

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GAMZE ZIVALI, Individually and on Behalf of All Others Similarly Situated,	:	Civil Action No. 08-cv-10310
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
AT&T MOBILITY LLC, et al.,	:	
	:	
Defendant.	:	
	:	

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DECERTIFY

REDACTED VERSION

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I. INTRODUCTION¹

This case is not about “eight million stories.” See AT&T Mobility, LLC (“Defendant” or “AT&T”) Memorandum of Law in Support of Motion to Decertify (“Def. Mem.”) at 1.² Rather, the record reflects a singular story indicating that all opt-in plaintiffs are “similarly situated” with respect to being denied proper compensation due to the utilization of a timekeeping system that cannot contemporaneously capture hours expended when performing substantially identical off-the-clock job functions. AT&T does not dispute the existence of these key substantial similarities; it simply overlooks them. Nor can AT&T argue that its policies, practices and timekeeping systems were different for each plaintiff. To the contrary, AT&T separately seeks summary judgment as to all opt-in plaintiffs based on the uniformity of the factual and legal issues.

In an effort to find some differences among opt-in plaintiffs, AT&T focuses on matters that are irrelevant to the claims and potential defenses, concern issues of differing damages, or otherwise provide no grounds for decertification. In rejecting arguments similar to those AT&T makes here, one court observed the following when certifying an FLSA collective action:

If one zooms in close enough on anything, differences will abound; even for a single employee doing a single job, the amount of time that she spends [working off-the-clock] . . . on Monday will differ, at least minutely, from the amount of time that she spends . . . on Tuesday. But plaintiffs’ claims need to be considered at a higher level of abstraction.

Frank v. Gold’n Plump Poultry, Inc., 2007 WL 2780504, at *4 (D. Minn. Sept. 24, 2007).

¹ Unless otherwise indicated, all exhibits cited herein are attached to the accompanying Declaration of Robert M. Rothman, dated December 13, 2010. Deposition testimony is cited as Exh. __ (name of deponent) [page:line-page:line].

² Defendant attempts to use the 26-page Declaration of attorney Thomas Gies as a supplement to the facts and argument contained in Def. Mem. Plaintiffs believe that providing such support in a separate document serves to evade the page limitations that the Court already enlarged at the request of AT&T. Therefore, plaintiffs address those arguments herein to the extent possible.

This Court has already made a preliminary determination that all plaintiffs are similarly situated, *see Zivali v. AT&T Mobility LLC*, 646 F. Supp. 2d 658, 662 (S.D.N.Y. 2009), when it concluded that plaintiffs had shown the required factual nexus between their claims and those of other potential class plaintiffs. Since the time of the original certification order, two things have occurred that confirm the wisdom of the Court's ruling. First, more than 4,100 plaintiffs have opted-in to this action, evidencing the wide-spread nature of the off-the-clock unpaid overtime work. Second, discovery has been completed, and now the evidentiary record fully supports the Court's original analysis, reasoning and determination that this case can and should proceed as a collective action.

For example, following the initial certification, AT&T deposed 29 randomly selected opt-in plaintiffs, who consistently testified that they performed essentially identical categories of work off-the-clock without proper pay. And it is undisputed that Defendant's timekeeping system ("MyTime") was configured so as to prevent plaintiffs from being able to directly record these off-the-clock hours worked. Instead, only managers or their delegates could make the needed daily adjustments to MyTime. But the MyTime reporting shows less than [REDACTED] of the opt-in plaintiffs' work days were ever adjusted in a way that Defendant's own expert opines [REDACTED] [REDACTED] further supporting plaintiffs' position that AT&T systematically failed to record the off-the-clock hours that plaintiffs worked. *See* Exh. 62 (Bernard Siskin, Ph.D., Rebuttal Report) at 9 [REDACTED]

The record is replete with class-wide evidence of Defendant's Fair Labor Standards Act ("FLSA") violations and AT&T's knowledge thereof. For example, AT&T performed internal audits

³ In analyzing the opt-in plaintiffs' time records, Dr. Paul White determined that [REDACTED]

that found [REDACTED]

[REDACTED] The evidence also shows that all plaintiffs are similarly situated with respect to AT&T's formal overtime policies, which effectively placed them in a "Catch-22" type of situation in which they could only report working off-the-clock overtime if they wanted to risk [REDACTED]

[REDACTED]

Almost all of the 29 randomly selected opt-in plaintiffs also testified – consistent with AT&T's written policies – that they were afraid to request adjustments for off-the-clock work, that they had learned not to make such requests based on their managers' prior refusals to fix the record, or that the ubiquitous nature of off-the-clock work without compensation made employees unaware that the tasks constituted compensable activities. The opt-in plaintiffs are also similarly situated with respect to evidence that AT&T had no formal method by which Retail Sales Consultants ("RSCs") or Assistant Store Managers ("ASMs") were to submit and record requests for adjustments. The lack of concrete procedures further signaled to plaintiffs that Defendant did not welcome or want them reporting this off-the-clock work. Due to the lack of proper time reporting systems, AT&T is unable to present a shred of evidence that contradicts plaintiffs' claims that they performed off-the-clock work without proper compensation.

Thus, the overwhelming weight of the evidence demonstrates – contrary to Defendant's position – that AT&T's policies, practices and timekeeping systems frustrated and prevented plaintiffs from having their actual work hours recorded and paid. More importantly with respect to the instant motion, all opt-in plaintiffs are similarly situated with respect to the Company-wide evidence that establishes Defendant's FLSA liability, and these claims can be properly, efficiently and fairly resolved in this collective action.

Indeed, all the relevant factors support continued certification of this collective action. First, plaintiffs have similar employment and factual settings and they all labored under the same policies, practices and procedures that led them to work off-the-clock. Second, Defendant's identified defenses can all be properly addressed and resolved in this collective action based on representative testimony or through bifurcation of the liability and damages phases of the trial. And many of the asserted defenses raise issues common to substantially all opt-in plaintiffs, and therefore can be most appropriately resolved at one time in this proceeding.

Third, fairness and procedural considerations underlying 29 U.S.C. §216(b) militate strongly in favor of certification. As discussed herein, the Company-wide evidence of Defendant's improper practices, policies and procedures is germane to all opt-in plaintiffs' FLSA claims. It would not only be extremely inefficient and wasteful for the same relevant factual and legal issues to be reexamined, again and again, in more than 4,100 individual cases, but AT&T's requested approach would risk possible inconsistent rulings. By contrast, continuing this collective action saves resources and prevents the parties and the court system from having repeatedly to face thousands of individual trials, all covering the same factual and legal issues regarding Defendant's liability for having required plaintiffs to work off-the-clock without proper compensation.

Cases like this, where thousands of individuals have relatively small claims against their employer, are exactly what was contemplated by the Supreme Court in setting out the requirements of a collective action in *Hoffman La-Roche v. Sperling*, 493 U.S. 165, 170 (1989). This case can, and should, remain certified for purposes of collective trial.

II. RELEVANT FACTUAL AND LEGAL ANALYSIS

In originally certifying this collective action, the Court found the existence of the “factual nexus” required for certification⁴ based upon the following undisputed facts: (1) AT&T’s MyTime computerized timekeeping system applied to all hourly employees; (2) only time reported in MyTime is paid to hourly employees; (3) employees can only log into MyTime when they are present in the retail stores; and (4) only a supervisor has override capability to retroactively adjust the MyTime hours worked record. *Zivali*, 646 F. Supp. at 661-62. On the basis of these undisputed facts the Court concluded:

By definition, then, MyTime cannot, at the time work is completed, accurately capture hours with respect to certain work activities. For instance, plaintiffs allege that the opening or closing of the store itself – which necessarily occurs either before an employee can “punch in” or “punch out” of MyTime – cannot be accurately recorded at the time. Indeed, all activities that take place outside of the store location – like responding to company e-mails and text on portable devices provided by the employer, or time spending servicing customer outside of the store – go uncaptured by the MyTime system.

Id. at 662 (citations omitted). In opposing certification, AT&T argued that plaintiffs’ declarations from a handful of employees evidenced no more than “idiosyncratic” and “unrepresentative” evidence of the

⁴ The FLSA permits representative or collective actions on behalf of “employees similarly situated.” 29 U.S.C. §216(b). The relevant inquiry for certification of a collective action is “whether there is a ‘factual nexus’ between the claims of the named plaintiff and those who have chosen to opt-in to the action.” *Davis v. Lenox Hill Hosp.*, 2004 U.S. Dist. LEXIS 17283, at *23 (S.D.N.Y. Sept. 1, 2004) (citation omitted). AT&T is mistaken when contending that in order to maintain certification, plaintiffs are *required* to provide “substantial evidence” that they were victims of a “single decision, policy, or plan” that violates the FLSA. Def. Mem. at 2. Courts in this District have never required the showing of substantial evidence; rather, the proper inquiry is whether on a more complete record the plaintiffs are in fact similarly situated. *See Zivali*, 646 F. Supp. 2d at 661; *see also Russell v. Ill. Bell Tel. Co., Inc.*, 2010 WL 2595234, at *8 (N.D. Ill. June 28, 2010) (“[a]lthough certification requires a factual nexus, plaintiffs in a FLSA collective action need not be situated identically”) (citations omitted). Moreover, the standard under a collective action is “considerably less stringent” than the proof required pursuant to Fed. R. Civ. P. 23 for class certification. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996) (citation omitted); *Ayers v. SGS Control Servs.*, 2007 U.S. Dist. LEXIS 19634, at *16 (S.D.N.Y. Feb. 27, 2007).

alleged off-the-clock work practices. *Id.* Now that discovery is complete, AT&T has moved to decertify this collective action, but after more than 4,100 employees opted into this case because they experienced the same uncompensated off-the-clock work conditions as the named plaintiffs, AT&T has had to down play somewhat its earlier assertion that plaintiffs' claims are "idiosyncratic" or "unrepresentative."

Following conditional certification and upon the completion of discovery, "the district court will, on a fuller record, determine whether a so-called 'collective action' may go forward by determining whether the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." *Myers v. Hertz Corp.*, 624 F.3d 537, 554 (2d Cir. 2010); *see also Pefanis v. Westway Diner, Inc.*, 2010 WL 3564426, at *4 (S.D.N.Y. Sept. 7, 2010). There are essentially three relevant factors the Court should consider when deciding whether this case should continue to proceed as a collective action: (i) the factual and employment settings of the opt-ins; (ii) the various defenses available to AT&T that may be individual to each plaintiff; and (iii) fairness and procedural considerations. *See Laroque v. Domino's Pizza, LLC*, 557 F. Supp. 2d 346, 352 (E.D.N.Y. 2008); Def. Mem. at 2.⁵

⁵ The cases AT&T cites to support its contention that "[c]ourts regularly decertify FLSA cases where opt-ins make individualized allegations of non-compensated off-duty work," are inapposite. Def. Mem. at 2, n.3 and 4. For example, *Simmons v. T-Mobile USA, Inc.*, 2007 WL 210008 (S.D. Tex. Jan. 24, 2007), on which Defendant heavily relies, was recently distinguished by a case in the very same district, *Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528 (S.D. Tex. 2008). The *Falcon* court explained that the plaintiff in *Simmons* had not "'adduced any probative evidence' that the supplementary tasks and sales duties required of SRSRs 'typically required other SRSRs to work more than forty hours per week and thus that SRSRs (as a group or in substantial numbers) are required . . . to work uncompensated overtime.'" *Falcon*, 580 F. Supp. 2d at 539 (citation omitted). Here, there is overwhelming evidence in the record supporting the claims that RSCs and ASMs commonly worked unpaid overtime.

III. THE EVIDENCE SHOWS PLAINTIFFS ARE SIMILARLY SITUATED

A. AT&T's Contention that It Has Purportedly Lawful Timekeeping Systems and Policies Creates Additional Bases for Maintaining This Collective Action

Ironically, in arguing that its timekeeping policies and systems are purportedly lawful and allow for the easy capture of all hours worked, Defendant has effectively acknowledged that all opt-in plaintiffs are similarly situated with respect to the common questions of fact and law relating to these issues. As discussed above, however, in conditionally certifying this action, the Court concluded that MyTime created a condition that fostered off-the-clock work that was not properly recorded or paid. Since the Court made this determination nothing has changed, either factually or legally, that would call into question the Court's earlier determination regarding MyTime's role in the failure to record all hours worked and pay the required overtime.

All of the undisputed evidence regarding the way in which MyTime functions – *e.g.*, that it does not allow hourly employees directly to record their time worked outside the stores, that only supervisors can adjust the MyTime record so as to include this time worked outside of the stores, etc. – remains the same. In addition, the documents and testimony obtained in discovery reinforce and confirm the Court's prior conclusion that MyTime, as configured and utilized by Defendant, frustrated and prevented all overtime hours from being recorded and paid.

Through discovery, plaintiffs also have obtained evidence showing that not only do managers fail to make the adjustment that would record the off-the-clock hours worked in MyTime, but AT&T fails to provide employees with any consistent and uniform way for them to request such adjustments, a

[REDACTED]

[REDACTED] Thus, AT&T's timekeeping system stifles plaintiffs' ability to seek manual adjustment of their record of hours worked by failing to provide any specified means, system, vehicle or other recommended procedure or process

that would encourage employees consistently to report their off-the-clock work. While AT&T contends that the lack of such systems purportedly adds “flexibility” in its timekeeping practices, the lack of appropriate recording systems is actually just another roadblock to an employee’s ability to seek adjustments. Moreover, the lack of any specified means for the employee formally to document the hours worked outside the store telegraphs to employees that AT&T does not really want them recording this work time. Nor would managers realistically be able to make the necessary adjustments.⁶

The lack of any formal documentary record of such hours worked outside the store also means that AT&T has no record showing how many employees reported this time and requested that it be paid. AT&T’s “head-in-the-sand” approach to timekeeping and overtime payment is particularly damning here, because the evidence also shows that AT&T is well aware of its long-standing practice of having employees work off-the-clock without proper pay. Indeed, AT&T has been repeatedly sued and has paid millions of dollars to settle claims alleging this improper conduct. *See* Exh. 56. Moreover, the evidence demonstrates management’s knowledge in a multitude of additional ways, including that managers frequently caused the off-the-clock work by calling or texting employees when the employees were out of the store.

In addition to the global evidence relating to the flawed MyTime system, all opt-in plaintiffs are similarly situated with respect to Company-wide policies and practices that force them to work off-the-clock without proper compensation. For instance, if an employee asked to be paid for working off-the-clock, the Company’s written policies would subject that employee [REDACTED]

[REDACTED] *See, e.g.*, Exh. 53 and Exh. 61. This disciplinary policy

⁶ In order to adjust MyTime to reflect accurately when the time was actually worked, managers would need to input a start and end time punch for each and every instance that an employee was engaged in a phone call, text message or other work activity while not in the store. Based on the fact that employees each received hundreds of such calls and text messages off-the-clock, the burden imposed on managers would be insurmountable.

creates a [REDACTED]

evidence also shows that AT&T managers have a common practice of refusing to make adjustments when employees seek such adjustments. *See* fn 16. These policies and practices have created a culture where RSCs and ASMs do not seek adjustments to the MyTime record, and managers do not adjust the record even though they know employees are working off-the-clock.

These uniform policies, practices and systems work in concert to discourage and preclude RSCs and ASMs from being able to have their off-the-clock work properly entered into MyTime. As a result, plaintiffs are systematically denied compensation for overtime hours they worked. In short, evidence that is common to all plaintiffs shows that – consistent with what the Court found when originally certifying this case as a collective action – MyTime is structured in a way that does not give plaintiffs access to this timekeeping system, and the surrounding policies and practices frustrate and block the process of employees seeking and managers making any adjustments to the hours-worked record that would pay for the work time that is at issue in this case.

Notably, while the evidence fully supports continued certification because all opt-in plaintiffs are similarly situated with respect to AT&T’s unlawful timekeeping policies and practices, this is not even a requirement in order to meet the requirements for continued certification.⁷

⁷ Many courts do not require this factor to be balanced on a motion for decertification. *See Vennet v. Am. Intercontinental Univ. Online*, 2005 WL 6215171, at *6 (N.D. Ill. Dec. 22, 2005) (“A unified policy, plan, or scheme, though, is not necessarily required to satisfy the similarity situated requirement, especially if a collective action would promote judicial economy because there is otherwise an identifiable factual or legal nexus.”) (collecting cases); *Falcon*, 580 F. Supp. 2d at 535; *Pendlebury v. Starbucks Coffee Co.*, 518 F. Supp. 2d 1345, 1349 n.3 (S.D. Fla. 2007) (“This standard, however, is more appropriately applied at the first stage of the analysis. . . .”) (citations omitted). Nevertheless, as discussed herein, plaintiffs have substantial evidence that AT&T’s policies and practices created an environment that forced plaintiffs to work off-the-clock without compensation.

B. Plaintiffs' Factual and Employment Settings Demonstrate that They Are Similarly Situated

The first factor that courts consider in determining whether plaintiffs are similarly situated is whether the factual and employment settings of the individual plaintiffs are disparate. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 n.7 (5th Cir. 1995). Under this factor, courts look at considerations such as the job duties, geographical location, supervision, and pay provisions of the plaintiffs, among other things. *See Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000).

1. Plaintiffs' Job Duties Were the Same Nationwide

This Court has already determined that plaintiffs, both ASMs and RSCs, "have substantively similar duties across all of defendants' retail stores." *Zivali*, 646 F. Supp. 2d at 662. Further, AT&T does not dispute that plaintiffs, both ASMs and RSCs, performed the tasks at issue in this case off-the-clock, namely, among other things: (i) reviewing and responding to emails and text messages; (ii) working through lunch breaks; (iii) opening and closing retail stores; (iv) participating in telephone calls; (v) reviewing product information; (vi) servicing customers outside of the retail store; and (vii) participating in a variety of Company-related activities outside of normal business hours.

AT&T also concedes that: (i) it classified all ASMs and RSCs as non-exempt hourly employees; (ii) there was a consistent pay structure for ASMs and a similarly consistent pay structure for RSCs; and (iii) all of these non-exempt hourly employees were subject to using the Company's nationwide timekeeping system known as MyTime. *See* Defendant AT&T Mobility's Memorandum of Law in Opposition to Plaintiffs' Motion to Conditionally Certify an FLSA Class at 5.

Contrary to Defendant's assertions, there are no relevant distinctions between potential opt-in plaintiffs based on job titles. Plaintiffs all performed the off-the-clock tasks at issue in this litigation regardless of whether their job title was RSC or ASM. Additionally, plaintiffs' duties and responsibilities were uniform across the country. *See Zivali*, 646 F. Supp. 2d at 662 ("Here, ASMs and

RSCs that have substantively similar duties across all of defendant's retail stores") (citing Ex. K to Pelton Decl. [Docket Entry 20-11]); *see also Chowdhury v. Duane Reade, Inc.*, 2007 U.S. Dist. LEXIS 73853, at *12-*13 (S.D.N.Y. Oct. 2, 2007) (finding plaintiffs similarly situated as all assistant store managers at various locations had similar job descriptions and responsibilities). Moreover, the factual and legal issues surrounding the uniform nature and causes of AT&T's failure to pay overtime are the same for ASMs and RSCs.

To the extent that ASMs and RSCs did not perform *exactly* the same functions in every capacity does not thwart the fact that plaintiffs are similarly situated with respect to their job duties. *Falcon*, 580 F. Supp. at 536 ("That ASMs did not perform exactly the same duties off-the-clock does not undermine the conclusion that the putative class is similarly situated."). It makes no difference that one plaintiff was denied compensation when she opened the store, while another was denied compensation when she closed the store. That is simply a function of the time of day each was scheduled to work. What matters is that in both instances the employees were denied compensation because MyTime was configured in a way that impeded the ability to get paid for the time spent working off-the-clock. Thus, they are "similarly situated."

Nor can AT&T provide any rational reason why it should matter that ASMs may have had some duties that RSCs did not, where, as here, each of them performed one or more of the off-the-clock work activities at issue in this case, and where all of the unpaid overtime stems from plaintiffs' inability to have their work hours accurately recorded in MyTime. The evidence of the relevant policies, practices and procedures relating to the off-the clock work is the same, regardless of the nature of the work or the precise job title.

AT&T also argues that ASMs and RSCs are not similarly situated because some ASMs may have been delegated timekeeping rights which, in theory, allowed them to modify the MyTime record,

and that some may have been issued a Company laptop that might allow them to access MyTime while outside the store. *See* Def. Mem. at 25. But there is no evidence that either of these conditions were widespread among the 4,100 opt-in plaintiffs. More importantly, the evidence establishes that in practice the policies and procedures put in place by AT&T actually [REDACTED]

[REDACTED]⁸ For example, AT&T's policies [REDACTED]

[REDACTED] *See* Exh. 5 (Bruce) 174:21-175:15. Moreover, none of this diminishes the fact that AT&T is still liable under the FLSA for failing to pay for the subject off-the-clock work, as these employees still worked without proper pay. *See Falcon*, 580 F. Supp. 2d at 536.

2. Plaintiffs Are Similarly Situated with Respect to MyTime

AT&T does not, and cannot, dispute that its nationwide policies and practices require employees to perform many different tasks during periods *when they are not permitted to log into MyTime, and that such work hours are therefore not contemporaneously recorded* in AT&T's timekeeping system. This Court already determined at the conditional certification stage that plaintiffs were similarly situated with respect to the MyTime system. The Court stated:

[T]here is no question that defendant Mobility uniformly utilizes the MyTime computerized timekeeping system across all of its retail stores to record the time worked by all hourly employees. Second, only the time reported in MyTime is paid to hourly employees like ASMs and RSCs. Therefore, any time worked "off the clock" that is not inputted into MyTime goes unpaid. Third, Mobility employees who must rely on the MyTime system to keep accurate track of hours worked can only log into the system (*i.e.*, "punch in" or "punch out") while they are physically at a retail store location

⁸ One of the opt-in plaintiffs testified that although he had a laptop from which he could remotely access MyTime, in order to record the time he spent working outside of the store, he would need to go through the cumbersome process of logging in and logging out each and every time he received an e-mail, telephone call or text message. That AT&T discouraged the reporting of work by requiring logging in and logging out remotely in this fashion is demonstrated by the fact that when this plaintiff actually attempted to do so, Defendant placed him under investigation for fraudulent timekeeping practices. *See* Exh. 2 (D. Bennett) 62:8-64:2.

where company terminals are available. Finally, only a supervisor has override capability to retroactively adjust an employee's work hours as recorded in MyTime.

Zivali, at 661-62 (citations omitted). The extensive discovery that has ensued since the Court granted conditional certification has only confirmed that MyTime cannot accurately capture hours with respect to certain work activities. *See id.* at 662.

As the Court correctly noted, plaintiffs were paid only for time reported while logged into the MyTime system, which could be accessed by plaintiffs only while they were at the retail store location. While supervisors could override the MyTime system to record that off-the-clock work performed by ASMs and RSCs,⁹ the record is clear that these supervisors failed to do so to reflect the time worked.

3. Plaintiffs are Subject to the Same Policies, Practices and Procedures

Due to Defendant's uniform operating procedures and Company policies and practices, plaintiffs were all subject to the same forces that required them to work off-the-clock so as to be denied overtime compensation. Contrary to AT&T's contention that plaintiffs have "*no evidence* that the opt-ins were victims of a policy or widespread unlawful practice," discovery has revealed *considerable evidence* of precisely that. For example, in light of Defendant's declarations and the documentary evidence produced in discovery that demonstrates a nationwide policy of requiring employees to carry Company owned cell phones and blackberries ("COU" devices), Defendant's assertion that there was no expectation employees would use their devices when they were not logged into the MyTime system rings hollow.

Indeed, if Defendant truly did not expect employees to answer their phones or respond to messages, AT&T management would not call, e-mail and text message those devices with urgent

⁹ Only a supervisor or his or her delegate can override the MyTime system to adjust entries in MyTime. *See Fogle Decl.* (found at Bagley Ex. B) at ¶9.

questions requiring immediate responses when employees were not in the store.¹⁰ Nor would AT&T have required plaintiffs to be the primary contact for the customers at all hours. *See* Exh. 33 (Valenzuela) 75:1-5 (“they pretty much taught us and drilled in your head to put our cell phone number to the customer’s phone as part of our selling process for us to get a first point of contact for that customer”); [REDACTED]

[REDACTED]

Consistent with these practices, AT&T’s Code of Business Conduct reflects the policy decision to have employees conduct business outside the stores. Indeed, AT&T provided COU devices to employees because such work was expected in today’s business environment: [REDACTED]

[REDACTED]

AT&T provided plaintiffs with cell phones and text messaging capability in furtherance of its business purposes. AT&T’s senior management certainly understood that [REDACTED]

¹⁰ *See, e.g.*, Exh. 8 (Crockett) 27:17-22, 52:24-53:5 (managers and co-workers would call and text her on a daily basis); Exh. 19 (Keyser) 18:6-8 (texts came from managers, co-workers and customers); Exh. 2 (D. Bennett) 68:15-20; Exh. 13 (Harrell) 20:24-21:2; Exh. 32 (Timper) 10:15-19; Exh. 35 (Walsh) 11:12-12:23; Exh. 6 (Carrega) 14:21-23, 58:7-60:5; Exh. 12 (Gutierrez) 33:16-42:3; Exh. 15 (Hopkins) 16:18-23; Exh. 1 (Abdul-Rahman) 33:21-24; Exh. 24 (Ortiz) 49:5-49:16; Exh. 33 (Valenzuela) 58:15-19; Exh. 23 (Mosblech) 28:7-25; Exh. 22 (Moehring) 11:2-9.

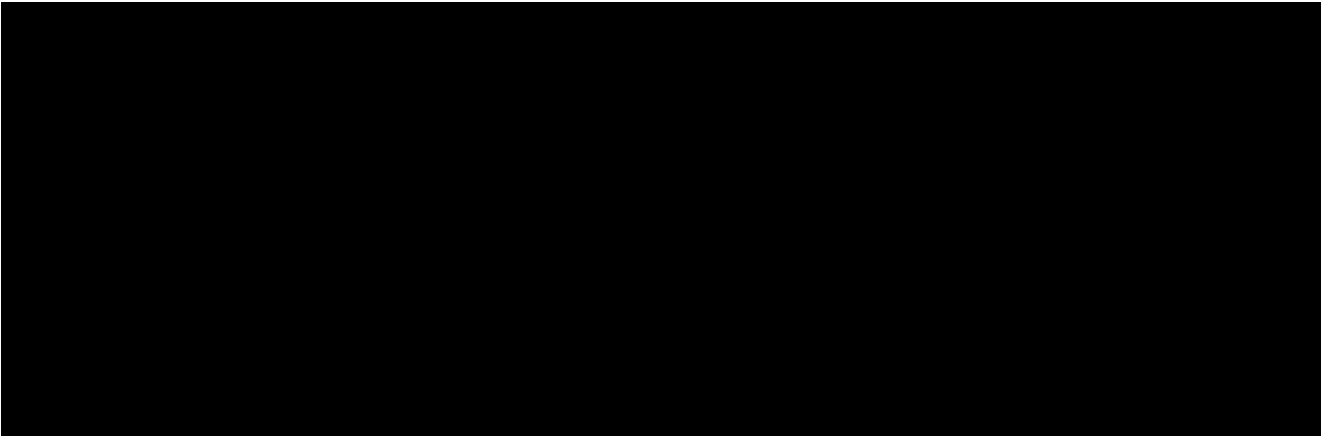
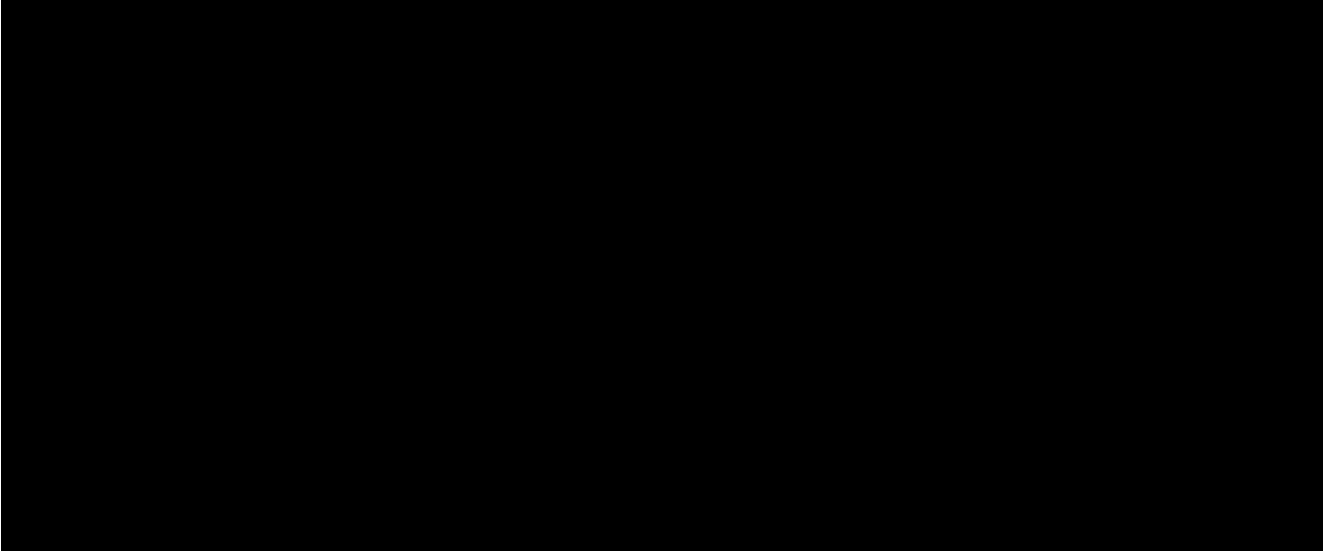
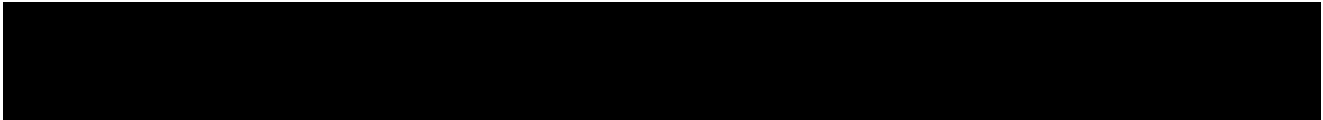
[REDACTED]

[REDACTED] Similarly, each of the other tasks at issue in this litigation such as opening and closing stores, and reviewing product information, were part of plaintiffs' job responsibilities.

However, these responsibilities coupled with AT&T's policies and practices put non-exempt employees in an untenable position, as they are subject to conflicting requirements that are mutually exclusive. The policies subject to RSCs and ASMs [REDACTED]

[REDACTED]

[REDACTED]



 Exh. 35 (Walsh) 15:12-15 (manager told him

that they did not have enough money allocated to the store to pay for off-the-clock calls).

In short, AT&T's policies and practices institutionalize off-the-clock work practices.

4. The Evidence Overwhelmingly Shows that Plaintiffs Consistently Performed Similar Tasks for Similar Reasons Off-the-Clock

a. Plaintiffs Worked Off-the-Clock Without Proper Pay

The uncontradicted evidence demonstrates that each of the opt-in plaintiffs worked off-the-clock without pay. Defendant fails to submit any evidence whatsoever indicating otherwise. Indeed, there is

not a single declaration, deposition or document from any of plaintiffs' managers indicating that AT&T paid all of the overtime wages plaintiffs were entitled to receive. To the contrary, the evidence demonstrates that each of the opt-in plaintiffs spent several hours a week working off-the-clock without compensation. *See* Exh. 37 (questionnaires).

b. Plaintiffs Worked Off-the-clock Performing Similar Tasks

As the Court recognized in its Order conditionally certifying the class, the MyTime system precluded employees from contemporaneously recording their time for tasks performed while they were outside of the store. *See Zivali*, 646 F. Supp. 2d at 662. Now that discovery is closed, the evidence fully supports the Court's conclusion that plaintiffs are similarly situated because the MyTime system caused them to perform off-the-clock job functions without compensation. Plaintiffs have testified uniformly that they and their coworkers routinely failed to receive compensation from AT&T for many tasks performed off-the-clock (*i.e.*, while they were physically unable to log themselves into MyTime), including:

- **Reviewing and Responding to Emails and Text Messages Without Compensation:**

See, e.g., Exh. 2 (D. Bennett) 13:9; 42:14-43:2; Exh. 6 (Carrega) 12:5-10; Exh. 7 (Clark) 16:5-6; Exh. 8 (Crockett) 8:8-18; Exh. 10 (Easdon) 27:1-7; Exh. 12 (Gutierrez) 9:22; Exh. 13 (Harrell) 20:18-23; Exh. 14 (Hendricks) 53:12-21; Exh. 15 (Hopkins) 9:22-10:6; Exh. 17 (Joven) 23:7-15; Exh. 18 (Kaddoura) 9:23-10:6; Exh. 19 (Keyser) 8:4-11; Exh. 20 (Linnenbaugh) 9:7-19; Exh. 21 (Marshall) 61:115-118; Exh. 22 (Moehring) 7:20-8:4; Exh. 23 (Mosblech) 18:5-18; Exh. 24 (Ortiz) 12:21-13:16; Exh. 1 (Rahman) 50:2, 53:23; Exh. 26 (Russell) 37:3-4, 39:13-25, 49:12-25, 50:1-25; Exh. 27 (Sanchez) 25:17-24; Exh. 28 (Schneider) 28:3-16; Exh. 29 (Smay) 8:17-24; Exh. 30 (Sterling) 43:14-17; Exh. 31 (Teran) 13:12-19; Exh. 32 (Timper) 10:22-11:3; Exh. 33 (Valenzuela) 19:5-16; Exh. 35 (Walsh) 47:11-14.

- **Working Through Lunch Breaks Without Compensation:**

See, e.g., Exh. 2 (D. Bennett) 109:20-110:2; Exh. 3 (Bonomo) 42:14-43:2; Exh. 6 (Carrega) 102:25-103:3; Exh. 7 (Clark) 16:5; Exh. 8 (Crockett) 8:8-18; Exh. 10 (Easdon) 13:15-19; Exh. 12 (Gutierrez) 9:23; Exh. 13 (Harrell) 20:18-23; Exh. 15 (Hopkins) 9:22-10:6; Exh. 18 (Kaddoura) 9:23-10:6; Exh. 19 (Keyser) 8:4-11; Exh. 21 (Marshall) 36:7-14; Exh. 22 (Moehring) 35:1-19; Exh. 23 (Mosblech) 18:5-18; Exh. 1 (Rahman) 89:12-14; Exh. 26 (Russell) 94:23; 102:5-10; 104:13-21; Exh. 27 (Sanchez) 17:15-17; Exh. 28 (Schneider) 28:3-16; Exh. 29 (Smay) 8:17-24; Exh. 31 (Teran) 13:12-

19; Exh. 32 (Timper) 10:22-11:3; Exh. 33 (Valenzuela) 19:5-16; Exh. 35 (Walsh) 100:17-19.

- **Opening and Closing AT&T's Retail Stores Without Compensation:**

See, e.g., Exh. 2 (D. Bennett) 13:9-14; Exh. 3 (Bonomo) 42:14-43:2; Exh. 6 (Carrega) 12:5-10; Exh. 8 (Crockett) 8:8-18; Exh. 10 (Easdon) 41:14-16; Exh. 11 (Farley) 9:20-23; Exh. 12 (Gutierrez) 9:23-24; Exh. 13 (Harrell) 20:18-23; Exh. 14 (Hendricks) 72:1-21; Exh. 15 (Hopkins) 9:22-10:6; Exh. 17 (Joven) 23:7-15; Exh. 18 (Kaddoura) 9:23-10:6; Exh. 19 (Keyser) 8:4-11; Exh. 21 (Marshall) 70:4-6; Exh. 22 (Moehring) 46:15-21; Exh. 23 (Mosblech) 18:5-18; Exh. 24 (Ortiz) 19:15-19; Exh. 26 (Russell) 71:1-13; Exh. 27 (Sanchez) 65:5-11; Exh. 29 (Smay) 8:17-24; Exh. 31 (Teran) 13:12-19; Exh. 32 (Timper) 10:22-11:3; Exh. 33 (Valenzuela) 19:5-16; Exh. 35 (Walsh) 80:11-13.

- **Participating in Work Related Telephone Calls Without Compensation:**

See, e.g., Exh. 3 (Bonomo) 42:14-43:12; Exh. 7 (Clark) 16:6; Exh. 8 (Crockett) 8:8-18; Exh. 10 (Easdon) 27:1-7, 16:22-25; Exh. 13 (Harrell) 20:18-23; Exh. 14 (Hendricks) 78:3-9; Exh. 15 (Hopkins) 9:22-10:6; Exh. 19 (Keyser) 8:4-11; 32:17-20; Exh. 21 (Marshall) 46:3-5; Exh. 24 (Ortiz) 12:21-13:16; Exh. 1 (Rahman) 54:15-21; Exh. 26 (Russell) 8:8-18; Exh. 27 (Sanchez) 61:22-25; Exh. 28 (Schneider) 28:3-16; Exh. 29 (Smay) 8:17-24; Exh. 31 (Teran) 13:12-19; Exh. 35 (Walsh) 113:1-25.

- **Reviewing Product Information Without Compensation:**

See, e.g., Exh. 8 (Crockett) 8:8-18; Exh. 10 (Easdon) 23:24-25; Exh. 14 (Hendricks) 85:3-8; Exh. 15 (Hopkins) 9:22-10:6; Exh. 17 (Joven) 23:7-15; Exh. 22 (Moehring) 7:20-8:4; Exh. 26 (Russell) 62:18-25; Exh. 28 (Schneider) 28:3-16; Exh. 29 (Smay) 8:17-24; Exh. 31 (Teran) 13:12-19; Exh. 33 (Valenzuela) 19:5-16.

- **Servicing Customers Outside of the Retail Store Without Compensation:**

See, e.g., Exh. 2 (D. Bennett) 13:9-14; Exh. 3 (Bonomo) 42:14-43:2; Exh. 6 (Carrega) 12:5-10; Exh. 7 (Clark) 16:5; Exh. 10 (Eadson) 35:2-21; Exh. 12 (Gutierrez) 9:24; Exh. 13 (Harrell) 20:18-23; Exh. 14 (Hendricks) 34:17-21; Exh. 15 (Hopkins) 9:22-10:6; Exh. 17 (Joven) 23:7-15; Exh. 18 (Kaddoura) 9:23-10:6; Exh. 19 (Keyser) 8:4-11; Exh. 22 (Moehring) 7:20-8:4; Exh. 23 (Mosblech) 18:5-18; Exh. 24 (Ortiz) 12:21-13:16; Exh. 1 (Rahman) 102:8; Exh. 26 (Russell) 86:4-18; Exh. 27 (Sanchez) 24:12-14; Exh. 29 (Smay) 8:17-24; Exh. 31 (Teran) 13:12-19; Exh. 33 (Valenzuela) 19:5-16.

In fact, more than 4,100 other plaintiffs have since opted into the case, claiming that they were not properly paid for these same tasks.

The fact that each and every one of the plaintiffs does not claim to have performed each and every one of these tasks off-the-clock does not provide a basis for decertifying this action. *See Hill v. Muscogee Cnty. Sch. Dist.*, 2005 WL 3526669, at *3 (M.D. Ga. Dec. 20, 2005) (holding that

defendant's focus on the specific tasks resulting in overtime was "too narrow," and that the duties for which plaintiffs were not paid were consistent with plaintiffs' normal job duties, thereby rendering plaintiffs similarly situated); *see also Russell*, 2010 WL 2595234, at*6 (rejecting Illinois Bell's (a wholly owned subsidiary of AT&T) argument that plaintiffs do not all claim to have performed pre-shift, post-shift or lunch break work, and noting that most plaintiffs who were deposed claimed overtime in one or more of the categories).

c. Plaintiffs' Provided Consistent Explanations Concerning AT&T's Failure to Provide Proper Compensation

AT&T erroneously contends that plaintiffs have nobody but themselves to blame for AT&T's failure to compensate plaintiffs properly. Defendant's contention is not only wrong as a matter of law, but also ignores the factual record.

Numerous employees testified that they performed work off-the-clock because they were made to understand that doing so was part of their job. For example, plaintiffs testified that they were provided with COU devices and were required to review and respond to Company emails and text messages at all hours of the day and night, whether or not they were "punched-in."¹¹ Further, plaintiffs were required to work while they were on their lunch breaks.¹² Plaintiffs did not log back into MyTime

¹¹ *See* Exh. 19 (Keyser) 13:16-15:2 (managers told her that she was required to review texts; that is why she was given the COU); Exh. 35 (Walsh) 11:12-12:23 (manager told him that COU was given to him so that he could be contacted through work-related e-mails, phone calls and text messages when not at work); *Id.* at 61:6-15 (read e-mails off-the-clock because he thought it was required of him); Exh. 6 (Carrega) 14:15-20 (was told by his manager that "you're going to get a COU, and this is for customers to contact you when they need to"); *id.* at 72:8-73:4 ("Respond to customers who contact you, that is what the phone is for."); Exh. 8 (Crockett) 16:12-17:8, 30:3-35:15, 59:3-24; Exh. 2 (D. Bennett) 50:19-51:4, 51:17-52:1, 71:6-11; Exh. 12 (Gutierrez) 14:5-15:5; Exh. 24 (Ortiz) 50:22-51:22, 103:11-106:13; Exh. 7 (Clark) 45:10-15; 35:20-24, 45:10-15; Exh. 26 (Russell) 17:13-18; Exh. 17 (Joven) 31:17-22; Exh. 14 (Hendricks) 38:13-21; 41:6-11; Exh. 31 (Teran) 48:1-4; 54:20-21.

¹² *See* Exh. 12 (Gutierrez) 61:5-9 (was told by her manager that she had to leave the break room in order to go to the sales floor during her lunch break and while off-the-clock); Exh. 6 (Carrega) 28:16-23 (manager would interrupt lunch breaks for work); Exh. 19 (Keyser) 52:3-22; Exh. 8 (Crockett) 89:24- (continued. . .)

because they did not want to make the customers wait.¹³ In any event, it would not have mattered if they did log in before helping the customer during lunch, because the manager would have removed that time so that it appeared that they employee had taken a full lunch break.¹⁴ In fact, the opt-in plaintiffs who later became store managers themselves admitted that they would shave time from employees' records in order to show a full lunch break. *See, e.g.*, Exh. 32 (Timper) 78:7-80:11. As a result of the widespread practice of requiring off-the-clock work without compensation, many plaintiffs were unaware at the time that the work they were performing was legally compensable.¹⁵

90:2; Exh. 24 (Ortiz) 76:3-22 (got called by his manager every day during his lunch break); Exh. 2 (D. Bennett) 110:11-11:25; Exh. 13 (Harrell) 105:22-106:6; Exh. 32 (Timper) 74:11-25; Exh. 35 (Walsh) 104:15-19; Exh. 7 (Clark) 19:6-17; Exh. 3 (Bonomo) 16:15-18, 85:16-89:21 (never had a sit-down thirty minute lunch because he was always called to help customers, and always helped the customer because he did not want to "risk his job"); Exh. 20 (Linnenbaugh) 52:11-17; 55:2-5; Exh. 26 (Russell) 93:1-4; Exh. 33 (Valenzuela) 44:6-11; Exh. 23 (Mosblech) 62:24-64:7; Exh. 31 (Teran) 54:2; Exh. 27 (Sanchez) 19:4-13; Schneider 36:3-11; Exh. 18 (Kaddoura) 71:17-15.

¹³ Exh. 13 (Harrell) 51:1-10 (never told people he would get back to them when he got back to the store because he was commissioned and wanted to make sure the customer was happy); *Id.* at 107:6-24 (did not ask to be paid for working through lunch because he would just get out, service the customer and make the customer happy); Exh. 7 (Clark) 19:6-17 (she would not clock back because customers were waiting and she was told by her manager that customers come first).

¹⁴ *See, e.g.*, Exh. 32 (Timper) 78:7-80:11 (did not log back in because she was required to show a full lunch break whether or not it was true); Exh. 35 (Walsh) 8:6-9:15 (Manager would punch him out for lunch even when he worked through because the manager said it was policy); *id.* at 107:20-108:25 (if he took a lunch shorter than 45 minutes and clocked back in, the manager would say that state law and Company policy was that he had to take a 45 minute lunch and his time would be adjusted to reflect a 45 minute lunch even if he worked all or part of that time); Exh. 3 (Bonomo) 17:2-19:11; Exh. 33 (Valenzuela) 50:3-13.

¹⁵ *See, e.g.*, Exh. 3 (Bonomo) 33:7-18 (he assumed working off-the-clock and not being paid was "the way the business worked" because the violations were so frequent); Exh. 11 (Farley) 24:7-16; Exh. 13 (Harrell) 20:5-16, 32:7-20, 61:4-62:25, 76:13-20; Exh. 32 (Timper) 71:2-5, 7:15-20, Exh. 6 (Carrega) 13:13-14:9; Exh. 15 (Hopkins) 13:24-14:21; Exh. 1 (Abdul-Rahman) 62:16-19; Exh. 20 (Linnenbaugh) 15:16-24; Exh. 23 (Mosblech) 87:12-88:5; Exh. 21 (Marshall) 24:9-15; Exh. 7 (Clark) 24:14-25:25.

Moreover, the evidence shows that Defendant persistently resisted or refused plaintiffs' requests for adjustments to their time records for off-the-clock work that they performed.¹⁶ Many were threatened with discipline or adverse employment consequences,¹⁷ and AT&T's own written policies

While plaintiffs are not even required to show that a common policy stems from a centralized authority, such a showing is supported when multiple decentralized units adopt an unlawful policy. *See Gambo v. Lucent Techs.*, 2005 WL 3542485, at *5 (N.D. Ill. Dec. 22, 2005). Moreover, plaintiffs further support their claims of a nationwide practice by demonstrating that AT&T's Chief Executive Officer had knowledge of the practice. *See* Exh. 16 (Hunter) 78:10-80:12. Similarly, Lewis Walker,

¹⁶ *See, e.g.*, Exh. 19 (Keyser) 10:9-11:13, 25:2-16, 72:23-73:24 (requested to be paid for off-the-clock work but her manager made a joke out of it); Exh. 8 (Crockett) 16:12-17:8 (managers told her that if she did not answer her calls she would get written up, but the time spent on the calls would be unpaid.); Exh. 2 (D. Bennett) 28:11-33:17, 39:6-18 (managers refused to make adjustments despite repeated requests); Exh. 32 (Timper) 80:14-81:13; Exh. 35 (Walsh) 75:20-79:3, 92:9-25, 90:7-91:11, 104:23-105:7 (numerous and repeated requests to managers to be paid for off-the-clock work were consistently denied); Exh. 6 (Carrega) 29:9-19; Exh. 12 (Gutierrez) 62:6-63:25; Exh. 33 (Valenzuela) 45:4-10; Exh. 14 (Hendricks) 24:9-21; 25:1-19; Exh. 23 (Mosblech) 58:4-10; Exh. 31 (Teran) 28:17-22; Exh. 27 (Sanchez) 41:1-22; Exh. 22 (Moehring) 11:2-9; Exh. 21 (Marshall) 17:25-18:5; Exh. 18 (Kaddoura) 14:19-15:11 (managers and supervisors refused to make the adjustments and he was told to "suck it up and take one for the team").

¹⁷ *See, e.g.*, Exh. 21 (Marshall) 30:20-31:12 (feared retaliation and was threatened that if he kept asking for adjustments, he would not be able to work at AT&T anymore); Exh. 19 (Keyser) 31:6-31:11 (after being refused a number of times, she stopped asking for adjustments because she needed the job); Exh. 8 (Crockett) 42:23-44:17 (did not continue asking to be paid for off-the-clock work because she was already told that it would not be paid and was afraid to report it); Exh. 35 (Walsh) 17:10-20 (did not call the ethics hotline because he did not want to step on toes and create trouble for himself); Exh. 6 (Carrega) 16:17-24 (felt like he had to work off-the-clock to avoid being terminated); Exh. 12 (Gutierrez) 65:8-16 (did not escalate her complaints over her manager because she feared adverse employment consequences); Exh. 15 (Hopkins) 27:6-23 (feared being terminated if he was to confront his manager for an adjustment for text messages); Exh. 26 (Russell) 44:20-25 (did not want to get on the "wrong side" of management by requesting adjustments); Exh. 29 (Smay) 74:6-7 (did not want to jeopardize his employment); Exh. 23 (Mosblech) 59:4-8 (feared retaliation for consistently bothering his manager for adjustments); Exh. 31 (Teran) 53:5-9 (did not want to jeopardize his job by asking for time adjustments); Moehring 11:17-12:2 (feared retaliation).

AT&T's Vice President – Human Resources Operations and Labor, testified [REDACTED]

[REDACTED] In fact, this division of AT&T has been sued or investigated by the Department of Labor for FLSA violations more than 45 times in the past three years alone. *See* Exh. 56. After being sued and investigated so many times in so many places for these violations, any argument that the common policy does not extend from a centralized authority is beyond cavil.

C. AT&T's Defenses Are Not Individualized and Are Without Merit

The purportedly individual issues that Defendant identifies (Def. Mem. at 27) are in fact common to many, if not all, potential opt-in plaintiffs, and can be collectively addressed and resolved with representative evidence and testimony regarding Defendant's common operating practices. For example, in *Mendez v. Radec Corp.*, 232 F.R.D. 78 (W.D.N.Y. 2005), defendant argued that the fact finder would have to make individualized inquiries as to plaintiffs' lunch breaks or lunch interruptions, but the court disagreed and granted plaintiffs' motion for class certification pursuant to the even stricter requirements of Rule 23, while denying defendant's motion to "decertify" the FLSA claims. *See id.* at 92 (noting that the "Second Circuit has expressly recognized that the fact that a defense may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones so as to make class certification inappropriate") (citation and internal quotations omitted).

Defendant identifies only three potential defenses, erroneously characterizing them as "individualized," and suggesting that they weigh in favor of decertifying the case: (i) varying actual or constructive knowledge; (ii) varying uses of complaint procedures; and (iii) the purportedly *de minimus* nature of some of the work performed by plaintiffs. Courts have held, however, that simply alleging a number of individualized defenses is not enough to support a decision to decertify. *See Hyman v. First Union Corp.*, 982 F. Supp. 1, 6 (D.D.C. 1997) ("[T]he existence of asserted separate defenses with

respect to each Plaintiff does not automatically eliminate §16(b) joinder.”); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1107 (10th Cir. 2001) (concluding that “the presence of ‘highly individualized’ defenses clearly did not, as the district court concluded, outweigh ‘any potential benefits in proceeding as a collective action’”).

Moreover, AT&T’s defenses fall into two categories. They are either legal arguments that would apply across the board to the entire class’ claims or they simply involve the measure of damages. *See Burch v. Qwest Commc’ns Int’l., Inc.*, 677 F. Supp. 2d 1101, 1121 (D. Minn. 2009) (finding that many of the same defenses that AT&T plans to raise here are “either legal questions that can be resolved on a classwide basis or defenses that relate to the amount of damages, not liability”). Despite Defendant’s arguments, claims like those of the plaintiffs are frequently, and manageably, tried on a class-wide or collective basis.

1. Class-Wide Evidence Shows AT&T Knew Plaintiffs Were Not Being Paid for Off-the-Clock Work

With respect to the alleged lack of management knowledge of overtime worked, Defendant misstates the law and the evidence. First, an employer cannot shield itself from liability under the FLSA by burying its head in the sand and not attempting through diligence to determine whether its employees are working off-the-clock. *See Martinez v. Food City, Inc.*, 658 F.2d 369, 375 (5th Cir. 1981) (citing *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973)). As in this case, the employers in *Martinez* and *Brennan* argued that they had limited or no knowledge of unreported overtime, relied on employees to report their hours fully, and promulgated memoranda to encourage full reporting. *See id.* Observing that the immediate supervisors may have had actual knowledge of uncompensated overtime, and that a reasonably diligent employer could have acquired knowledge of the violations of the FLSA, the *Martinez* and *Brennan* courts held the employers had, at a minimum, constructive

knowledge of the violations. Based upon the evidence, the same application should be found here. *See also Goldberg v. Kickapoo Prairie Broad Co.*, 288 F.2d 778 (8th Cir. 1961).

Defendant's argument that there may have been a varying degree of knowledge by management is immaterial under the applicable "knew or should have known" analysis, as even a little bit of knowledge is sufficient to meet the "should have known" standard. In any case, the weight of the full evidentiary record reflects AT&T's overwhelming knowledge that its policies, practices, procedures and operating systems caused unpaid off-the-clock work. To make this showing of knowledge, any individual opt-in plaintiffs would need to present essentially the same evidence, including, but not limited to, the following: (a) in many instances managers cause unpaid off-the-clock work when e-mailing, texting and calling plaintiffs; (b) managers are often present in stores while plaintiffs are working off-the-clock (missed lunches and opening/closing); (c) plaintiffs request but managers refuse to make adjustments; (d) AT&T's internal monitoring shows [REDACTED]

[REDACTED] (e) AT&T's expert White confirmed that [REDACTED]

[REDACTED] (f) AT&T's expert Mullin confirmed that [REDACTED]

[REDACTED] (g) AT&T has been subject to repeated complaints, claims and lawsuits because of these off-the-clock work practices; and

(h) recently, AT&T has [REDACTED]

Moreover, plaintiffs further support their claim of a nationwide practice by demonstrating that AT&T's Chief Executive Officer had knowledge of the practice. *See* Exh. 16 (Hunter) 78:10-80:12. In addition, in the spring of 2008, upper level management [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Similarly, documentary evidence indicates that [REDACTED]

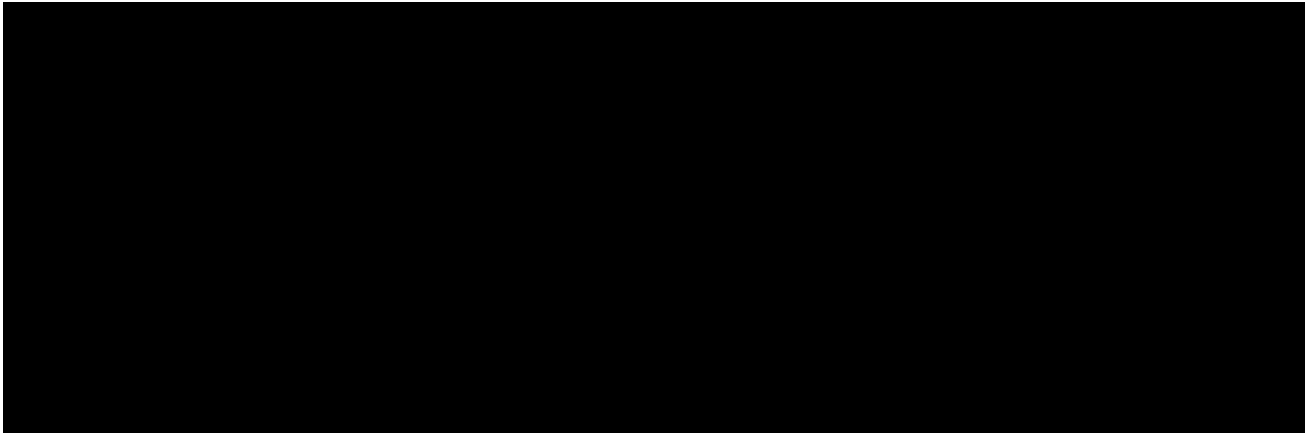
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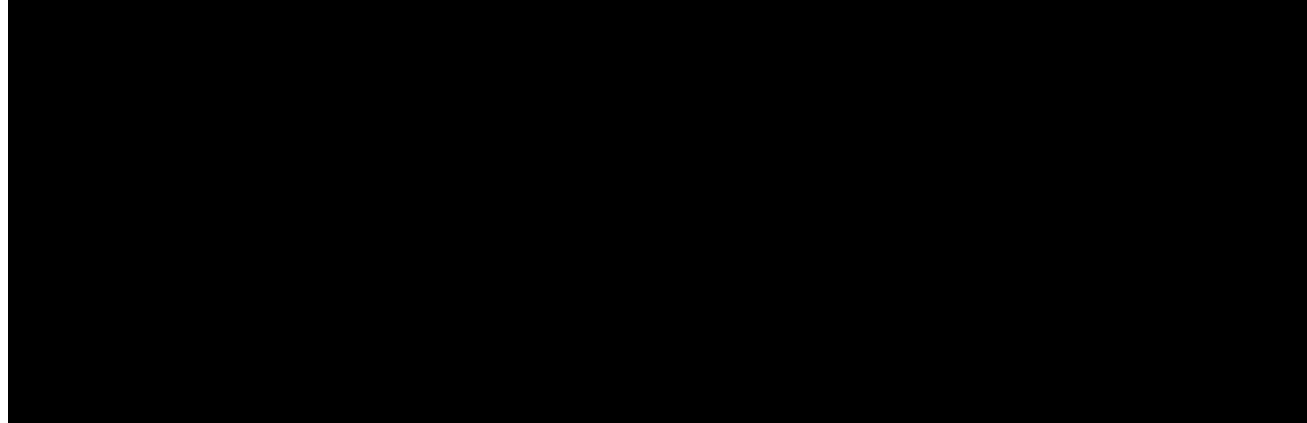
AT&T has been sued and investigated repeatedly over the practice. *See* Exh. 56. Internal audits [REDACTED]

[REDACTED]

18 [REDACTED]



Any argument by Defendant that it is shielded from liability because its written policy required plaintiffs to report all hours worked is wrong on at least two levels: first, as discussed above, AT&T's written policies were not so clear cut and proper, and they actually caused plaintiffs to suffer unpaid overtime by discouraging them from reporting it. Second, it is AT&T's practices, procedures and processes that matter, not just its written policies. "The mere promulgation of a rule against [working "off the clock"] . . . is not enough." *Clark v. Dollar Gen. Corp.*, 2001 WL 878887, at *4 (M.D. Tenn. May 23, 2001) (citation omitted). It is the duty of employers to control employees' work time so that if the employer does not want the work to be performed, it must stop it from being performed. The Department of Labor's regulations are explicit regarding an employer's duty to control employees' work hours:



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

29 C.F.R. §785.13 (emphasis added). *See Chao v. Gotham Registry, Inc.*, 514 F. 3d 280, 288-89 (2d Cir. 2008) (quoting same); *Reich v. Dep't of Conservation & Natural Res.*, 28 F.3d 1076, 1084 (11th Cir. 1994) (concluding that defendant could not avoid overtime compensation simply by adopting a policy against overtime and issuing periodic warnings); *Russell*, 2010 WL 2595234, at *9 (“lawful written (or verbal) policies will not shield the company from liability if plaintiffs can show other company-wide practices that may have been contrary to those policies and violated the FLSA”); *Campbell v. Advantage Sales & Mktg., LLC*, 2010 WL 3326752, at *4 (S.D. Ind., Aug. 24, 2010) (“even where a formal policy is compliant with the FLSA on its face, an employer may still be liable for FLSA violations occurring in common practice”) (citation omitted). If such were not the case, companies could avoid liability under the FLSA simply by pointing to written policies stating that employees are to be paid for all hours worked, despite having systematic practices that force those employees to work off-the-clock and without proper pay. For this reason, “[a]ny employer ‘who is armed with knowledge that an employee may be working overtime cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation.’” *Cunningham v. Gibson Elec. Co., Inc.*, 43 F. Supp. 2d 965, 975 (N.D. Ill. 1999) (quoting *Newton v. City of Henderson*, 47 F.3d 746, 748 (5th Cir. 1995)).¹⁹

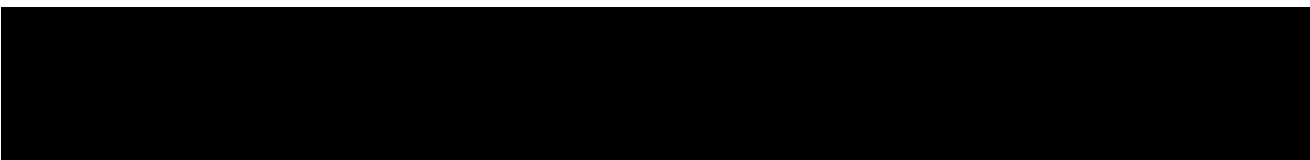
¹⁹ Courts have had no difficulty applying these principles to reject employers’ attempts to defend against the failure to pay overtime by claiming that employees did not fill out the proper *time* records, or that they violated an employer’s rule or agreement with the employer against working overtime. For example, in *Burry v. National Trailer Convoy, Inc.*, 338 F.2d 422, 426 (6th Cir. 1964), the employer unsuccessfully argued that the employees could not recover unpaid overtime because their written contract prohibited them from working over 40 hours a week without the employer’s written consent and because their time sheets showed 40 hours.

Defendant argues that mini-trials will be necessary to evaluate whether work performed by plaintiffs off-the-clock is compensable. *See* Def. Mem. at 29. But here the nature of the work falls into a few specific categories, and the questions AT&T raises continue to be common to the opt-in plaintiffs as a whole. Furthermore, whether the activities in which plaintiffs engaged constituted compensable work, and whether Defendant's management was aware plaintiffs were working off-the-clock, are not defenses as much as they are challenges to plaintiffs' proof. Ultimately, an employer is liable for work performed by its employees, whether it has actual or constructive knowledge that the work is performed. *See Brennan*, 482 F.2d at 827; *Reich*, 28 F.3d at 1082.

2. Whether Plaintiffs Were Required to Complain About Unpaid Overtime Presents a Common Question of Law

Defendant also contends that it has a defense regarding whether plaintiffs "escalate[d] their complaints, and if so, what action Mobility took in response." Def. Mem. at 29. Defendant cites no cases in this District supporting the application of that purported defense, however, because under the controlling law, if Defendant had knowledge of plaintiffs' off-the-clock work as a whole, it must compensate plaintiffs for that work even if they did not make a special request for payment. *See, e.g., Chao*, 514 F.3d at 288 (holding that the employer's rule that employees must seek pre-approval before working overtime did not exempt the employer from FLSA liability when employees worked overtime without seeking pre-approval but with the employer's knowledge).²⁰

Moreover, where, as here, Defendant has knowledge that unpaid off-the-clock work is being performed by plaintiffs, it cannot excuse its failure to pay this overtime on the ground that employees



have failed to press the issue. This is particularly true in this case, where the policies, practices and procedures were designed to dissuade and stop the reporting of off-the-clock work.

Defendant's position is also contrary to FLSA record-keeping regulations that required the employer to keep an accurate record of all hours worked. As the Supreme Court explained in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946): "it is the employer who has the duty under §11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in the position to know and to produce the most probative facts concerning the nature and amount of work performed." *Id.* at 687. Because the requirement to keep an accurate record of hours worked is not contingent upon employees asking AT&T to do so, AT&T cannot blame opt-in plaintiffs for the Company's failure to follow FLSA §11(c). AT&T willfully failed to keep a proper record of hours worked in order to avoid paying overtime compensation as required by §16(b) of the FLSA. AT&T cannot evade this record-keeping and overtime-pay obligation by failing to provide a viable system that would permit employees to record their hours worked.²¹

Finally, the evidence reveals that when employees do complain, it has not changed much if anything in terms AT&T's practices and policies. Rather, in keeping with AT&T's practice, the managers refused to make the requested adjustments. (*See* fn 16.)

3. The Time Spent Working Off-the-Clock Is Not *De Minimus*


Defendant argues that mini-trials will be necessary to evaluate whether some of the work performed by plaintiffs off-the-clock is *de minimus* and non-compensable. *See* Def. Mem. at 29-30.

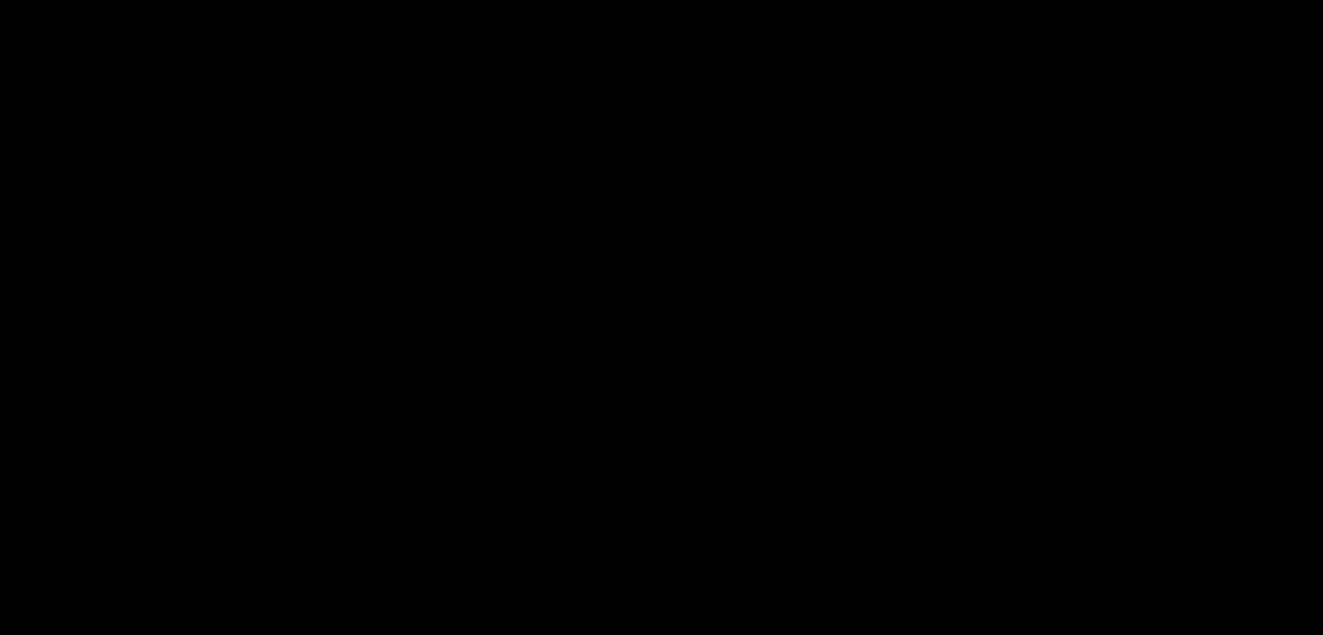
²¹ Because it would be unfair to penalize the employee twice, first by the failure to pay proper overtime and second by the failure to keep proper records to prove the amount of unpaid overtime, the Supreme Court in *Anderson* held that FLSA overtime damages can be proven where the employee "produces sufficient evidence to show the amount and extent of [off-the-clock] work as a matter of just and reasonable inference." *Id.* at 687. The Court continued: "The employer cannot be heard to complain that the damages lack exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of §11(c) of the Act." *Id.* at 688.

Defendant, however, cites inapposite case law to support this argument, which was already raised by Defendant and rejected by this Court during the conditional certification stage. In reality, AT&T's argument is just another legal defense that similarly situates all of plaintiffs and is a legal question that should be properly resolved on a class-wide basis. *See Frank*, 2007 WL 2780504, at *4 (holding that the issue of how much time is *de minimus* is a legal one that is properly resolved on a class-wide basis).

The doctrine that “*de minimus* overtime” should not be compensated also does not apply to the case at bar. The factors to be considered in determining whether time should be excluded from compensation as *de minimus* are: “(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim *in the aggregate*; and (3) whether ‘the claimants performed the work on a regular basis.’” *Reich v. New York City Transit Auth.*, 45 F.3d 646, 652 (2d Cir. 1995) (quoting *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984) (emphasis added)); *see also Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 717 (2d Cir. 2001). The 29 opt-in plaintiffs who were deposed worked, on average, 6 hours and 35 minutes off-the-clock each week. *See* Exh. 37. Multiplied by the number of weeks they each worked, there is no way that the unpaid time can be properly categorized as *de minimus*. Multiplied again by the number of plaintiffs who have opted in to this case, the amount of unpaid overtime at issue here is staggering.

The *de minimus* rule further provides that an employer, in recording working time, may only disregard “insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes.” *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1414 (5th Cir. 1990) (citing 29 C.F.R. §785.47). An employer, however, may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to *him or her* as part of the job. *See id.*

Here, AT&T has acknowledged that 



4. Many Identified Individual Issues Concern Proof of Damages that Do Not Upset Certification

AT&T argues that plaintiffs are not similarly situated because they spent differing amounts of time conducting work-related telephone calls off-the-clock (*see* Def. Mem. at 16), working through lunch (*see id.* at 18), or opening and closing stores (*see id.* at 21). AT&T's argument misses the point. Those differences and the others AT&T highlights in its papers solely concern the amount of damages that plaintiffs are entitled to receive. As a matter of law, they have no bearing whatsoever on the issue of whether plaintiffs are similarly situated. *See Russell*, 2010 WL 2595234 at *14 (“Because each plaintiff’s circumstances are likely to be different, [v]ariations in damages . . . do not warrant decertification.”) (citation omitted); *Maynor v. Dow Chem. Co.*, 671 F. Supp. 2d 902, 933 (S.D. Tex. 2009) (individualized inquiries into number of hours spent in online training affects damages, not liability, and does not defeat certification); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (“[T]he amount of damages is invariably an individual question and does not defeat class action treatment.”); *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796, 798 (10th Cir. 1970) (“[T]he

fact that there may have to be individual examinations on the issue of damages has never been held [to be] a bar to class actions.”) (citations omitted).

D. Fairness and Procedural Concerns Support Moving Forward with the Collective Action

1. Considerations of Fairness Support Maintaining This Case as a Collective Action

The Second Circuit has recognized that the FLSA is a remedial statute. *See Braunstein v. E. Photographic Labs., Inc.*, 600 F.2d 335, 336 (2d Cir. 1978). “The purpose of the FLSA . . . was to ‘guarantee[] compensation for all work or employment engaged in by employees covered by the Act.’” *Reich*, 45 F.3d at 648-49 (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944) (alteration in original)). As a result, certification of an FLSA collective action “comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits.” *Braunstein*, 600 F.2d at 336.

For this reason, the Court should “consider whether certification would serve the purposes and putative benefits of a collective action under §216.” *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678 (D. Colo. 1997). In *Hoffman-LaRoche*, the Supreme Court clearly articulated that purpose: “A collective action allows . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity.” 493 U.S. at 170. Taken together, these purposes weigh heavily against Defendant’s motion to decertify the class and dismiss the opt-in plaintiffs, forcing them to pursue their claims independently. *See Rodolico v. Unisys Corp.*, 199 F.R.D. 468, 484 (E.D.N.Y. 2001) (“Mindful of the broad remedial purposes of the ADEA, as well as the fact that the ‘similarly situated’ requirement of section 216(b) does not compel the plaintiffs to meet the predominance prerequisite of Rule 23(b)(3), the Court has viewed the picture painted by the plaintiffs as a whole and finds that a collective action is appropriate for the liability phase of the plaintiffs’ claim.”).

Defendant's proposed decertification would simply ensure that identical facts and evidence regarding the existence of Defendant's policies and practices would need to be raised repeatedly in separate trials regarding the very same legal and factual issues. Not only would this be a serious waste of judicial resources, it would be unfair and prejudicial to plaintiffs. Class and collective actions are frequently the only cost effective and economically viable way in which to prosecute relatively small individual claims for employee overtime. Likewise, without the ability to pool their resources, it is highly unlikely that many of the plaintiffs in this case will be able to afford the costs of pursuing their claims on their own. *See, e.g., Nerland v. Caribou Coffee Co., Inc.*, 564 F. Supp. 2d 1010, 1026 (D. Minn. 2007) (stating that the right of the defendant to defend against individualized claims on an individual basis must be balanced against the plaintiffs' rights to have their day in court); *Pendlebury*, 518 F. Supp. at 1363 ("If decertification were granted, the federal court system potentially would have hundreds of individual lawsuits all dealing with the same issue. Defendant's suggestion that few Plaintiffs would refile is the precise reason Congress authorized class action treatment for these types of cases."). Although the FLSA's remedial nature alone does not justify denying Defendant's motion for decertification, "it does at least suggest that a close call as to whether plaintiffs are similarly situated should be resolved in favor of certification." *Falcon*, 580 F. Supp. 2d at 541.

2. The Court Has the Necessary Means to Ensure a Manageable Trial

Plaintiffs have established that individual plaintiffs are similarly situated. However, if the Court is concerned about managing this case, it has procedural tools at its disposal to make the case more manageable, such as the use of representative testimony and bifurcation.

a. Representative Testimony

In a collective action, courts have consistently found that representative testimony is acceptable. Trial in an FLSA case, such as this, will typically involve a very few representative witnesses. *See*

Martin v. Selker Bros., Inc., 949 F.2d 1286, 1298 (3d Cir. 1991) (“It is not necessary for every single affected employee to testify in order to prove violations or to recoup back wages. The testimony and evidence of representative employees may establish *prima facie* proof of a pattern and practice of FLSA violations.”); *McLaughlin v. Seto*, 850 F.2d 586, 589 (9th Cir. 1988); *see also Brennan*, 482 F. 2d at 829; *Sec’y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991); *Reich v. Gateway Press*, 13 F.3d 685, 701 (3d Cir. 1994); *Donovan v. Williams Oil Co.*, 717 F.2d 503, 505-06 (10th Cir. 1983).

Moreover, a mere sampling or representation that the policy at issue in this lawsuit exists in certain stores will suffice. *See Levy v. Verizon Info. Servs. Inc.*, 2007 WL 1747104, at *5 (E.D.N.Y. June 11, 2007) (representative sample that Verizon TSRs working in three states were similarly subjected to Verizon’s allegedly unlawful overtime policy sufficient to permit an inference that the policy governed all 19 offices).

b. Bifurcation

In addition, Federal Rule of Civil Procedure 42(b) provides that in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, the Court may order separate trials of any claims or of any separate issues. *See Falcon*, 580 F. Supp. 2d at 541 (when a court believes that bifurcation of the liability from damages issues would further judicial economy, that tool is at its disposal). Accordingly, courts regularly bifurcate FLSA cases into liability and damages stages to allow a case to proceed collectively, while preserving the opportunity to make an individualized analysis of the damages due to each individual plaintiff. *See, e.g., Wilks v. Pep Boys*, 2006 WL 2821700, at *7 (M.D. Tenn. Sept. 26, 2006); *Nerland*, 564 F. Supp. at 1025.

The amount of time for which plaintiffs may recover for working off-the-clock can be determined in the damages portion of a bifurcated case. *See Russell*, 2010 WL 2595234, at *7 (determining that number of minutes logging into computers can be determined in the damages portion of a bifurcated case); *Maynor*, 671 F. Supp. 2d at 933 (bifurcation in FLSA collective actions is

appropriate, because “to the extent the issue is the amount of hours each individual plaintiff spent in online training, this issue affects damages, not liability”).

Likewise, the individual defenses that AT&T raises go largely to the issue of damages, which can be dealt with in a separate liability-phase determination, since plaintiffs allege that Defendant has maintained and applied certain uniform, across-the-board practices that violate the FLSA. *See Mendez*, 232 F.R.D. at 92 (disagreeing with defendants’ argument that the fact finder would have to make individualized inquiries into plaintiffs’ lunch break interruptions and noting that “individual defenses” to plaintiffs’ claims go largely to the issue of damages). “In almost any class action in which there are claims for damages, though, each plaintiff must establish his entitlement to damages and the extent of those damages. That alone does not mean that a class should not be certified.” *Id.*

IV. CONCLUSION

Plaintiffs have met their burden to show that they are similarly situated and that they were the victims of a unified practice that forced them to work off-the-clock. Therefore, the Court should deny Defendant’s motion.

DATED: December 13, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert M. Rothman, hereby certify that on December 13, 2010, I caused a true and correct copy of the attached:

Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Decertify; and

Declaration of Robert M. Rothman in Opposition to (i) Defendant's Motion to Decertify, and (ii) Defendant's Motion for Summary Judgment

to be served electronically on all counsel registered for electronic service for this case

/s/ Robert M. Rothman

Robert R. Rothman