necessary element of injury to Plaintiff herself. Accordingly, the Court concluded that Plaintiff failed to state a claim for relief under § 1 of the Sherman Act because it did not allege facts supporting a plausible inference that Defendants entered into any agreement or conspiracy to unlawfully restrain trade, or facts showing that Plaintiff herself suffered any harm as a result of Defendants' anti-competitive conduct. *Id.* at 1148. The Court opined that Plaintiff's federal and state law antitrust claims were predicated on the same allegations of conspiracy and therefore Plaintiff also failed to plausibly allege conspiracy under the Cartwright Act for the same reasons that it failed to do so under the Sherman Act. *Id.* at 1149. The Court therefore granted Defendants' motion to dismiss.

***Miranda, et al. v. Selig,* 860 F.3d 1237 (9th Cir. 2017).** Plaintiffs, a group of minor league baseball players, alleged that Defendants, the Office of the Commissioner of Baseball, Major League Baseball ("MLB") and 30 baseball club franchises, violated federal antitrust laws by restraining horizontal competition between and among" the MLB franchises and artificially and illegally depressing minor league salaries. *Id.* at 1239. Plaintiffs asserted that they each played minor league baseball between 2010 and 2012, and while employed as minor league players, the class representatives worked an average of 50 to 60 hours per week and earned less than

$10,000 per year. *Id.* Defendants filed a motion to dismiss under Rule 12(b)(6), arguing that the business of baseball has long been exempt from federal antitrust laws, and Congress specifically declined to take minor league baseball out of the scope of the exemption. *Id.* The District Court granted Defendants' motion to dismiss. On appeal, the Ninth Circuit affirmed the District Court's ruling. The Ninth Circuit noted that the Supreme Court first exempted the business of baseball from federal antitrust laws almost a century ago when it held that the business of baseball does not constitute "trade or commerce among the several States," and therefore is not bound by antitrust laws because the "business is giving exhibitions of baseball, which are purely state affairs." *Id.* at 1240. Further, the Ninth Circuit noted that in 1998, Congress passed the Curt Flood Act, which explicitly maintained the baseball exemption for anything related to the employment of minor league baseball players and the relationship between organized professional major and minor league baseball. *Id.* at 1242. Plaintiffs argued that the baseball exemption did not apply to minor league baseball because previous case law did not decide the issue of "whether major league baseball and its constituent clubs could conspire to fix the salaries paid to minor league players." *Id.* However, the Ninth Circuit opined the Defendants' farming structure belied the claim that major and minor league baseball were separate and distinct in a meaningful way because minor league baseball players are employed and paid by MLB, and MLB employs minor league players with the hope that some of them will develop into major league players. *Id.* Therefore, Ninth Circuit held that the employment of minor league players was precisely the type of activity that falls within the antitrust exemption for the business of baseball. In light of Supreme Court precedent, and the Curt Flood Act, the Ninth Circuit determined that minor league baseball came squarely within the nearly century-old business-of-baseball exemption from federal antitrust laws. Accordingly, the Ninth Circuit upheld the District Court's ruling granting Defendants' motion to dismiss.

***NY Independent Contactors Alliance, Inc., et al. v. Consolidated Edison Co. Of New York*, 2017 U.S. Dist. LEXIS 27381 (S.D.N.Y. Feb. 27, 2017).** Plaintiffs, a union and an association of contractors, alleged that Defendant entered into anti-competitive agreements with Plaintiff union's rival, Local 1010, and Local 1010's umbrella organization, LIUNA, to help Local 1010 monopolize utility asphalt patch-paving work for Defendant, in violation of §§ 1 and 2 of the Sherman Act. Defendant moved to dismiss Plaintiffs' claims, and the Court granted the motion. According to the complaint, in 2014 Defendant revised its contract terms to require contractors from whom it purchased utility asphalt patch-paving work to employ only workers who belonged to a union affiliated with the Building & Construction Trades Council of Greater New York ("BCTC"), to the extent such labor was available (the "Provision"). *Id.* at *2. Plaintiffs alleged that the BCTC denied membership to Local 175, but had accorded membership to Local 1010 and therefore the Provision had the effect of denying Defendant's work to Local 175 members and contractors who were temporarily required by their collective bargaining agreements to employ Local 175 members on Defendant's jobs. *Id.* at *2-3. Plaintiffs claimed that this change resulted from an anti-competitive agreement among Defendant, LIUNA, and Local 1010 to allow Local 1010 to monopolize Con Ed's asphalt patch-paving work, which Plaintiffs claimed would decrease the number of contractors bidding on Defendant's work, could raise Defendant's costs (by eliminating competition between Local 175 and Local 1010), and could lower the quality of work performed for Defendant. The Court determined that the complaint offered no evidence of an agreement. The Court thus considered whether there were plausible grounds to infer an agreement. The Court explained that a complaint alleging an anti-competitive agreement must state "plausible grounds to infer an agreement." *Id.* at *9. The Court stated that the plausibility of Defendant entering into an agreement that would raise costs and lower the quality of services it received was very low and the complaint did not contain an explanation for why Defendant would enter into such an implausible agreement. Further, the Court found that even if such an agreement were plausible, the likelihood of a diminution in competition was highly speculative because any rise in costs would be temporary, lasting only as long as the contractor's agreement with Local 175, and it was speculative as to whether the contractor's costs would be passed on to Defendant. *Id.* at *10. Plaintiffs' claim that Defendant's action would diminish competition among unions was similarly speculative, because the Provision left contractors free to use the services of any union that was affiliated with the BCTC, and free to use unions not affiliated with the BCTC when there were not enough workers affiliated with the BCTC. Furthermore, the Court stated that nothing prohibited workers from forming one or more new unions that affiliated with the BCTC and thus would be able to compete with Local 1010. *Id.* at *10-11. Therefore, the Court found it highly implausible that Defendant adopted the Provision to foreclose competition, gain a competitive advantage, or destroy a competitor, and thus there was no § 2 violation. For the

same reasons, Plaintiffs' § 1 claim that the Provision was an anti-competitive exertion of monopoly power failed the same plausibility test. Accordingly, the Court granted Defendant's motion to dismiss.

***Wyckoff, et al. v. Office Of The Commissioner Of Baseball,* 2017 U.S. App. LEXIS 16728 (2d Cir. Aug. 31, 2017).** Plaintiffs, a group of professional baseball scouts, brought an action against Defendants, the current and former Commissioners of Major League Baseball, the Office of the Commissioner, and the baseball clubs that comprise Major League Baseball (the "Franchises"), alleging violations under the Sherman Act and New York's Donnelly Act, and minimum wage, overtime, and record-keeping violations under the FLSA. Plaintiffs alleged primarily that Defendants conspired to decrease competition in the labor market for professional baseball scouts. The District Court granted Defendants' motion to dismiss. On appeal, the Second Circuit affirmed. Plaintiffs argued that the District Court erred by ignoring factual allegations indicating that the claims of professional baseball scouts fall outside professional baseball's long-recognized exemption from antitrust regulation. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *Id.* at *3. Since 1922, however, the U.S. Supreme Court has recognized a judicially created exemption from antitrust regulation for the business of baseball. The District Court applied this precedent to exempt from antitrust regulation certain claims brought by professional baseball umpires against the American League. *Id.* In 1998, Congress passed the Curt Flood Act, which created an exception to baseball's antitrust exemption for major league baseball players. The Act stated that this exception applied only to major league baseball players and not to others "employed in the business of organized professional baseball." *Id.* at *3-4. In light of the binding precedent from the Supreme Court and the limited exception created by Congress in the Curt Flood Act, the Second Circuit refused Plaintiffs' invitation to adopt a narrower reading of baseball's antitrust exemption. *Id.* at *4. Accordingly, because it was bound by that precedent, the Second Circuit held that Defendants' conduct in this case was insulated from antitrust scrutiny. Further, the Second Circuit noted that Plaintiffs' own allegations foreclosed their argument that they were not involved in the business of baseball, as their complaint stated that professional baseball scouts "assess baseball players and project the players' abilities to perform at the major league level, and they present that information to the Franchises." *Id.* Plaintiffs acknowledged that this information was "important and valuable to the Franchises," because it "guide[s] the Franchises' decisions on how to rank players to be acquired" through free agency, the amateur draft, and other player acquisition means. Plaintiffs further acknowledged that because the Franchises "place importance on the acquisition and development of baseball players, . . . a scout who is good at evaluating baseball players has great value." *Id.* at *4-5. Therefore, the Second Circuit found that based on Plaintiffs' allegations, the District Court properly concluded that professional baseball scouts are involved in the business of baseball and, therefore, the complained-of conduct failed to state a claim for which relief can be granted under existing precedent. The Second Circuit therefore affirmed the District Court's order dismissing the case.

(lxxii) Workplace Class Action Arbitration Issues

***Ayon, et al. v. Camino Real Foods, Inc.*, Case No. 1220057012 (JAMS Dec. 11, 2017).** Plaintiff, an hourly employee, filed a class action on behalf of himself and a putative class of employees alleging that Defendant violated various provisions of the California Labor Code. Defendant filed a motion to compel arbitration based on an agreement Plaintiff signed when he applied for employment with Defendant. *Id.* at 2. The arbitration agreement did not explicitly address class arbitration to resolve disputes between the parties. *Id.* The Court granted Defendant's motion to compel individual arbitration of Plaintiff's claims, and to dismiss the class action allegations. *Id.* at 3. Plaintiff appealed. While the appeal was pending, the California Supreme Court issued its decision in *Sandquist v. Lebo Automotive*, 1 Cal.5th 233, 248 (2016), holding that "as a matter of state contract law, the parties' arbitration provisions allocate the decision on the availability of class arbitration to the arbitrator." *Id.* In light of *Sandquist*, the parties stipulated to dismiss the appeal and to submit Plaintiff's claims to arbitration to have the arbitrator decide the threshold issue of whether the arbitration agreement authorized class arbitration. *Id.* Before the arbitrator, Plaintiff argued that that expansive language used in the arbitration agreement could only be construed to permit class arbitration. *Id.* at 4. The arbitrator found that case law authorities have rejected this contention, and that when an agreement to arbitrate included the terms "any claim, dispute, or controversy," those terms were limited to claims, disputes, or controversies between Plaintiff and Defendant. *Id.* Plaintiff further argued that because class claims were not expressly excluded, Defendant must have intended for the agreement to include class claims. *Id.* Plaintiff pointed to the fact that Defendant expressly

excluded claims brought under the National Labor Relations Act, worker's compensation claims, and unemployment insurance in support of their argument. However, the arbitrator held that case law authorities have expressly found these types of claims beyond the reach of private arbitration as they are governed by their own adjudicatory systems. *Id.* Finally, Plaintiff asserted that any ambiguities in a contract should be construed against the drafter. The arbitrator stated that the arbitration agreement was not ambiguous, as it stated unequivocally that it applied to all disputes between Plaintiff and Defendant. *Id.* at *4-5. The arbitrator further concluded that case law precedents have not found an implicit agreement of authorize class action arbitration when interpreting nearly identical language. *Id.* at 5. Accordingly, the arbitrator agreed with Defendant that the arbitration agreement did not permit class-wide arbitration.

***Convergys Corp. v. NLRB*, 866 F.3d 635 (5th Cir. 2017).** The National Labor Relations Board (the "Board") determined that Convergys violated the National Labor Relations Act ("NLRA") both by requiring job applicants to sign a class and collective action waiver and by subsequently seeking to enforce the waiver. Convergys sought review of the Board's determination, arguing that it conflicted with Fifth Circuit binding case law. The Fifth Circuit granted Convergys' petition for review and denied the Board's cross-application for enforcement. *Id.* at *636. An Administrative Law Judge ("ALJ") recommended a finding that Convergys violated § 8(a)(1) of the NLRA, relying on the Board's prior decision in *D. R. Horton, Inc.,* 357 NLRB 2277 (2012). The ALJ's reliance on this decision was subsequently undermined by the Fifth Circuit's denial of enforcement in *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) ("*Horton*"). *Id.* at *637. Nevertheless, the Board adopted the ALJ's opinion. The Board sought to distinguish *Horton* and to rely instead on other Board decisions recognizing a broad "right of employees to join together to improve their terms and conditions of employment through litigation." *Id.* The Board ordered Convergys to cease and desist from requiring applicants to sign a waiver, to cease and desist from enforcing the waiver, and to take steps to ensure all applicants and current and former employees knew the waiver was no longer in force. *Id.* Convergys petitioned for review of the Board's decision, and the Board submitted a cross-application for enforcement of its order. The Fifth Circuit stated that it had already had rejected the Board's position that § 7 guarantees a right to participate in class or collective actions, holding that the use of a class or collective action is a procedure rather than a substantive right. The Fifth Circuit stated that, despite the Fifth Circuit's decision in *Horton* and similar rulings by a majority of the circuits that had considered the issue, the Board persistently had clung to its view that § 7 guarantees a substantive right to participate in class and collective actions, and it persistently had declined to enforce Board orders based on this disregard of the law. *Id.* at *637. The Fifth Circuit explained that the Board's argument ignored the contrary holding of *Horton* that "the use of class action procedures . . . is not a substantive right." *Id.* at *638. Moreover, the Board's assertion that the waiver in *Horton* was permissible only because the FAA overrode the NLRA contradicted the determination in *Horton* that the statutes were not in conflict. *Id.* Finally, the Board's suggestion that *Horton* was distinguishable because the FAA empowers arbitration agreements to waive rights that other agreements cannot waive was contrary to Supreme Court precedent, which held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), that the FAA placed arbitration agreements "on an equal footing with other contracts." *Id.* at *639. For all these reasons, the Fifth Circuit concluded that *Horton* precluded the Board's position. Accordingly, the Fifth Circuit held that the Board's position that § 7 guarantees a substantive right of employees to participate in class and collective actions against their employers was contrary to binding precedent. *Id.* at *640.

***In Re CBRE, Inc. And Thoma, et al.*, 2017 NLRB LEXIS 574 (NLRB Nov. 24, 2017).** Steve Thoma, the charging party, filed an action with the National Labor Relations Board ("NLRB") asserting that Respondent, his employer, violated § 8(a)(1) of the National Labor Relations Act (the "Act") by maintaining an arbitration agreement that contained language that employees would reasonably believe infringed upon their rights to file unfair labor practice charges with the NLRB. The parties filed a joint motion and stipulation of facts with the NLRB and stipulated that the following issues be resolved: (i) whether Respondent violated § 8(a)(1) of the Act by maintaining an arbitration agreement that employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the NLRB; (ii) whether the language in Thoma's initial unfair labor practice charge constituted an admission that the arbitration agreement excludes claims seeking to enforce rights under the Act, and whether such an admission should be binding notwithstanding the amended charge; (iii) whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, controlled enforcement of the arbitration agreement; and (iv) whether the complaint was barred by § 10(b) of the Act. *Id.* at *3. The Administrative Law

Judge ("ALJ") found that the language in Respondent's arbitration agreement violated § 8(a)(1) as employees would reasonably read the agreement to require arbitration of all employment related claims, including alleged violations of the Act. *Id.* at *7. Respondent argued that there was no violation, and that the language in the original charge was an admission by Thoma "that the arbitration agreement excludes claims seeking to enforce rights under Section 7 and that Thoma would not believe on face value that the language precluded him from filing a charge with the Board." *Id.* at *8. The ALJ disagreed and explained that the test to determine whether a practice violated the Act is an objective one, and was not dependent upon an employee's subjective interpretation. *Id.* Thus, Thoma's subjective belief as to whether the arbitration agreement precluded him from filing a charge was not relevant. *Id.* at *10. The ALJ further determined that because the language in the arbitration agreement violated the Act, it fell "within the FAA's savings clause." *Id.* at *11. As a result, the ALJ stated that the FAA did not preclude the finding of a violation. *Id.* The ALJ also ruled that the parties stipulated that Respondent's arbitration agreement had been in effect since at least March 17, 2016, and that it was in effect at the material time periods set forth in the complaint, including the period of time when Thoma filed the charge and amended charge. Accordingly, the ALJ found that the complaint was not time-barred by § 10(b) of the Act. *Id.* at *12. Therefore, as the ALJ held that Respondent engaged in certain unfair labor practices, the ALJ ordered Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. *Id.* at *13-14. Specifically, the ALJ ordered Respondent to rescind or revise its arbitration agreement, and to notify employees that it has done so. *Id.* at *14.

***Jock, et al. v. Sterling Jewelers Inc.,* 2017 U.S. App. LEXIS 9634 (2d Cir. June 1, 2017).** Plaintiffs brought a class action alleging that Defendant discriminated against them in its promotion and compensation policies and practices in violation of both Title VII of the Civil Rights Act and the Equal Pay Act of 1964 ("EPA"). On February 2, 2015, following the grant of Plaintiffs' motion to refer the matter to arbitration, the Arbitrator, operating under the auspices of the American Arbitration Association ("AAA"), issued a class certification award addressing Plaintiffs' motion to have opt-out classes certified for both the Title VII claims and the EPA claims. The Arbitrator certified Plaintiffs' Title VII disparate impact claims for injunctive and declaratory relief only (and denied certification of Plaintiffs Title VII disparate treatment claims), and denied certification of an opt-in class action for Plaintiffs' EPA claims. Plaintiffs subsequently re-filed their EPA certification motion, and amended it to seek certification of an opt-in collective action under 29 U.S.C. § 216(b). The Arbitrator subsequently granted Plaintiffs' motion. The Arbitrator also tolled the statute of limitations for the EPA claims so that individuals could opt-in to the EPA collective action if their claims arose on or after October 16, 2003. Defendant moved to vacate the Arbitrator's conditional certification award and order on tolling insofar as these rulings tolled the statute of limitations for Plaintiffs' EPA claims. The District Court held that it has no jurisdiction to review the Arbitrator's conditional certification award and tolling order because these rulings were not "final" arbitration awards. On appeal, the Second Circuit affirmed the District Court's ruling. The Second Circuit found that the District Court's order neither confirmed nor denied confirmation of an arbitral award or partial award, but only held that the it lacked jurisdiction to consider an interim decision of the Arbitrator. *Id.* at *2. The Second Circuit agreed, and thereby affirmed the District Court's ruling.

***Jock, et al. v. Sterling Jewelers Inc.,* 2017 U.S. App. LEXIS 13243 (2d Cir. July 24, 2017).** Plaintiffs brought a class action alleging that Defendant discriminated against them in its promotion and compensation policies and practices in violation of both Title VII of the Civil Rights Act of 1964 and the Equal Pay Act ("EPA"). In 2008, Plaintiffs voluntarily re-filed their claims as a class arbitration with the American Arbitration Association ("AAA"). On February 2, 2015, the Arbitrator issued a class certification award addressing Plaintiffs' motion to have opt-out classes certified for both the Title VII and the EPA claims. The Arbitrator certified a class for injunctive and declaratory relief only for the Title VII claim (while at the same time denying certification of Plaintiffs' disparate treatment claim under Title VII), and denied certification of Plaintiffs' EPA claim. Defendant challenged the Arbitrator's authority to assert jurisdiction over absent class members, *i.e.*, those individuals – approximately 70,000 employees and ex-employees – beyond the 254 named Plaintiffs and opt-ins. The Arbitrator rejected that challenge to her authority and issue her class certification award. On Defendant's petition to vacate the class certification award, the District Court also rejected the challenge to the Arbitrator's authority, and affirmed the class certification award in part. Defendant subsequently appealed the District Court's order confirming in part the Arbitrator's class certification award. *Id.* At the outset, the Second Circuit noted that it may vacate an arbitration award "where the arbitrator exceeded her powers, or so imperfectly executed them that a mutual,

final, and definite award upon the subject matter submitted was not made." *Id.* The Second Circuit stated that the question before it was whether the Arbitrator had the authority to certify a class that included absent class members, *i.e.*, employees other than the named Plaintiffs and those who had opted-in to the arbitration previously. *Id.* Defendant contended that the Arbitrator's authority was limited to those who had consented to her jurisdiction, and the "absent" class members had not done so, and the Arbitrator's class certification award – to the extent it purported to bind those "absent" class members – was in excess of her authority. The Second Circuit held that the District Court did not squarely address whether the Arbitrator had the power to bind absent class members given that they never consented to the Arbitrator determining whether class arbitration was permissible under the agreement in first place. *Id.* at *3. Accordingly, the Second Circuit concluded that the District Court erred in finding that this question had been conclusively resolved. *Id.* The Second Circuit reasoned that the District Court must decide whether an Arbitrator, who may decide the question whether an arbitration agreement provides for class procedures because the parties "squarely presented" it for decision, may nevertheless purport to bind non-parties to class procedures on this basis. *Id.* at *5. The Second Circuit therefore vacated and remanded the District Court's ruling for further consideration of whether the Arbitrator exceeded her authority in certifying a class that contained absent class members who did not consent to the Arbitrator's authority.

***Jones, et al. v. Singing River Health Services Foundation,* 2017 U.S. App. LEXIS 229 (5th Cir. Jan. 5, 2017).** Plaintiffs, a group of employees in three consolidated class actions, alleged that Defendants recklessly disregarded the under-funding of employee pension plans. On appeal, Defendant asserted that the gateway issue of arbitrability must itself be submitted to an arbitrator and the District Court erred in failing to compel the *Lowe* class to arbitrate its claims. Defendant KPMG audited the annual financial statements of Defendant SRHS from 2008 through 2012. Plaintiff Lowe was a former employee of SRHS and was a vested participant in the Plan. KPMG performed work for SRHS and the Plan pursuant to engagement letters, which required that disputes or claims arising out of or relating to the contract must be submitted to arbitration. *Id.* at *2. The letters also defined the scope of KPMG's audits and KPMG's role as auditor. Plaintiff Lowe filed a class action against KPMG, SRHS, the Plan trustees, and others in February 2015, alleging that KPMG was aware of or recklessly disregarded the under-funding and was therefore complicit in the breaches of fiduciary duty by the Plan's trustees. Plaintiff Lowe's suit against KPMG was consolidated procedurally with the *Jones* case and the *Cobb* case, as all arose out of the alleged under-funding of the Plan. KPMG moved to compel arbitration in the *Jones* and *Lowe* actions. *Id.* at *3. After reviewing allegations in both suits, the District Court granted the motion in *Jones* but denied it in *Lowe*. *Id.* Neither Plaintiff Jones nor Plaintiff Lowe was a party to the contracts between SRHS or the Plan and KPMG. Both accused KPMG of wrongdoing in its role as auditor of the Plan. The District Court held that the *Jones* class, whose pleading specifically invoked the engagement letters, must submit to arbitration under the doctrine of equitable estoppel. *Id.* at *4. The District Court observed that the factual allegations pled by Plaintiffs in *Jones* relied upon the professional standards required by the engagement letters. The *Lowe* class, in contrast, pled solely common law claims and made no factual allegation invoking the engagement letters. KPMG argued that the *Lowe* claims actually relied on the engagement letters, because the letters defined the scope of KPMG's contractual role with SRHS and the Plan, and therefore equitable estoppel compelled submission of the class claims in *Lowe* to arbitration. The District Court disagreed and denied Defendants' motion to compel. On appeal, the Fifth Circuit stated that the question was whether the arbitration terms in KPMG's engagement letters could be enforced against the non-signatory class in *Lowe* by virtue of equitable estoppel. The Fifth Circuit opined that KPMG offered little evidence to prove that Plaintiff Lowe's common law claims could only be determined "by reference to" the engagement letters. *Id.* at *8. The Fifth Circuit found that Plaintiff Lowe alleged that KPMG "knowingly participated in the plan trustees' breach of fiduciary duty." *Id.* at *10. The Fifth Circuit determined that those trustees were neither coextensive with SRHS nor parties to an arbitration agreement with KPMG. *Id.* at *11. The Fifth Circuit held that it was clear based on Plaintiff Lowe's pleadings and the arguments offered by KPMG, that Lowe's claims were not directly dependent on the engagement letters. Accordingly, the Fifth Circuit concluded that the District Court did not abuse its discretion, and affirmed the decision denying Defendants' motion to compel arbitration.

***Jones, et al. v. Waffle House,* 866 F.3d 1257 (11th Cir. 2017).** Plaintiff, a job applicant at one of Defendant's chain restaurants, brought a class action alleging violations of the Fair Credit Reporting Act ("FCRA") after he was rejected from a job at the location in Ormond Beach, Florida. *Id.* at 1261. Plaintiff claimed that Defendant

violated the FCRA by failing to give him a copy of his background checks and to give him the opportunity to dispute the checks. While the class action was pending, Defendant obtained a job at another of Defendant's restaurants located in Kansas City, Missouri. Plaintiff signed an arbitration agreement in connection with his employment in Kansas City, which covered all claims and controversies past, present, or future, arising out of any aspect of or pertaining in any way to his employment and that contained a delegation provision requiring that an arbitrator resolve any dispute related to the enforceability of the agreement. Defendant moved to compel arbitration when it learned of Plaintiff's employment and the agreement. The District Court denied Defendant's motion. On Defendant's appeal, the Eleventh Circuit vacated the District Court's decision and remanded with instructions to compel arbitration. The Eleventh Circuit held that Defendant was entitled to compel arbitration under the Federal Arbitration Act ("FAA") given the FAA's presumption in favor of arbitration, and the District Court was obliged to enforce the parties' clear intent to arbitrate these issues. The arbitration agreement had a broad, valid, and enforceable delegation provision expressing the parties' clear intent to arbitrate gateway issues of arbitrability, including the interpretation, applicability, enforceability, and formation of the agreement. Likewise, Plaintiff failed to show that the arbitration agreement was substantively or procedurally unconscionable. The Eleventh Circuit rejected Plaintiff's claims that the arbitration agreement improperly interfered with the District Court's managerial authority over class actions. The Eleventh Circuit concluded that the fact that the arbitration agreement was pre-signed by Defendant's general counsel did not render it an improper *ex parte* communication in violation of Florida Rules of Professional Conduct since Plaintiff did not disclose his pending suit when he signed the arbitration agreement. Accordingly, the Eleventh Circuit vacated the District Court's decision to deny Defendant's motion to compel and remanded the case with instructions to compel arbitration and stay the case pending arbitration. *Id.* at 1273.

***Joseph III, et al. v. Select Staffing,* Case No. 17-CV-6134 (C.D. Cal. Oct. 6, 2017).** Plaintiff, an employment applicant, filed a class action alleging that Defendant procured a background check on Plaintiff without proper notification or authorization in violation of the Fair Credit Reporting Act ("FCRA"). Defendant filed a motion to compel arbitration of Plaintiff's claims and to dismiss the class claims. *Id.* at 1. Plaintiff's counsel conceded the validity of Defendant's motion, and the parties subsequently filed a joint stipulation to dismiss Plaintiff's class claims and stay the action pending arbitration of Plaintiff's individual claims. *Id.* In 2013, 2015, and 2017, Plaintiff had completed an application for employment with Defendant that included an arbitration provision. *Id.* at 2. Plaintiff initialed or signed a separate section of the application stating that he agreed to resolve by arbitration any dispute relating to or arising out of his employment or termination of employment, and that he waived his right to bring or join any type of class claim in any Court. *Id.* The Court rejected the stipulation; instead, it determined that a valid agreement to arbitration existed and that it encompassed Plaintiff's claims. *Id.* Accordingly, the Court granted Defendant's motion to compel arbitration of Plaintiff's claims and dismiss the class claims. Further, since all of Plaintiff's individual claims were subject to arbitration and because Plaintiff waived his right to pursue a class action, the Court exercised its discretion to dismiss the action. *Id.* Accordingly, the Court dismissed the action an denied the parties' joint stipulation as moot.

***Noye, et al. v. Kelly Services, Inc.,* 2017 U.S. Dist. LEXIS 183604 (M.D. Pa. Nov. 6, 2017).** Plaintiff filed a class action alleging Defendants violated the Fair Credit Reporting Act's ("FCRA") disclosure requirements, and the requirement to provide applicants with a copy of the report and a description of consumer rights. *Id.* at *5. Plaintiff interviewed for a job through the staffing company Defendant Kelly Services ("Kelly") for a position with Defendant Johnson & Johnson ("J&J"). *Id.* at *2. A Kelly recruiter offered Plaintiff a job and Plaintiff verbally indicated that he wanted to accepted the job, and the recruiter requested that he then complete Kelly's on-line application. The application contained an arbitration screen with a link to a document titled "Dispute Resolution and Mutual Agreement to Binding Arbitration." *Id.* at *3. In the application, Plaintiff informed Kelly that he had been convicted of a crime. After completing the on-line application, Plaintiff signed an employment agreement for J& J that a Kelly employee administered. *Id.* at *4. A Kelly employee signed the employment agreement and a Kelly "on-boarding coordinator" then sent Plaintiff an email that he had "been hired" and welcoming him to the Kelly team. *Id.* at *5. Subsequently, the Kelly recruiter informed Plaintiff that J&J could not hire Plaintiff, but that Kelly would keep him in mind for future opportunities. *Id.* at *4. Plaintiff alleged that J&J decided not to hire Plaintiff because of a background report that Kelly had purchased. Kelly filed a motion to compel arbitration and stay the case. *Id.* at *6. The Court denied without prejudice Kelly's motion to compel arbitration and ordered the parties to conduct limited arbitration-related discovery. Kelly subsequently renewed its motion to compel

arbitration and to stay the case pending completion of the arbitration. The Court granted Kelly's renewed motion and stayed the case. At the outset, the Court ruled that Plaintiff entered into a valid arbitration agreement. *Id.* at *12. Plaintiff did not dispute the existence of the agreement, but asserted that he could not recall the agreement. *Id.* at *10. However, in his deposition Plaintiff testified that it was a "safe assumption" that he electronically signed the box confirming acknowledgment of being provided a copy of the arbitration agreement and that he clicked on the link offering a copy of the agreement. *Id.* at *11. The Court determined that the record was undisputed that Plaintiff's electronic signature was required to proceed past the arbitration screen and submit the application to Kelly. Accordingly, the Court ruled that there was no genuine dispute of material fact that Plaintiff electronically received and signed the arbitration agreement. *Id.* at *12. The Court rejected Plaintiff's argument that the arbitration agreement was superseded by the employment agreement. The Court ruled that the employment agreement and arbitration agreement could be read to "stand together," as the arbitration agreement and the employment agreement covered different territories. *Id.* at *16. The Court also reasoned that the arbitration agreement could be revoked or modified only in writing by Plaintiff and an authorized representative of Kelly, and the employment agreement made no reference to the arbitration agreement, did not include an integration clause, and did not state an intent to revoke the arbitration agreement. *Id.* at *17. The Court also rejected Plaintiff's argument that the arbitration agreement was unconscionable, ruling that it was neither procedurally or substantively unconscionable. Finally, Plaintiff claimed that the arbitration agreement did not cover this dispute as it was a pre-employment dispute. The Court rejected this argument and concluded that Kelly had hired Plaintiff. Furthermore, the Court ruled that the arbitration agreement covered Plaintiff's claims, since Plaintiff's § 1681b(b)(2) and § 1681b(b)(3) claims alleged violations of the FCRA for employment purposes. As such, the Court granted Kelly's motion and ruled that Plaintiff's claims against Kelly were subject to arbitration and stayed the pending action.

***Peng, et al. v. Uber Technologies,* 2017 U.S. Dist. LEXIS 25840 (E.D.N.Y. Feb. 23, 2017).** Plaintiffs, a group of drivers, brought a putative class action alleging that Defendant breached their contracts and failed to pay Plaintiffs money owed. Defendant moved to compel arbitration, and the Court granted Defendant's motion. Plaintiffs were all native Chinese speakers who spoke little or no English and argued that they were not bound by the arbitration agreements because the terms were not reasonably communicated to them and they did not knowingly agree to the terms. *Id.* at *12. Plaintiffs assented to two substantially similar electronically signed service agreements, one in April 2015 and one December 2015, that modified the previous agreement through clicking on the "Yes, I agree" buttons. The April 2015 agreement contained a clause that Defendant could modify the agreement at any time. *Id.* at *2. The December 2015 agreement stated that each Plaintiff had 30 days to opt-out of the agreement. After clicking "Yes I agree," there was a further affirmation of assent as a large box popped up in bold stating "PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." *Id.* at *18. There was no time limit for Plaintiffs to review the on-line contracts. *Id.* at *21. The Court rejected Plaintiffs' argument that their assent was not informed because they were unable to read the agreement, which was only provided in English. It reasoned that it is well-settled law that that failure to read a contract is not a defense to contract formation. *Id.* at *21. Plaintiffs also contended that the December 2015 Agreement should apply only to claims after its issuance; however, the Court found that the December 2015 Services Agreement was the operative agreement for all of Plaintiffs' claims because the April 2015 agreement expressly provided that Defendant could modify the terms and conditions of agreement at any time. The Court ruled that the delegation clause in the December 2015 agreement that delegated the gateway questions of arbitrability to the arbitrator was not procedurally or substantively unconscionable. *Id.* at *31. The Court opined that the 30-day opt-out provision in the arbitration agreement substantially negated any challenge of procedural unconscionability with respect to the delegation clause. *Id.* at *34. The Court also rejected Plaintiffs' argument that the delegation clause was substantively unconscionable because it required drivers to pay "exorbitant arbitration fees and attorneys' fees." *Id.* at *39. The Court found that Plaintiffs did not make a showing of their inability to pay for arbitration or that the cost differential between arbitration and litigation was so substantial as to deter them from bringing their claims. *Id.* at *40. Second, the Court reasoned that the December 2015 agreement contained a provision that circumscribed the fee-splitting requirement in the April 2015 agreement, because it stated that: (i) the drivers would not be required to bear any greater costs than if they had filed the action in a court of law; and (ii) Defendant would bear all the arbitration fees until the dispute was resolved. *Id.* at *41. Thus, Plaintiffs would not have to bear any fees or expenses beyond what they would have had to pay to pursue this action. The Court also rejected Plaintiffs' argument that the class action waiver

was unconscionable, as the U.S. Supreme Court has issued multiple decisions holding that class action waivers in arbitration agreements were enforceable. *Id.* at *42. The Court also rejected Plaintiffs' argument that the class action waiver violated the National Labor Relations Act ("NLRA"), since even if Plaintiffs were drivers under the NLRA, the Second Circuit had ruled that a class action waiver in arbitration did not violate the NLRA. *Id.* at *43. As such, the Court granted Defendant's motion to compel arbitration. *Id.* at *44.

***Varela, et al. v. Lamps Plus,* 2017 U.S. App. LEXIS 14284 (9th Cir. Aug. 3, 2017).** Plaintiff brought an action asserting claims of negligence, breach of contract, and invasion of privacy when Defendant allegedly released his personal information in response to a phishing scam. Defendant moved to compel a bi-lateral arbitration pursuant to an arbitration agreement (the "Agreement") it drafted and required Plaintiff to sign as a condition of his employment. The District Court found that the Agreement was a contract of adhesion and ambiguous as to class arbitration. The District Court construed the ambiguity against Defendant, and compelled arbitration of all claims by allowing a class-wide arbitration to proceed. *Id.* at *2. On appeal, Defendant argued that the parties did not agree to class arbitration. The Ninth Circuit disagreed, and affirmed the District Court's ruling. The parties agreed that the Agreement included no express mention of class proceedings. The Ninth Circuit therefore used state law contract principles in order to interpret the Agreement. The Ninth Circuit explained that in California, a contract is ambiguous "when it is capable of two or more constructions, both of which are reasonable." *Id.* at *3. At its outset, the Agreement contained a paragraph outlining Plaintiff's understanding of the terms in three phrases, including: (i) assent to waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company;" (ii) waiver of "any right I may have to resolve employment disputes through trial by judge or jury;" and (iii) "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment." *Id.* The Ninth Circuit determined that a reasonable interpretation of the expansive language would be that it authorizes class arbitration, as class proceedings could be part of a "lawsuit or other civil legal proceeding." *Id.* The Ninth Circuit further found that the construction was supported by the paragraph below the statements, captioned "Claims Covered by the Arbitration Provision." The first sentence contemplated "claims or controversies" the parties may have against each other, which Defendant argued supported purely binary claims. *Id.* However, Plaintiff's claims against the company included those that could be brought as part of a class. The Agreement specifies that arbitrable claims are those that "would have been available to the parties by law," which the Ninth Circuit noted would include claims as part of a class proceeding. *Id.* at *4. Further, the paragraph listed a non-limiting, vast array of claims covered by the arbitration provisions, including many types of claims for discrimination or harassment ("race, sex, sexual orientation . . .") that are frequently resolved through class proceedings. *Id.* The paragraph also excluded from the Agreement two types of claims, but not class or collective proceedings. *Id.* at *5. Additionally, the Ninth Circuit noted that the Agreement authorized an Arbitrator to "award any remedy allowed by applicable law," which it stated would include class-wide relief. *Id.* The Ninth Circuit therefore found that because the Agreement was capable of two reasonable constructions, the District Court correctly found ambiguity. By accepting the construction posited by Plaintiff, *i.e.*, that the ambiguous Agreement permitted class arbitration, the Ninth Circuit determined that the District Court properly found the necessary "contractual basis" for agreement to class arbitration. *Id.* at *5-6. Accordingly, the Ninth Circuit affirmed the District Court's decision granting class arbitration.

Appendix I

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