COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT – DIVISION 3
CIVIL ACTION NO. 10-CI-5512

VELMA HISLE, et al PLAINTIFFS

vs. **Reply Memorandum of Law In Support of Motion to Certify Class Action**

CORRECTCARE-INTEGRATED HEALTH, INC. DEFENDANT

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Defendant's *Memorandum In Opposition to Motion to Certify Class Action* asserts that it "has always" applied an automatic 30 minute meal break deduction to its' employees. This policy's application is the core issue uniting the Named Plaintiffs and the proposed Class and renders them similarly situated. The available information indicated that the proposed class is sufficiently numerous. Finally, defendant's contentions regarding the need for additional discovery can be satisfied by conditional certification of the class, a procedure contemplated by CR 23.03(3) and conditional certification was suggested in plaintiffs' motion as well.

1. Factual Findings That the Present Record Supports

Contrary to defendant's contention, the present record supports the following findings of fact pertinent to the plaintiff's motion:

1. Defendant employs nurses and other medical personnel that it staffs at nine facilities operated by the Kentucky Department of Corrections. *Memorandum in Opposition to Motion to Certify Class Action* at 1.

2. Defendant has always automatically deducted 30 minutes for a meal break for each of its employees per eight hour shift. *Id.* at 2.

3. Unless the particular employee undertook to report to defendant otherwise, defendant proceeded with its automatic 30 minute deduction for a meal break. *Id.*

4. Plaintiffs Velma Hisle, Kelly Goff and Elizabeth Gulley, Crystal York and Dana Johnson all base their claims on defendant's policy of deducting 30 minutes for a meal break, while being required by defendant to perform compensable work during this supposed meal break, as defendant acknowledges. *Id.* at 2-3.

5. Four other nurses, Kathryn Burchett, Mary Dean, Dawn Lowe and Melissa Grate, either formerly or presently employed by defendant at Northpoint have moved to intervene in this action. They likewise challenge defendant's policy of automatically deducting 30 minutes for a meal break even though they are required to perform compensable work during this supposed meal break.

6. Defendant requires its nurses to monitor a radio at all times, including during their meal and/or rest breaks, because it serves defendant's contractual obligations to KDOC. *Deposition of Sherri Stearman* at 5-8.[1] Nurses that fail to monitor their radios at all times, including during their meal and/or rest breaks, are subject to discipline by defendant. *Id.* at 8.

7. Discovery documents exchanged by the parties thus far identify the following persons, in addition to the present Named Plaintiffs and the proposed intervening plaintiffs as potential class members, Sarah Souders,

[1] A copy of Stearman's deposition is attached to this motion as Ex. 1.

Tammy Wilson,[2] and 16 other nurses listed on the work schedules for Crystal York that defendant has produced with the following last names: Jackson, Hamlin, Reynolds, Sallee, Austin, Brockman, Dunn, Murphy, Dedman, Conley, Belcher, McManus, Hall, Nunemaker, Hunt, Langford.[3]

2. The Named Plaintiffs and the Proposed Class Are Similarly Situated

According to defendant, the Named Plaintiffs and all of its other employees are and always have been subject to defendant's policy of automatically deducting 30 minutes for a supposed meal break. As the application of this policy is the core issue uniting the Named Plaintiffs and the proposed Class, they are "similarly situated."

Courts have ruled that employees are "similarly situated" if they are subject to the same challenged policy, the best illustrations being a series of cases also arising for healthcare workers subject, as are the Named Plaintiffs and the proposed class members, to an automatic meal break deduction policy. *Hamelin v. Faxton-St.Luke's Healthcare,* 274 F.R.D. 385, 394-97 (N.D.N.Y. 2011); *Meyers v. Crouse Health Sys.*, 274 F.R.D. 404, 414-416 (N.D.N.Y. 2011).[4]

The Named Plaintiffs and proposed Class members shared and share similar, if not identical, factual settings that will be material in litigation

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[2] See Ex. 1 to plaintiffs' *Memorandum of Law In Support of Motion to Certify Class Action.*

[3] These documents are attached as Ex. 2 to this memorandum.

[4] That these class actions were certified under New York law makes no difference. New York law like Kentucky law incorporates the standards of the federal Fair Labor Standards Act for determining whether time worked is compensable time. *Meyers,* 274 F.R.D. at 413 (New York law incorporates FLSA standards); *City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n,* 212 S.W.3d 89, 95 (Ky. 2006).

challenging this policy. The following are some but not necessarily all of the examples:

- All were non-exempt employees.
- All were hourly employees.
- All had 30-minute meal breaks automatically deducted from their time whether they took a bona-fide meal break or not.
- All were not just permitted but required by defendant to work during their unpaid meal breaks.
- All bore the responsibility under the defendant's policy of reporting to a manager (or someone) in order to have the automatic deduction cancelled.
- All remained unpaid for working during their meal breaks if they did not report it.
- All worked in plain sight during regular working hours, when they worked during their unpaid meal breaks.

Because defendant's meal break deduction policy was applied to all of defendant's employees at present and at all other times, the Named Plaintiffs and the proposed class members claims' will turn on the same legal issues. Accordingly, the Named Plaintiffs and the proposed Class are similarly situated. That the quantum of damages may vary among class members is no grounds to defeat this conclusion. *E.g., In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 522 (S.D.N.Y. 1996).

3. The Potential Class Members Are Sufficiently Numerous

While there appears to be no hard and fast rule as to numerousity, there is a general recognition that less than 20 is too few, more than 40

surely enough. *E.g., Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986). While the exact number or identity of the class members need not be pleaded, the plaintiff ordinarily "must show some evidence or reasonable estimate of the number of class members." *Long v. Thornton Township High Sch. Dist.*, 82 F.R.D. 186, 189 (N.D. Ill. 1979). The Court may "make common sense assumptions in order to find support for numerosity." *German v. Federal Home Loan Mortg. Corp.*, 865 F.Supp. 537, 552 (S.D.N.Y. 1995). Plaintiffs may rely on reasonable inferences to estimate the size of the class. *McNeill v. New York Housing Auth.*, 719 F.Supp. 233, 252 (S.D.N.Y. 1989).

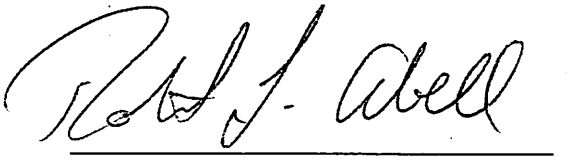
The present record supports a finding of numerousity of the proposed class. There are five named plaintiffs, four proposed intervenors, two other nurses, Souders and Wilson, that attended the nursing staff meeting at Northpont in August that could be included in the class and 16 other nurses that can readily be idenfited as co-workers of York, who was employed by defendants from 6/7/06 to 11/9/07. Even if the class were limited merely to defendant's employees and Blackburn and Northpoint, the Court would have to suspend its common sense to conclude that the potential class members were not so numerous as to not fulfill the numerosity requirement. The potential class members do indeed appear to number in the hundreds, given the time period involved and the number of KDOC institutions at which defendants provide employees and services.

Conclusion

For all the foregoing reasons, the Named Plaintiffs respectfully request that this Court grant their request to certify a class under CR 23 as follows: all persons since September 25, 2005, who were, are or will be Correctcare employees who have earned but who did not receive compensation for work performed during what were supposed to be meal and/or rest breaks.

Alternatively, to conditionally make such a certification, and to grant authority to the Named Plaintiffs' counsel that means (including the providing of information on counsel's or another website, the holding of informational meetings, and the placing of notices with the media) through which notice can be given to all current and former employees of defendant similarly situated to the Named Plaintiffs of the nature and status of the action.

Respectfully submitted,



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Certificate of Service

It is hereby certified that a true copy of the foregoing was mailed, postage prepaid, this 26 day of September 2011 to the following:

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