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

VELMA HISLE, et al PLAINTIFFS

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

CORRECTCARE-INTEGRATED HEALTH, INC. DEFENDANT

* * * * *

The Court should certify this case as a class action. Information disclosed by defendant makes it inescapable that the violations of Kentucky wage and hour law pleaded by the Named Plaintiffs are the result of deliberate, intentional policies applied and followed by defendant at the various Kentucky state correctional facilities at which it serves as a contractor to provide nursing and related medical services.

Factual Background

1. The Named Plaintiffs

The Named Plaintiffs were employed by defendant at two different state correctional facilities: Blackburn Correctional Complex in Fayette County at which were employed Velma Hisle, Kelly Goff and Elizabeth Gulley, and Northpoint Training Center, where employed was Dana Johnson and Crystal York. The defendant contracts with the state Department of Corrections to provide nursing and other health care services at a number of state correctional facilities. Goff, Gulley, Johnson and York all worked as nurses for defendant. Hisle worked as a certified medication aide.

2. Facts Common To All Members of the Proposed Class

As set out in the verified complaint filed initially by Hisle, Goff and Gulley, as well as the intervening complaints subsequently filed by Johnson and York, defendant has engaged in repeated and widespread violations of Kentucky wage and hour law. As most pertinent to this matter those violations are as follows: (1) defendant has long followed a policy of deducting 30 min. each day from the time worked by each of its employees for a supposed meal break yet requires, as a matter of policy, its nurses and certified medication aides to perform compensable work during this supposed meal break.

Although defendant denied in its answers that this was its policy,[1] information that has come to light in discovery shows otherwise, shows the violations be standard procedure, shows the violations to be willful and repeated. First, defendants required, as a matter of policy, its nurses to carry with them and monitor at all times including during meal breaks radios. That this was policy is shown by minutes of a staff meeting held in August 2010, at Northpoint in which the policy was reiterated.[2] Second, in June 2008, plaintiff Elizabeth Gulley wrote defendant and specifically informed it that its policy requiring nurses to carry with them and monitor all times including during meal breaks radios was a violation of both federal and

[1] Defendant has us far been unable to articulate the factual basis for this denial; its failure was the subject of plaintiffs' recently filed *Motion to Compel Interrogatory Answers.*

[2] A copy of the minutes of the staff meeting is attached hereto and marked as Exhibit 1 to this memorandum.

Kentucky state wage and hour law.[3] Third, defendants recently produced, after many months delay, the time card records for Hisle Goff, Gulley and Johnson, which all reflect that 30 min. was deducted for supposed meal break from each of their shifts. Although defendant was unable to produce such records regarding York, York has produced her timesheet records, which likewise show a deduction of 30 min. each day for a supposed meal break.

The Named Plaintiffs have asserted in their complaints that the above-described practice and policy of defendant violates the following state law: (1) requirement under KRS 337.285 that non-exempt employees who work more than 40 hours per week receive overtime compensation rate of not less than 1 1/2 times the regular rate of pay; and, (2) the requirement under KRS 337.355 that defendants employees receive a bona fide meal break, during which they are not required to be on duty or to perform active or even inactive work duties.

It is believed that there are several hundred former and/or current employees of defendants, all of whom have not been paid the wages and/or overtime compensation due them and who have interest in the outcome of this proceeding. Therefore, the Named Plaintiffs seek this Court's permission provide information to those other interested parties through the Robert Abell Law or another website, through collective meetings, and by notices

[3] A copy of this letter is attached hereto and marked as Exhibit 2 to this memorandum.

placed with local media. In this way, information about this action, the relief that is being requested, the interests and rights of affected persons can all be addressed, and a forum can be provided to answer those persons' other questions.

Argument

1. CR 23.01 Allows Certification of This Class

A class may be certified under CR 23.01 when

> (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

Each element of CR 23.01 is easily met in this case.

The determination of whether to grant class status does not involve any analysis of the underlying merits of the suit:

> We find nothing in either the language or history of Rule 23 the gives a court any authority to conduct a preliminary inquiry into the merits of the suit in order to determine whether it may be maintained as a class action.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974); *see also Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 723 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). First, the resolution of the motion for class certification is limited to ascertaining whether the prerequisites of CR 23.01 are satisfied based on the allegations in the complaint and the intervening complaints. Certification generally does not require any type of extensive evidentiary showing for the purposes of certification, and the "[c]ourt is

required to regard all substantive allegations contained in the complaint as being true, and factual disputes arising at the hearing and in the pleadings are to be resolved in the plaintiff's favor." *Keasler v. Natural Gas Pipeline Co.*, 84 F.R.D. 364, 365 (E.D. Tex. 1979).

CR 23.03 requires the determination of class certification to be made "[a]s soon as practical after the commencement of an action brought as a class action" and expressly allows this court to grant conditional certification, a decision which may be altered or amended before any decision on the merits. Thus, as a leading commentator in class actions and stated:

> ... because Rule 23 itself requires the court to make a class determination "as soon as practicable," and permits the court to alter or amend its order before the decision on the merits, many presumptions are fairly invoked a the court in reaching an early determination. Since Rule 23 is generally required to be liberally construed, these presumptions arising in an early stage of the litigation, are invoked for the most part in favor of upholding the class.

2 H. Newberg, *Newberg on Class Actions*, §7.17 at 7-62 (3d ed. 1992); *see also Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986) ("questions concerning class certification are left to the sound discretion of the district court").

A. The Proposed Class Is so Numerous That Joinder of All Members Is Impracticable

The first element of a certification analysis under CR 23.01 is whether "the class is so numerous that joinder of all members is impracticable ...." *Id.* This element does not impose a strict numerical test. *In re: American Medical System, Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). As one court has

observed, "I see no necessity for encumbering the judicial process with 25 lawsuits, if one will do." *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 F.R.D. 452, 463 (E.D. Pa. 1968).

In this litigation, the class is so numerous that joinder will be impracticable, if not impossible. Correctcare presently employs and has employed in the past what is to believed to be many hundred employees that would fall within the proposed class. Based on the number of persons affected by defendant's unlawful wage and hour policies, it is difficult to imagine how the court could entertain these claims in any capacity other than through a class action. Class certification will greatly assist the court in managing these person's claims and this litigation.

B. There Are Questions of Law or Fact Common to All Members of the Class

CR 23.01 also requires that the members of the class share common questions of law and fact. Class certification is particularly appropriate where the issues common to the class turn on questions of law which are applicable in the same manager each member of the class. *Califano v. Yamasaki,* 442 U.S. 682, 700-701 (1979). The commonality test is qualitative rather than quantitative, and certification requires only a single issue common to all members of the class. *In re: American Medical,* 75 F.3d at 1080; 1 H. Newberg, *Newberg on Class Actions* § 310 at 3-50. Complete identicality of the claims is not necessary, and class certification is proper where, as here, a common course of wrongful conduct is alleged. *Coley v.*

Clinton, 635 F.2d 1364, 1378 (8th Cir. 1980); *see also Sterling v. Velsicol Chemical Corp*, 855 F.2d 1188, 1197 (6th Cir. 1988).

Here, the common questions of law and fact shared by the members of the identify class include but are not limited to the following:

- whether defendant's policies result in its nurses and certified medication aides regularly being required to work without being paid the wages due them and/or to work beyond 40 hours per week without receiving overtime compensation;

- whether defendant's policies and procedures at the correctional facilities in regard to its employees employed as nurses and/or certified medication aides including the refusal to grant bona fide meal breaks violates KRS Chapter 337.

This list of common questions of both law and fact unquestionably satisfies CR 23.01, as these fundamental issues pertain to defendant's employment practices. Those practices have violated and continue to violate the class members' rights under the Kentucky wage and hour law. The Named Plaintiffs' claims and the claims of the proposed class members are "so interrelated [that] the interest of the class members will be fairly and adequately protected in their absence." *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n. 13 (1982). In sum, each member the proposed class has been victimized by defendant's illegal employment practices as alleged in the complaint and in the intervening complaints; as a consequence, the commonality requirement of CR 23.01 is met.

C. The Claims of the Named Plaintiffs Are Typical of the Claims of the Proposed Class

CR 23.01 requires that the claims of the representative parties be typical of the claims of the entire class. As stated in *American Medical*,

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the alleged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and if his or her claims are based on the same legal theory.

75 F.3d at 1082.

This typicality requirement is met as long as the Named Plaintiffs and the proposed class members may rely on the same broad course of alleged wrongful conduct to support the claims for relief. *See Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 373 (D. Del. 1990) (typicality exists where the plaintiff's claim arises from the same event or course of conduct and is based on the same legal theory as the claims of the class members). In other words, "[w]here the class representatives' claims are such that they will have to prove the same elements as the remainder of the class typicality should be found notwithstanding factual differences between various members of the class." *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 38 (E.D. Va. 1981).

Here, claims of the representative parties are typical of – if not identical to – the claims of the members of the proposed class. All members of the proposed class have claims that defendant's employment practices and policies violate applicable Kentucky state wage and hour law. All members of

the proposed class have claims for unpaid wages and/or overtime compensation. It should be noted that the representative parties in this case include employees who worked different shifts, in different capacities and at different locations for defendant. All of the representative parties – and all members of the proposed class – have been affected by defendant's policies and procedures, and all are seeking relief under the same statutes. While damages will need to be determined under an individual basis, any difference in the degree of harm suffered by the class members does not diminish the typicality of the proposed claims, making class certification appropriate. *See, e.g., Spillman v. City of Baton Rouge*, 417 So.2d 1212 (La. App. 1982) (certifying class action brought on behalf of current and former fireman, seeking recalculation payment of overtime and holiday pay, and holding that any differences in the amounts due to each member of the class did not provide a sufficient basis for rejecting class-action status).

D. The Class Representatives Will Fairly and Adequately Protect the Interest of the Class

CR 23.01 also provides that one seeking to represent a class must "fairly and adequately protect the interests of the class." The Sixth Circuit has articulated two criteria for determining adequacy of representation: (1) the representatives must have common interests with unnamed members of the class, and (2) it must appear that representatives will vigorously prosecute the interest of the class to qualified counsel. *In re American Medical,* 75F.3d at 1083.

Here, the Named Plaintiffs are the former coworkers and colleagues of members of the proposed class. No conflicting or antagonistic interests exist even within the group of Named Plaintiffs, or between the Named Plaintiffs and the members of the proposed class.

As to the qualifications of the undersigned counsel, this factor – like the qualifications of the named plaintiffs themselves – is presumed in the absence of specific proof to the contrary. *South Carolina Nat'l Bank v. Stone*, 139 F.R.D. 325, 330-331 (D.S.C. 1991). Courts generally hold that the employment of competent counsel assures vigorous prosecution. *Id.* at 331. In any event, the defendant bears the burden to demonstration the representation will be inadequate. *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592-93 n. 15 (5th Cir. 1979). Here, competency the Named Plaintiffs' counsel more than meets the requirements of CR 23.01. Robert L. Abell is a respected member of the Fayette County bar, is a member of the National Employment Lawyers Association, and has substantial and varied experience in complex employment and other litigation matters.

2. The Named Plaintiffs Also Satisfy the Requirements of CR 23.02 (a) and (c)

In addition to satisfying the requirements of CR 23.01, the proposed class in this case also satisfies the provisions of CR 23.02(a) and (c). CR 23.02 allows an action to be certified as a class that meets any one of the three independent provisions of that rule. In this case, at least two provisions, (a) and (c) are satisfied.

A. The Named Plaintiffs Meet the Criteria for Certification under CR 23.02 (a)

Class certification is appropriate under CR 23.02 (a), which states that an action may be maintained as a class if the "prosecution of separate actions by or against individual members of the class would create a risk of inconsistent adjudications establishing incompatible standards of conduct for the party opposing the class, or, "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]"

Individual lawsuits by employees against defendant could lead to inconsistent and varying adjudications as to the employment violations alleged in the verified complaint and intervening complaints. Based on this consideration, certification is proper under CR 23.02(a).

B. The Named Plaintiffs Meet the Criteria for Certification under CR 23.02 (c)

Certification is equally supported by CR 23.02(c) because "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and a class action is clearly "superior to other available methods for the fair and efficient adjudication" of this controversy. The Court should note that the Named Plaintiffs are committed to representing the interests of the entire class, and they are not aware of any other pending litigation concerning the illegal employment

practices that are described in either the verified complaint or in the intervening complaints. CR 23.02 (c) (i)-(ii). Further, since defendant maintains its headquarters in this jurisdiction, there is no conceivable undesirability of litigating these claims in this jurisdiction. CR 23.02 (c)(iii). And, given the anticipated localized residency of most members of the class, who are believed to preside predominantly in the central Kentucky area, there is no anticipated difficulty in managing this class action. CR 23.02 (c)(iv). In this case, therefore, class-action device is not merely an acceptable method for proceeding, but is plainly this superior method.

Finally, public policy supports the certification of this class. The named plaintiffs and the members of those class, by the very nature of their worksite, work in highly stressful atmosphere and often during shifts the present considerable challenges to the families. Defendant is a contractor to our Commonwealth that has exploited that contract by violating our state's wage and hour law and reaping undue and unjust profits that ought be paid the Named Plaintiffs and the class members as the wages and/or overtime compensation due them. Until such time as the employment practices at issue in this case are addressed and remedied by this Court, there is a substantial probability that those practices will continue to violate the class members' rights under Kentucky law, and that they will continue to be required to work under illegal rules, regulations and practices. By certifying the proposed class – at least conditionally – this Court will permit the

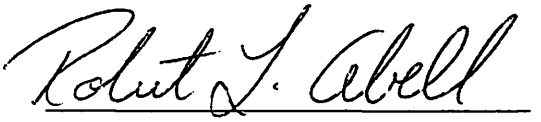
Named Plaintiffs' counsel to initiate a procedure for identifying and contacting each and every impacted current and former employee of the defendant, allowing them to seek a remedy for defendant's statutory violations.

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 presently or previously employed by defendant since September 25, 2005 at a Kentucky state correctional facility as a nurse or certified medication aide.

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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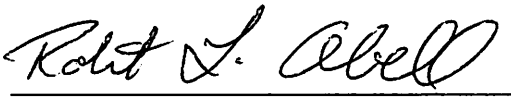
Counsel for Plaintiffs

Certificate of Service

It is hereby certified that a true copy of the foregoing was mailed, postage prepaid, this 10 day of August 2011 to the following:

James M. Mooney
Elizabeth A. Darby
Moynahan, Irvin, Mooney & Stansbury
110 North Main Street
Nicholasville, KY 40356



Counsel for Plaintiffs

Staff Meeting
August 5, 2010
2:00 pm

Present: Ron Everson, Shelli Conyers-Votaw, Sherri Stearman, Kathryn Burchett, Mary Dean, Dolly Hamlin, Melissa Grate, Mary Jo Murphy, Sarah Sowders, Tami Vickers, TammyWilson

Absent: Vickie Clements, Dana Johnson

Topic	Action/Plan of Correction
Chain of Command	Dr. Everson has taken over the administrative duties for five prisons. The Chain of Command for the medical department is listed below: Sherri Stearman – NSA Direct Supervisor of Staff.- Issues that staff have should go to Sherri and discuss them with her. She will handle scheduling of staff and has the authority to assign additional duties to staff. If you have problems with the task or assignment, go to Sherri with your issue. Each issue will be looked at on a case by case. Dr. Everson, Shelli Conyers-Votaw and Sherri Stearman will meet monthly to discuss staff issues. Shelli Conyers-Votaw –Head of the Department. Sherri Stearman report to Shelli Conyers-Votaw. Shelli is CorrectCare and the prison system contact.
Management Style	Dr. Everson's management style is Total Quality Improvement (TQI). Before making a decision, he will discuss ways to make improvements with the front line staff. The staff that does the job and will solicit their opinions.
Judgment Call	If the nursing staff is unable to reach Dr. Everson or Shelli to send out a patient, use your nursing judgment on sending the inmate out, and it will not be questioned.
Security Gates	Officers are going to continue to do information reports when gates/doors are left unlocked. They will be trying to determine who it was that left the gates/doors unlocked and disciplinary action will be taken.
Keys/Radios	Keys and radios should be on your person at all times. Nurses should have their radios turned on and with them at all times so they can respond to medical emergencies, and be reached as needed.
Time Accountability	Time spent out of the department needs to be communicated with your direct line supervisor.
Pills Found on the Pill Room Floor	For the past several months there have been pills found on the pill room floor. If a pill is dropped pick it up and dispose of it properly. Narcotics should have two nurses signatures. **Nurses are responsible for checking the pill room floor after each pill call and at the end of each shift to make sure there are no pills left on the floor.** *The pill room is to be swept and mopped daily. It is everyone's responsibility in keeping the pill room clean.*

Ex. 1

ATTN STACY FIELDS

6.2.08

DEAR STACY FIELDS,

I NOTICED ON MY LAST CHECK THAT 6 HOURS ARE MISSING. IT HAS BEEN BROUGHT TO MY ATTENTION THAT 1 HOUR PER DAY IS BEING TAKEN FROM THE 12.5 HOURS PER DAY WORKED. ARE ARRANGEMENTS GOING TO BE MADE FOR SOMEONE TO RELIEVE ME ON SATURDAY, SUNDAY, AND MONDAY, SO THAT I MAY LEAVE BCC & MEDICAL FOR A 30 MINUTE LUNCH & 2 15 MIN. BREAKS? I HAVE BEEN TOLD SINCE BEGINNING HERE AT BCC THAT PER WARDEN RION - MEDICAL PERSONNELL ARE NOT ALLOWED TO LEAVE THE GROUNDS UNTIL THEIR SHIFT IS OVER.

IT IS ILLEGAL FOR YOU OR ANYONE TO STATE THAT I RECEIVE 1 HOUR OF COMPLETE DOWNTIME. I AM ALWAYS TO RESPOND TO THE RADIO, THE PHONE, ANY EMERGENCY, AND EVERY KNOCK AT THE DOOR. I HAVE NEVER, SINCE I WORKED HERE, BEEN RELIEVED BY ANYONE SO THAT I MIGHT LEAVE THIS FACILITY FOR 1 TOTAL HOUR. WHAT

Ex. 2

CORRECT CARE IS DOING IS ILLEGAL

THERE IS A PENDING LAWSUIT AT THE FAYETTE COUNTY DETENTION CENTER - CASE # 5.06-CV-00299JBC - WHEREIN THE OFFICERS WHO TOOK BREAKS AND LUNCHES WITH THEIR RADIOS AND THE UNDERSTANDING THAT THEY MUST RESPOND AT ALL TIMES TO AN EMERGENCY AND TO THOSE RADIOS. ALL THOSE OFFICERS WILL BE PAID BACK FOR ALL OF THE BREAKS AND LUNCHES THEY TOOK, BECAUSE ACCORDING TO FEDERAL LAW + 29 CFR 785.19 KRS 337.365 + 29 CFR 785.19 (A) KRS 337.355 (KY. REFORMED STATUTES) IT IS NO BREAK, IT IS NO LUNCH, IF YOU HAVE A RADIO YOU MUST RESPOND TO, A PHONE YOU HAVE TO ANSWER, OR AN EMERGENCY YOU MUST GO TO, IT IS NOT A BREAK OR LUNCH AND YOU ARE NOT ABLE TO TOTALLY GET AWAY FROM THE WORK ENVIRONMENT IT IS ILLEGAL NOT TO BE PAID FOR ALL OF THAT TIME. THE Ky. LABOR BOARD + THE WAGE AND HOUR DIVISION STATE THE SAME THING.

I ALSO DID NOT RECEIVE 2 HOURS OF PAY FOR A MANDATORY MEETING HELD IN MAY. BRIDGET PUT UP A NOTE

ON THE WALL, THAT IF WE DID NOT ATTEND THE MANDATORY MEETING WE WOULD BE GIVEN AN UNEXCUSED ABSCENCE. ALL MANDATORY MEETINGS ARE SUPPOSED TO BE COMPENSATED FOR.

I HAVE NO INTENTION OF BEING LITERALLY TRAPPED IN THIS FACILITY AND ON THESE GROUNDS AND BE DOCKED FOR 1 HOUR I IN NO WAY EXPERIENCE AS DOWN TIME.

I SINCERELY HOPE YOU CAN GIVE ME AN ANSWER TO THIS LETTER SOON, AS I REALLY FEEL I NEED TO TAKE FURTHER STEPS TO CLARIFY WHAT MY POSITION IS HERE. I AM FEELING VERY INSULTED IN THAT I RECEIVE NO SHIFT DIFF, NO WEEKEND DIFF. & NOW THIS IS HAPPENING? IF IT ISN'T RESOLVED I WILL CONTACT THE LABOR BOARD AND AN ATTORNEY ETC.

SINCERELY,

ELIZABETH GULLEY