

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
CENTRAL DIVISION at LEXINGTON

*Filed Electronically*  
Civil Action No. 5:06-cv-299-JBC

JUSTIN CRAWFORD, BOBBI BARTLETT,  
BRIAN HERBEL, JESSICA HERBEL,  
REBECCA GRILLO, KEVIN JOHNSON,  
CLAUD A. REYNOLDS, DEBORAH  
LENNON and JANET VANNATTA, on  
behalf of themselves and all other similarly  
situated current and former employees of the  
Lexington-Fayette Urban County  
Government, Division of Community  
Corrections

PLAINTIFFS

v.

LEXINGTON-FAYETTE URBAN  
COUNTY GOVERNMENT

DEFENDANT

**MEMORANDUM IN SUPPORT OF MOTION TO  
DECERTIFY MEAL BREAK SUBCLASS**

Plaintiffs, Justin Crawford (“Crawford”), Janet Vannatta (“Vannatta”), Kevin Johnson (“Johnson”), Claud Reynolds (“Reynolds”), Brian Bartlett (“Bartlett”), Brian Herbel (“Brian”), Jessica Herbel (“Jessica”), Deborah Lennon (“Lennon”), and Rebecca Grillo (“Grillo”) (collectively “Class Representatives”) filed a collective action alleging that Defendant, Lexington-Fayette Urban County Government (“LFUCG”), violated the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, by failing to pay overtime to certain employees of the Division of Community Corrections (“DCC”). Plaintiffs allege that LFUCG owes them

overtime compensation under the FLSA because the unpaid twenty (20) minute meal period provided to Plaintiffs should be treated as compensable time.

On January 26, 2007, the Court granted the Plaintiffs' Motion for Conditional Certification of a collective action. On March 12, 2007, the Court authorized notice to be sent to individuals who "currently work for the LFUCG DCC, or [who] have worked for the LFUCG DCC at any time from September 6, 2003, until the present, as an Officer, Corporal, Sergeant, Lieutenant, Major, and/or Captain." (Notice, attached as Exhibit A to March 12, 2007 Order.) On May 28, 2008, the Court then certified a subclass of "all plaintiffs who, since September 6, 2003, until the present, have been or are now assigned to the Custody, Intake, and/or Master Control Bureaus or "areas" within the DCC, and which shall assert the plaintiffs' conditionally certified collective claim that the LFUCG has a policy and practice of denying the plaintiffs a bona fide meal break ("Meal Break Subclass"). [Doc. No. 311: May 28, 2008 Order at 13].

Testimony from several members of the Meal Break Subclass highlights their dissimilar experiences with respect to meal breaks and underscores the individualized nature of their claims. Establishing that any particular class member is entitled to compensation for a meal period will involve a determination of whether the particular class member had the opportunity to take a meal break; whether that meal break was interrupted; whether meal breaks are frequently or infrequently interrupted; how long any interruptions last; whether the class member was required to perform work on his meal break or did so voluntarily; whether the type of work performed was minor or insubstantial; and whether the class member requested payment for a missed meal break and was denied. In addition, the dissimilarities of employees' experiences among the Custody, Intake and Master Control Bureaus and the dissimilarities of employees' claims on different shifts who are supervised by different Commanders mandate decertification.

The completion of discovery of the meal break issue and development of this case over the last year compels reconsideration and decertification of the Court's prior order certifying a Meal Break Subclass. The depositions taken by the parties starkly reveal fundamental dissimilarities pertaining to individual claims of missed or interrupted meal breaks, including whether the alleged missed or interrupted breaks occurred. Individual disputes over such fundamental questions entirely eliminate any possibility of proceeding collectively. LFUCG respectfully urges this Court to consider the fuller development of this case since certification and to decertify the subclass.

### **STATEMENT OF FACTS**

#### **I. Meal Break Policy**

The DCC's meal break policy provides that employees in the Intake, Custody, and Master Control Bureaus at the DCC who work an eight (8) hour and twenty (20) minute shift will receive two paid ten-minute rest breaks and one twenty-minute unpaid meal break. [Operational Order 3.1-2b, Ex. B to Pl. Motion for Summary Judgment Regarding Meal Breaks]; Capillo Depo. pp. 20, 71; Kammer Depo. p. 106; Coles Depo. p. 15; J. Herbel Depo. 58; Reynolds Depo. 29, 107]. The sequence of breaks is a ten-minute break, a twenty-minute break in the middle of the shift, and another ten-minute break. [Jarvis Depo. p. 73; Carter Depo. p. 25; 1/4/07 Hr. Tr. (Frashser) pp. 89 – 90].

The DCC provides meals free of charge to its employees in the Officer's Dining Room ("ODR"). [Brookshire Depo. p. 34; Compston Depo. p. 16; Crawford 11/17/06 Depo. p. 112; Duncan Depo. p. 93; Franklin Depo. 15; Grillo Depo. p. 132; Hauryluck Depo. p. 66; Rankin Depo. p. 66; Reams Depo. p. 13; Stormbringer Depo. p. 65; Vinegar-Ford Depo. p. 109]. The ODR is open from 10:30 a.m. to 1:00 p.m. on first shift; 5:00 p.m. to 7:00 p.m. on second shift and 5:00 a.m. to 7:00 a.m. on third shift. [Kelly Depo. p. 31; J. Herbel Depo. p. 50; Capillo

Depo. p. 38; 1/3/07 Hr. Tr. (Kammer) p. 159.] Therefore, on second shift, some employees choose to eat on their first ten minute break, and on third shift some employees choose to eat on their last ten minute break to take advantage of the free meal. [Crawford 11/17/06 Depo. p. 107; DeWitt Depo. 18-19; Tuttle Depo. 18]. For example, many employees on third shift take their meal break between 5:00 a.m. and 7:00 a.m. [DeLeon 8/16/07 Depo. 53; Brookshire Depo. p. 132; Hauryluck Depo. p. 13-14]. Twenty-minute meal breaks occur toward the middle of the shift, unless the employee chooses to eat earlier or later on the ten-minute break so that they could eat at the ODR. [Jarvis Depo. p. 49; Carter Depo. pp. 25-26; Brookshire Depo. p. 42; Crawford 11/17/06 Depo. p. 107].

Employees are not required to eat at their desks or to take their breaks in the area where they are assigned to work. [Balltrip Depo. 58; Bartlett Depo. 69; Cason Depo. 12; DeWitt Depo. 22; Rankin Depo. p. 100; Taylor Depo. p. 69; Franklin Depo. p. 16; Gibbs Depo. p. 67; Mitchell Depo. pp. 59–60; R. Jones Depo 7/9/07 p. 57]. If employees bring food back to their desks in Master Control, Custody, or Intake, it is their choice. [Balltrip Depo. 90; Crawford 11/20/06 Depo. p. 112; Grillo 3/13/08 Depo. p. 296; C. Johnson Depo. p. 76]. Commanders (Sergeants, Lieutenants, or Captains) who choose to eat in their offices are not required to answer telephone calls or respond to other interruptions. [Mitchell 1/23/08 Depo. pp. 67-68; Simpson Depo. pp. 58, 63]

## **II. Differences Between the Bureaus, Shifts and Commanders**

Experiences of employees with respect to breaks vary from shift to shift, from Bureau to Bureau, and from Commander to Commander [J. Herbel Depo. 41]. How breaks are handled, whether and how interruptions are handled and the time spent on breaks varies by shift and Bureau [J. Herbel Depo. p. 93; Bartlett Depo. p. 61].

Differences exist even among the Custody, Intake, and Master Control Bureaus. Employees have testified that Intake Commanders will assist employees with getting their breaks [J. Herbel Depo. 79], unlike Custody where it depends on the Commander [J. Herbel Depo. 80]. For example, Sgt. Crawford's directive regarding meal breaks was purportedly different from other Commanders. [Bartlett Depo. p. 101]. Commanders on second shift tried to get their employees breaks and sent employees to give them breaks [J. Herbel Depo. 46, 47], but the third shift Commanders would allegedly not assist with breaks [J. Herbel Depo. 47]. Breaks on second shift were longer [Byrd Depo. pp. 20-21]. Third shift Custody Commanders allegedly refused to pay for overtime unlike Intake Commanders [J. Herbel Depo. 90]. Custody employees have a better chance of getting their breaks [J Herbel Depo. 79].

Employees' complaints about meal periods vary among different employees [J. Herbel Depo. 79]. Different practices exist for breaks on each shift [J. Herbel Depo. 80].

**A. Custody**

Officers and Corporals in the Custody Bureau rotate between working in housing units overseeing the custody and care of inmates and working as rovers. [See Job Description for Officers; Ex. 13 to LFUCG's Mem. in Opposition to Plaintiffs' Motion for Partial SJ on Exemption; 1/3/07 Hr. Tr. (Kammer) p. 72; Jones 7/9/07 Depo. p. 119; Lindsay Depo. p. 18]. Sergeants, Lieutenants, and Captains work in Shift Command. [Barry Lindsay Depo. 70; Jeffrey Carter Depo 36].

Custody employees who work in housing units are relieved from their duties by a rover so that they can leave the housing unit for their meal period. [1/3/07 Hr. Tr. (Kammer) p. 37]. Contrary to the assertions of some Plaintiffs, employees are not required to obtain coffee for trustees; transport mail, razors, cleaning supplies, jumpsuits, hygiene packs, or laundry, take out trash, transport soiled suits in biohazard bags; transport clippers, underclothes, sheets, toilet

paper; answer the phone; read articles at shift command, escort prisoners or attorneys; supervise trustees; watch video monitors; open doors or observe inmates on their meal breaks. [See Blair Depo. p. 93; Kammer Depo. p. 181; 1/3/07 Hr. Tr. (Kammer) p. 91, 182; Hill Depo. p. 58; Byrd Depo. p. 112; Duncan Depo. p. 89; Lennon 12/14/06 Depo. p. 93; DeLeon 8/16/07 Depo. pp. 72-73, 75-77, 83, 98, 104-05, 127; Hauryluck Depo. p. 76; 1/4/07 Hr. Tr. (Southworth) p. 41; DeWitt Depo. p. 72]. If any of these tasks are performed on meal breaks, they are minor and insubstantial in comparison with the duty of guarding inmates. [Franklin Depo. p. 20].

Rovers are supposed to perform the duties that some Plaintiffs allege they perform on their breaks. Rovers would get the supplies, including cleaning supplies, toilet paper, carepacks, sheets, and jumpsuits for the units. [Balltrip Depo. p. 65; Corbett Depo. p. 18; Byrd Depo. p. 19; DeWitt Depo. p. 13; Blair Depo. p. 15; Hood Depo. p. 86]. In addition, the job description for the Third Shift Custody rover provides that "Rovers are responsible for collecting and delivering any item that their assigned unit is in need of." [Third Shift Rover Job Description, Ex. 53 to LFUCG's Mem. in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Exemption issue].

For Custody Officers, Corporals and Sergeants, break sheets are located at the ODR, the smoke room, and in Shift Command, areas where breaks are normally taken. [Deleon 8/16/07 Depo. p. 78; Crawford 11/17/06 Depo. p. 123; Trotter Depo pp. 66-67].

Custody employees carry radios so that an officer may respond to emergency codes that occur while on break. [Hearing Transcript 1/3/07 p. 192-93 (Kammer)]. Not all employees take radios with them on break because they can be paged if needed [Southworth Depo. p. 22].

Custody officers working in housing units do not leave their units to respond to tones or codes. [Vannatta Depo 146]. Custody officers who are out of their units may be required to

respond to a tone or code. [Donnita Hughes Depo 44]. A Signal 7, which means an officer needs assistance, requires different employees to respond depending on its severity. In most cases, only Commanders and rovers respond to a Signal 7 unless otherwise directed. [Taylor Depo pp. 23-24; See Ex. 32 to LFUCG's Response to Plaintiffs' Motion for Partial Summary Judgment on exemption issue]. Only Commanders and medical personnel respond to medical tones, such as a Code 100 or Code 101. [*Id.*].

### **B. Intake**

Employees in the Intake bureau are relieved by another officer who also works in the Intake area during their meal breaks. [Bishop Depo. p. 57; Blair Depo. p. 12]. Lt. Jones, an Intake Shift Commander and a Plaintiff, said that Intake employees are not required to work on meal breaks [Jones Depo. p. 120; Whittlesey Depo. pp. 68, 83]. Another Intake Staff Commander, Lt. Cunningham, testified that the meal breaks of the employees she supervises are not interrupted "very often." [Cunningham Depo. p. 48]. Lt. Lafoe testified that she allowed Intake employees on 3rd shift to take breaks whenever they liked. [See Lafoe Affidavit, Ex. 6 to LFUCG Mem. in Support of Motion for Partial Summary Judgment on Exemption issue.]

Break sheets for Officers, Corporals, and Sergeants in Intake are located in their work areas. [Kammer Depo p. 157-58; Cunningham Depo. p. 54; B. Herbel Depo. p. 99]. Intake employees are not normally required to respond to tones on their breaks. [Gibbs Depo. p. 25, 27; B. Herbel Depo. p. 45; Blair Depo. 80; Brookshire Depo. pp. 82, 114, 128]. Intake employees do not carry radios while on break. [Gibbs Depo. p. 28; Lafoe Affidavit, ¶14 (only Sgt. McQueen took a radio on break, but he was not required to do so)].

### **C. Master Control**

Employees in Master Control are relieved for break by a rover who works in Master Control. [Bartlett 12/14/06 Depo. p. 6; Cook Depo. pp. 16-17]. Employees testified that they got meal breaks in Master Control. [DeLeon 1/23/08 Depo. p. 48; Powell Depo. p. 90; J. Herbel Depo. p. 52]. Lt. Johnson stated that her officers in Master Control get two full ten minute breaks and one twenty minute break. [C. Johnson Depo p. 60]. Moreover, Lt. Johnson testified that in Master Control, interruptions of breaks “seldom” happen. [C Johnson Depo. p. 39].

Break sheets for Officers, Corporals, and Sergeants in Master Control are located in their work areas. [Kammer Depo p. 157-58; DeLeon 08/16/07 Depo. 78]. Master Control did not have to respond to tones while on meal break. [DeLeon 1/23/08 Depo. p. 56]. Master Control officers do not normally carry radios on break. [C. Johnson Depo. pp. 39 -40; Balltrip Depo. p. 121; Barker Depo. p. 69].

### **III. Sergeants, Lieutenants, Captains and Majors are in Conflict with the Claims of the Class Members**

Although Plaintiffs complain that their meal break is not bona fide in part because they have to travel to sign break sheets, [Tenth Amended Complaint ¶ 82], that is not the case for all classifications in the Meal Break Subclass. For instance, Lieutenants, Captains, and Majors do not sign break sheets. [Mitchell 1/28/08, p. 15; Kammer Depo. 192; Hall Depo. p. 43; DeLeon 1/23/08; Depo. p. 55; Coles p. 44; Morgerson p. 11; Webb p. 41]. Consequently, their meal breaks cannot be affected by break sheets in any way. Custody Sergeants work in Shift Command [Winfred Coles Depo 26; Hearing Transcript 12/24/06, Isaacs p 103] , where break sheets are located, and thus they are not required to travel to sign break sheets.

Supervisory employees, who are Plaintiffs in this action, have also testified adversely to other members of the Meal Break Subclass that employees they supervise receive their meal breaks. [See, e.g., DeLeon 8/16/07 Depo. pp. 67, 81; K. Johnson 12/1/06 Depo, p 29-30, 39;

Hines Depo. 35 -36; Crawford 11/17/06 Depo. p. 45; Mitchell 1/23/08 Depo. pp. 79–80; Grillo Depo. 3/13/08 277; Cunningham Depo. 55, 62]. Moreover, Commanders have not disciplined employees for returning late from their breaks if there is a legitimate reason for doing so. [Grillo Depo. 11/30/06 pp. 90-91, 130; Grillo Depo. 3/13/08 p. 219; Southworth Depo. p. 37].

In contrast, other Plaintiffs have testified that their Commanders, who are Plaintiffs in this action, have denied them meal breaks or refused to compensate them for time worked. [Bartlett Depo. p. 90; Monty Corbett Depo 32; Charlotte Trotter Depo 43, 63]. Employees testified that it depended entirely on the Commander as to whether they received breaks or not or were paid for them [Hood Depo. 17; J. Herbel Depo. p. 102]. Commanders have their own practices and policies that they will approve [J. Herbel Depo. 91].

Some supervisors, who are Plaintiffs in this action, have admitted that they instructed employees to perform work on breaks. [Cunningham Depo. p. 52; Grillo 11/30/06 p 70; C. Johnson Depo 72; Mitchell 8/11/07 p. 112].

#### **IV. Conflicts in The Time Deemed Necessary to Eat**

Although the representative Plaintiffs contend that twenty minutes is not sufficient for a bona fide meal period, [Tenth Amended Complaint ¶ 78], Plaintiffs who have joined this action have testified that twenty minutes is sufficient time to eat.

Q. What do you consider enough time to eat a meal?

A. Twenty (20) minutes.

[DeLeon 1/23/08 Depo. p. 54; *see also* 1/4/07 Hr. Tr. (Frasher) p. 91; Franklin Depo, p 17; Cook Depo. p. 27; Barker Depo. p. 18; Brookshire Depo. p. 56; Lennon 12/15/06 Depo. p. 26; Byrd Depo. pp 37-38, 46; Dee Depo. pp. 20-21; DeLeon 01/23/08 Depo. p.54; DeWitt Depo. p. 24; Powell Depo. p. 7; Reams Depo. pp. 15, 25; Justin Depo. pp. 20-21; Trotter Depo. p. 18; 1/4/07 Hr. Tr. (Walker) pp. 114 – 115, 117; 1/4/07 Hr. Tr. (Williams) p. 70]; Hauryluck Depo. p. 82].

In addition, some officers concede that twenty minutes is enough time to eat if they do not choose to wait in line for food in the ODR [Grillo Depo. 284; Lindsay Depo. 96-97; Stormbringer Depo. 65-66] or if they choose to bring their food back to their work area. [Rankin Depo. p. 112]. Other employees have testified that twenty minutes is enough time to eat if they are not interrupted [DeWitt Depo. p. 24; Mitchell 1/23/08 Depo. pp. 85-86] or if they do not have to perform other duties during the twenty minutes. [Barker Depo. pp. 18, 79; Lennon Depo. p. 26; Stormbringer Depo. pp. 64-65]. Employees acting as rovers have sufficient time to eat in 20 minutes: [Cook Depo. p. 27; Lindsay Depo. p. 96; Rankin Depo. p. 25].

#### **V. Employees Can and Do Resume Their Breaks**

In the event that an employee's break is interrupted, the employee can resume his break. [Grillo 11/30/06 Depo. pp. 51, 128; Cunningham Depo. pp. 40, 48, 88; DeLeon 8/16/07 Depo. pp. 73-74; Hall Depo. p. 53; Powell Depo pp. 31-32; Blair Depo. pp. 42-43; Legear Depo. p. 10; Webb Depo. pp. 33, 49; Whittlesey Depo. p. 65; Brookshire Depo. pp. 131-32; Byrd Depo. p. 45; Johnson Depo. 12/1/06 pp. 72-73; Simpson Depo. p. 47; Reynolds Depo. pp. 64-65, 67; Crawford Depo. Vol. II 11/20/06 p. 10; K. Johnson Depo. pp. 73, 89, 137].

Employees whose breaks are interrupted can request additional time for their break [Tuttle Depo. pp. 11, 75-76; DeWitt Depo. pp 17-18] and employees have done so [Franklin Depo. p. 28]. Employees admit that they are permitted to take longer breaks if their breaks are interrupted or if they perform any task while on break. [Taylor Depo. p. 5, 37; Webb Depo. p. 38; Bobbi Bartlett Vol. I 12/4/06 p. 99; Byrd Depo. pp. 23-24; Morgerson Depo. p. 16; K. Johnson Depo. 12/1/06 Depo. p. 137; Balltrip Depo. p. 96-97]. Officers who have their break interrupted to respond to a tone have the opportunity to continue their break afterward. [Cunningham Depo p. 40; Cason Depo. p. 18; Grillo 11/30/06 Depo. p. 51; K. Johnson Depo. pp. 73, 88-89; Morgerson Depo. p. 78; Pitts Depo. p. 150; Simpson Depo. p. 47].

Commanders permit employees to resume their breaks if they are interrupted. [Cunningham Depo. p. 48; K. Johnson 12/1/06 Depo. p. 137]. Employees are not disciplined if their breaks are extended because of tones or other duties. [Grillo Depo. pp. 88-89].

In fact, it is the policy and practice of the DCC that an officer whose meal break is interrupted can resume his break. [Hall Depo. p. 44; Hearing Transcript 01/04/07 p. 52 (Johnson); K. Johnson 12/1/06 Depo. p. 73; Simpson Depo. p. 49].

#### **VI. Employees Received Meal Breaks**

Some employees have confirmed that they received their twenty-minute meal breaks. [Compston Depo. p. 60; Barker Depo. p. 34; Brookshire Depo. p. 61; Bartlett Depo. 12/14/06 p. 20; K. Johnson Depo. 12/1/06 p. 29-30] or that they were given the opportunity to take a break. [Roberts Depo. p. 62]. Employees have been completely relieved of duties during meal breaks at times [Bartlett 12/4/06 Depo. p. 103] and were able to spend time predominantly for their own benefit during their meal break. [Coles Depo. p. 42; Balltrip Depo. pp. 11-12; 125].

Employees in Master Control usually got all of their breaks and were usually able to eat their meals in the ODR on first shift without interruption [Bartlett Depo. 12/14/06 p. 20]. In Master Control, the phones could be switched to the lobby for breaks [Compston Depo. 36-37]. Officers in Master Control got their full breaks [Johnson Depo. 60; J. Herbel Depo. p. 52].

#### **VII. Some Employees Took Longer Than Twenty Minutes for Their Break**

Employees sometimes take more than twenty minutes for a meal break, particularly if they perform any work functions on their meal break. [Cook Depo. pp. 44-45; Corbett Depo. p. 16; Hughes Depo. pp. 60-61; Reynolds Depo. p. 42; DeWitt Depo. p. 55; J. Herbel Depo. p. 83; Grillo Depo. 11/30/06 p. 115, 119-20]. Some officers in Master Control took more than 20 minutes for lunch. [Cook Depo. 44-45]. Some employees get more than three breaks [J. Herbel Depo. p. 131]. Intake employees can take extra smoke breaks [J. Herbel Depo. pp. 161-62;

Grillo Depo. p. 75 and Lafoe Affidavit, Ex. 6 to LFUCG Mem. in Support of Motion for Partial Summary Judgment on Exemption issue ¶¶ 8-10].

Moreover, some employees did not begin counting their break time until after they had completed any activities [Hearing Transcript 1/4/07 p. 76 (Williams); Capillo Depo. pp. 40–41; Southworth Depo. p. 16; R. Jones 7/19/07 Depo. p. 56; DeLeon Depo. p. 73]. Employees who are performing jail-related tasks are not considered to be on break, and that time is not counted against their break. [Kammer Depo. p. 191]. Numerous Officer Shift Activity Reports reflect the fact that Plaintiffs and other employees took longer than twenty minutes for their meal breaks. [K. Johnson 12/01/06 Depo. p. 95; See Activity Reports attached as Exhibits 1 – 6 to LFUCG’s Response to Plaintiffs’ Motion for Summary Judgment Regarding Compensability of Meal Breaks]. Knowing that employees may have chosen to perform a task on break or to wait in line at the ODR, rovers allow travel time and do not expect employees to return in an exact ten or twenty-minute time frame. [Compston Depo. p. 69; Stormbringer Depo. pp. 71-72; Mitchell Depo. pp. 52–53; Simpson Depo. pp. 60-61].

### **VIII. Plaintiffs’ Excessive Breaks**

Contrary to the allegations made by the representative Plaintiffs, Officers confirmed that they received extra breaks while working at the DCC. For example, in Master Control on third shift employees would sometimes take extra breaks. [Balltrip Depo. pp. 14-15]. One employee admitted she has no issues with breaks and testified that there was so much down time on third shift that the entire shift was almost like a break. [Roberts Depo. p. 61]. Officers on third Shift in Intake had a lot of free time. [See Lafoe affidavit, Ex. 6 to LFUCG’s Memorandum in Support of its Motion for Partial Summary Judgment on exemption issue]. Robert Williams, Third Shift Intake, testified that he gets all three of his breaks and sometimes more and that he gets his full twenty minutes (and sometimes more) for his meal break. [1/4/07 Hr. Tr. (Williams)]

p. 67]. Employees would often intentionally stop by a Commander's office so they could take a longer break and say they were talking to a Commander. [DeLeon Depo. pp. 92-94]. After it came to the attention of the DCC that some employees were abusing the break policy by taking excessive breaks [Hill Depo. p. 111; Korb Depo. p. 102], officers were disciplined for taking excessive breaks. [See Oral Warnings attached as Exhibit 7 to Defendants' Meal Break Response].

In fact, abuse of breaks is so common that there is a name for it—"ghosting." "Ghosting" is a term used to describe the practice of taking long breaks [Vannatta Depo. 38]. In fact, one of the Class Representatives, Vannatta, filed a grievance over Plaintiff Officer Wheeler's long breaks [Vannatta Depo. 34-35, 42, 165, Ex. 2].

Class members admitted that ghosting occurred [Franklin Depo. pp. 12-13] and have testified that it occurred on all shifts:

Q: When you acted as a rover, did you have a problem with officers ghosting you?

A Yes.

Q When would you consider an officer to be ghosting you?

A If it was longer than five minutes from when they were supposed to return. [Corbett Depo. p. 26]

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Q Did you ever notice a problem with ghosting when you were a rover?

A Yes, it did happen on occasion. [DeWitt Depo. p. 15]

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Q: When you were a rover, you ever have a problem with ghosting?

A. Yes.

Q. What does that term mean to you? When -- when would you consider yourself a -- when would you consider an officer to be ghosting?

A. On a ten-minute break?

Q. Yes. Yes, ma'am.

A. More than 15 minutes.

Q. What about a 20-minute break?

A. More than 25. [Duncan Depo. p. 44]

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Q Was that called ghosting?

A Yes. I think the ghosting happened a lot more on first shift than any shift, though.

Q Do you have any idea why that was?

A I think it was leniency more on that shift.

Q Leniency by who?

A Commanders, because most of the people on first shift at the time had been there longer than everybody else. [Balltrip Depo. p. 23]

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Q Are you familiar with the term ghosting?

A Yes, I am.

Q And what does that mean?

A Ghosting means where you get a 10-minute break and you're gone for 15 to 20 minutes on your break. You've ghosted me for 10 minutes.

Q Has that ever been a problem?

A Yes.

Q When has that been a problem?

A Basically when I worked on third shift, you've got some people there we like to call Casper. [Hauryluck Depo. p. 68]

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Q Are you familiar with the term "ghosting"?

A Yes, sir.

Q What does that mean to you?

A Basically you took too much time than what you -- instead of you taking your ten, you took 20. Instead of you taking 20, you might have took 30, and that -- so that's what that "ghosting" means.

Q Did you ever observe that yourself?

A Yes, sir. [Lindsay Depo. p. 103]

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Q In your opinion do you believe there's a problem with ghosting?

A Yes. It happened.

Q Can you explain what ghosting is?

A When you don't return to your unit within the amount of time that you're allowed to have a break. [Barker Depo. p. 21]

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Q Was that much of a problem for you?

A On second shift, yes, I think so.

Q So in what way?

A That guys would break a little more than they probably should have.

Q Was that on all three breaks or just --

A No, not all three. I mean, I didn't document it, but sometimes you'd get frustrated because you felt like you were getting ghosted and taken advantage of sometimes. [Byrd Depo. p. 21]

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A Oh, yeah, we're all familiar with the term ghosting.

Q What's your understanding of that term?

A You'd run into officers who would ghost you, which means they would take that extra time. They would be gone 20 minutes on a 10, 40 minutes on a 20, you know, and they would do that routinely. [Cook Depo. p. 58]

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But if you get a person that's five, ten, fifteen minutes late, that's called ghosting and you -- without the officer knowing why that person was late, they'll deem it as they were ghosted. [Mitchell 1/28/08 Depo. p. 53]

#### **IX. Employees Report Their Own Time Worked**

Employees are responsible for filling out their own time cards and are expected to record all hours worked. [Cunningham Depo. p. 68; Franklin Depo. p. 29; Kammer Depo. p. 139]. Each officer fills out their own time card and it is their responsibility to note any overtime they have worked on their own time card [Johnson Depo. 21; Vannatta Depo. 30-31].

Employees were not told not to record time they worked, were not told not to record all hours worked, were not told not to record any meal breaks that were missed, and were not told not to request to be paid for missed breaks. [Byrd Depo. p. 126; DeLeon 1/23/08 Depo. pp. 72-73; Reams Depo. p. 37; Roberts Depo. p. 55; Tuttle Depo. p. 32; DeWitt Depo. p. 38; K. Johnson Depo. p. 116; Mitchell Depo. pp. 36-37]. Nor were employees threatened with discipline for recording time they have worked. [Johnson Depo 12/1/06, p. 119].

Although in answers to interrogatories Plaintiffs uniformly claim that “[T]he unwritten rule known to all of us was that asking for additional compensation was strongly discouraged and payment was unlikely to be approved if requested,” Plaintiffs who were deposed could not explain how their understanding of this unwritten rule came about. [Tuttle Depo. p. 63; Blair Depo. p. 82; Byrd Depo. pp. 103-04; Duncan Depo. pp. 66-67; Franklin Depo. p. 81; DeWitt Depo. pp. 69-70; Cason Depo. p. 48]. In fact, the Commanders deny there is such an “unwritten rule.” [Gibbs Depo. p. 66; Morgerson Depo. p. 64; Isaacs. Depo. p. 36; Taylor Depo. p. 56; Reams Depo. p. 59]. Sgt. Regina Powell, a Plaintiff and supervisor, also denied that an

unwritten rule existed in Master Control not to request payment for missed breaks. [Powell Depo. pp. 120-21].

In fact, Commanders, including Plaintiffs in this action, uniformly testified that they would approve payment for a completely missed meal break if they are unable to be given a break: [DeLeon 8/16/07 Depo. p. 91-92; Gibbs Depo. p. 43, 65].

Q Have you been discouraged by your superiors from approving any compensation for employees for the time that they've actually worked?

A Not that I can recall.

Q If somebody worked through a meal break and or worked through part of a break and thought he or she should be paid for that, and they brought it to you and you verified that they did actually work, would you pay them for it?

A Yes, I would.

[Grillo 3/13/08 Depo. p. 303

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A. If an officer reports that he didn't take -- that he did not get to take their break, they would be paid.

[Hall Depo. p. 53]

\*\*\*\*\*

Q. So it would only be in a situation where an employee worked through part or all of the meal break that he or she would be entitled to additional pay, possibly?

A. That's my understanding of the policy, yes.

[Jones Depo. p. 231]

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Q. How about with respect to the 20-minute break, have you authorized someone to get paid for their 20-minute break if they -- and are you saying they didn't get them at all, right?

A. Yes, sir. If they say, "I haven't got my break," or if someone has come to me in the past and said, "I did not get my full break," and they've asked to get paid, at one time we used to fill out what we call an overtime slip, which basically it was a slip where a commander signed off on it stating we authorized x-amount of hours of overtime if you used sick time or whatever. There was a slip had all the different kinds of time on it. We don't use that form anymore. Now we send an e-mail generally to all shifts of what officers had what type of time usage in our area obviously.

[Dulin Depo. p. 35]

\*\*\*\*

Q. What happens if a commander is not notified till the end of the shift that an officer has not taken his break? Or let me rephrase that. An officer has missed his break because he had to work during his break.

A. If they notify you, you could authorize the overtime.

[Isaacs Depo. p. 35]

\*\*\*\*

Q If they had not gotten their break and worked overtime on your shift, what would you have done?

A If they notified me, I'd make sure that they got compensation for their time. [Kevin Johnson Depo, 12/1/06, p 23]

\*\*\*\*

Q So if an employee works through -- completely through a 20-minute meal break and didn't get to eat, should he or she put down that extra 20 minutes on the time card?

A Policy says they can, yes.

Q Okay. And policy says they're supposed to, aren't they? Doesn't it?

A The policy says they can, yes, sir. They're supposed to, yes, sir.

[Mitchell 1/28/08 Vol. 2 Depo. p. 38]

**X. Signing Break Sheets**

Some employees have testified that signing break sheets did not take any extra time and was not an issue. [Hines Depo. 32; Cason Depo. p. 24; 1/4/07 Hr. Tr. p. 95 (Frasher); B. Herbel Depo. p. 99].

Moreover, there is no uniform understanding of when breaks begin. Although Plaintiffs have stated and some employees have testified that breaks for Custody officers begin when an employee leaves the housing unit, other employees have testified that breaks begin when they signed the break sheet. [Balltrip Depo. p. 27; Brown Depo. p. 22; ; Mark Kelly Depo. p. 43; Southworth p. 16-18; Simpson Depo. pp. 60 -61; 120-21.].

Q. When he is relieved of duties for a break, when does his break start?

A. When he is finished with his duties. For example, if he gives -- if he passes out razors, if one of the things he does when he first hits the unit at midnight or thereafter is to say, "I've got razors. Anybody want to shave, come on down and get a razor," when the inmates come down, he then passes out whatever razors, does whatever procedures are necessary, collects the used razors. If that is all finished at 2 o'clock when he goes on his first break, he will physically take the razors and bring them back to shift command so they can be disposed of. It's a security issue. If that occurs, his break starts when he drops the razors off and reports to the paperwork commander, "I took 20 razors today. Here's 15 back dirty, 5 clean and 1 pair of clippers."

Q. Okay. And so when does his break start?

A. When he finishes that. Then he is no longer on facility business and he gets ten minutes from that point or 20 minutes from that point, depending upon which break he is on.

Q. Well, let's stay with the 10 minutes first. When is his 10 minute break up?

A. Ten minutes after that point. He should be back in the unit or at least making a good faith effort to get back to his unit 10 minutes after.

Q. Well, that's what I was going to ask you. Does he -- in order to be back on time, does he have to be inside his unit after the 10 minutes?

A. He cannot be back in his unit within the 10 minutes of the time he left because he's been doing something else and the something else is not documented

anyplace. He leaves the unit at 10 minutes past the hour, it takes him 5 minutes to get out of the unit and walk from point X in the building to shift command to find the captain, lieutenant, whoever, the paperwork commander, count the razors, drop them off. His break then starts at 15 minutes past the hour. [Capillo Depo. pp. 40-41]

Employees have a vast array of experiences regarding meal breaks. Meal breaks vary by shift, Bureau, and Commander. The Meal Break Subclass should be decertified.

## ARGUMENT

### **I. THE MEAL BREAK SUBCLASS SHOULD BE DECERTIFIED.**

In *Comer v. Wal-Mart Stores, Inc.*, the court noted that a two-step process of certifying a collective action was “consistent with the approach typically used by courts in suits filed under 29 U.S.C. § 216(b).” 454 F.3d 544, 546 (6th Cir. 2006). “At the second stage, following discovery, trial courts examine more closely the question of whether particular members of the class are, in fact, similarly situated.” *Id.* at 547. In the Order granting conditional certification, the Court recognized that at the second stage, “the court uses a higher standard to analyze the similarly situated issue.” *Crawford v. Lexington-Fayette Urban County Gov’t*, 2007 WL 293865, at \*5 (E.D. Ky. 2007). (citing *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409 (W.D. Pa. 2000)).

After the conditional certification phase, the second step of the process is usually conducted after merits discovery has occurred and

consists of a specific factual analysis of each employee’s claim to ensure that each proposed plaintiff is an appropriate member of the collective action. At this second stage, the court will again make a certification decision based on the ‘similarly situated’ standard, but will require a higher level of proof than was necessary at the first stage for conditional certification. If the conditional group of plaintiffs does not meet this standard at the second stage, the group is then decertified, [and] the opt-in plaintiffs are dismissed without prejudice....

The standard of proof for the second stage is much more stringent. *White v. MPW Indus. Servs., Inc.*, 236 F.R.D. 363, 367 (E.D. Tenn. 2006). The court must make a factual

determination on whether the named class members are actually similarly situated to the potential class members. *O'Neal v. Kilbourne Med. Labs., Inc.*, 2007 WL 956428, at \*6 (E.D. Ky. 2007). If the court finds that the named representatives are not similarly situated, then the opt-in plaintiffs are dismissed without prejudice and the original plaintiffs proceed to trial on the merits. *Lugo v. Farmer's Pride, Inc.*, 2008 WL 638237 at \*3 (E.D. Pa. 2008). *O'Neal*, 2007 WL 956428, at \*6; *O'Brien v. Ed Donnelly Enters., Inc.*, 2006 WL 3483956, at \*3 (S.D. Ohio 2006); *Smith v. Lowe's Home Ctrs., Inc.*, 236 F.R.D. 354, 357 (S.D. Ohio 2006). .

In performing the factual analysis as to whether the named plaintiffs are actually similarly situated to the opt-in plaintiffs, courts consider: (1) the disparate factual and employment settings of the individual plaintiffs, such as a) job duties; b) geographic location; c) supervision; and d) salary; (2) the various defenses available to the defendant that appear to be individual to each plaintiff; and (3) fairness and procedural considerations. *See Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953 (11<sup>th</sup> Cir. 2007) (citing *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10<sup>th</sup> Cir. 2001). In addition, courts consider: (1) the extent and consequences of disparate factual and employment settings of the individual plaintiffs; (2) whether the individual issues would predominate at trial; (3) whether a trial of the action could be coherently managed and evidence presented in a manner that would not confuse the jury or unduly prejudice any party; and (4) whether certification would serve the purposes of a collective action under 216(b) of the FLSA. *O'Brien*, 2006 WL 3483956, at \*3. Here, each of these factors counsels in favor of decertification.

**A. Disparate Factual and Employment Settings of the Plaintiffs Mandate Decertification.**

The various factual and employment settings of the Plaintiffs requires decertification. The Sixth Circuit has held that in determining whether a meal break is compensable, the court

should look to the frequency, nature, and type of interruptions of meal breaks. *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1985) (adopting the predominant benefit test to determine whether an interrupted meal period is compensable, which focuses on the facts and circumstances of the particular case). To prove that their meal breaks are compensable, the Plaintiffs must establish that the time they spend on any given meal break is predominantly for the benefit of LFUCG. Otherwise, the break is non-compensable. *Id.* Each Plaintiffs' claim must be examined on an individual basis to determine whether the break is predominantly for the benefit of LFUCG or for the Plaintiffs.

Here, Plaintiffs in the Meal Break Subclass are employed in three different Bureaus, each of which is different with respect to Plaintiffs' meal break claims. For instance, Plaintiffs allege that they are not relieved from duties because they have to respond to tones, carry radios, and travel to sign break sheets. The Meal Break Subclass includes Officers, Corporals, Sergeants, Lieutenants, Captains, and Majors from Intake, Custody, and Master Control. But employees in Intake and Master Control are not required to carry radios, respond to tones, or travel to sign break sheets. Moreover, only Officers, Corporals, and Sergeants sign break sheets. Custody Sergeants work in Shift Command, where breaks sheets are posted so they do not have to travel to sign break sheets. See Section III of Facts.

The evidence of record stands in stark contrast to their claims of a universal policy or practice with respect to meal breaks. Throughout the Custody, Master Control, and Intake bureaus, different practices exist with regard to meal breaks and the signing of break sheets. Moreover, numerous employees testified that twenty minutes was sufficient for a meal break and admitted that they received meal breaks. Other Plaintiffs were disciplined for taking excessive breaks. While some Plaintiffs claim that they performed tasks on their meal breaks, such as

getting coffee for trustees, many Plaintiffs admitted that they were not required to perform these tasks or that rovers could perform these tasks. When Plaintiffs are required to perform work functions on their breaks, such as responding to emergency tones, they are permitted to take extra time on their breaks or to resume their breaks after the tone. The break sheets that Plaintiffs sign are located either in the areas in which they work or the areas in which they are likely to take their breaks.

Moreover, the Meal Break Subclass includes Commanders who are responsible for ensuring that employees receive their breaks. The Commanders who are Plaintiffs in this action have uniformly testified that the employees they supervise receive their meal breaks and that they allow employees to resume their breaks if they are interrupted. The Commanders have also testified that they would approve payment for a missed break. This testimony stands in stark contrast to the claim of the Plaintiffs that they do not receive their meal breaks and that they cannot request to be paid for a missed break. See Sections III of Facts.

Here, Plaintiffs accuse many of the individuals who have joined the action of the alleged behavior at the root of this action. For instance, Sgt. Crawford allegedly directed Jessica Herbel to sign out for breaks that she did not receive [J. Herbel Depo. 49]. Sgt. Johnson allegedly refused to approve compensation for Jessica Herbel when she worked through a lunch break [J. Herbel Depo. 72]. Sgt. Johnson, Lt. Hall, and Sgt. Hughes will not make time adjustments [J. Herbel Depo. 78]. Sgt. Johnson threw Jessica Herbel's request for an overtime slip in the garbage and refused to pay for her time worked [J. Herbel Depo. 89-90]. Sgt. Johnson directed Bartlett not to fill out a time sheet [Bartlett Depo. 90]. Sgt. Crawford interrupted an officer's meal for commander checks [Crawford Depo. Vo. II 115]. Sgt. Hughes, a plaintiff, directed Lennon to stay late to help another officer get her head count straightened up [Lennon Depo. Vol. II p 82].

Sgt. Crawford admitted that he has directed officers to take laundry on their breaks and has instructed employees to perform work on breaks [Crawford Vol. II, 66, 134]. Lt. Jones, a Plaintiff, did not let his employees have a break one night in Intake when they were very busy [Jones Depo 132-133].

Compounding Plaintiffs' predicament is the fact that named Plaintiffs themselves are responsible for some of the alleged damages of other putative class members. For example, it is Crawford's responsibility to make sure that the employees' time is accurate [Crawford Depo. Vol. II 131]. Crawford verifies that information on time cards and in the time book is accurate [Johnson Depo. 21]. Part of Grillo's job is to ensure that the officers are getting the breaks they need [Grillo Depo. 14] and to see that employees are relieved from duty on their breaks [Grillo Depo. 29]. Johnson has trained employees on filling out time cards [Johnson Depo 39]. Grillo, Crawford and Johnson, therefore, may be a catalyst of the very problem for which they seek redress. They cannot represent class members seeking to be compensated for missed or interrupted meal breaks when they instructed or allowed some of those class members to engage in such work and did not ensure that the employees were completely relieved from duty.

In addition, although Plaintiffs have alleged that twenty minutes is not sufficient for a bona fide meal break, some Plaintiffs have testified to the contrary. See Section IV of Facts. Plaintiffs have also testified that they can resume their meal breaks and that they have received sufficient meal breaks. See Sections V and VI of Facts. Moreover, Plaintiffs in the class have been disciplined for taking excessive breaks and that other employees in the Meal Break Subclass have ghosted them. See Section VIII of Facts.

Plaintiffs admit that practices with respect to meal breaks vary from shift to shift, from Bureau to Bureau and Commander to Commander. [Roberts Depo 61; Deleon Depo 8/1/07 pp

48-49; J. Herbel Depo 102; Hood Depo p 17]. Plaintiffs have not demonstrated the existence of a policy or plan common to all class members. The only policy common to all members of the Meal Break Subclass is the DCC's policy providing for a twenty-minute unpaid lunch period. Moreover, whether a meal break is interrupted; whether interruptions of meal breaks are frequent or infrequent; how long any interruptions last; whether the class member was required to perform work on his meal break or did so voluntarily; whether the type of work performed was minor or insubstantial; and whether the class member requested payment for a missed meal break and was denied varies from class member to class member, from shift to shift, from Bureau to Bureau and Commander to Commander. The disparate factual and employment settings of the class members preclude a finding that the class members are similarly situated.

In *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D. N.J. 1987), the court decertified a class because of the disparate factual and employment settings. There, the court found that the employees were not similarly situated in part because the members of the proposed class came from different departments, groups, and organizations and were the subject of different job actions that occurred at various time as a result of decisions by different supervisors. *Id.* at 352.

The varying factual allegations concerning the alleged missed or interrupted meal breaks will require individualized proof. Specifically, Plaintiffs will have to show that a meal break was missed or interrupted; whether the meal break was frequently interrupted; how long any interruption lasted; whether work was performed on a meal break; whether any work performed was voluntary; whether any work performed was minor or insubstantial; whether the meal break was restricted in any way; and whether the meal break was predominantly for the benefit of the employer. The individualized proof necessary to establish Plaintiffs' claims mandates decertification. See *O'Brien*, 2006 WL 3483956, at \*7 (decertifying class with "widely varied

and individualized allegations”); *cf. Dudley v. Tex. Waste Sys., Inc.*, No. Civ.A.SA-05-CA-0078, 2005 WL 1140605 (W.D. Tex. May 16, 2005) (denying conditional certification for plaintiffs’ claims of meal break violations because “[a]ny analysis of lunch breaks will result in this court and any jury hearing individual testimony regarding whether drivers regularly took lunch breaks, or only occasionally.”).

In *Bayles v. American Medical Response of Colorado, Inc.*, 950 F. Supp. 1053 (D. Col. 1996), the plaintiffs worked in various jobs for an ambulance company. The plaintiffs alleged they worked twenty-four hour shifts and were paid for approximately thirteen hours of the shift because their employer deducted eight hours of sleep time and three hours a day for meal breaks. The plaintiffs claimed that they worked on their meal periods. The court held that the collective action should be decertified because:

the case [was] fraught with questions requiring distinct proof as to individual plaintiffs. Issues requiring individualized proof, such as call volume, sleep habits, conditions at particular stations, and treatment under [the employer’s] mealtime policy, dominate plaintiffs’ claims. In addition, [the employer’s] defense that plaintiffs impliedly agreed to [the employer’s] sleep time policy cannot be addressed on a class-wide basis.

*Id.* at 1067.

As the record amply demonstrates, there is no common experience regarding whether employees involuntarily missed meal periods or rest breaks, or whether they were compensated for that time. It will be necessary to determine whether class members were given the opportunity to take a break, whether they were asked to perform duties on that break or whether they volunteered to do so, and whether employees were compensated for the particular break. In addition, if a break was interrupted, it will be necessary to determine whether the employee had the opportunity to resume the break and whether they did so. Such individualized factual circumstances compel decertification.

**B. Individualized Defenses Mandates Decertification**

Plaintiffs' allegations of inadequate meal breaks compels consideration of LFUCG's individualized defenses. LFUCG has asserted that Plaintiffs are equitably estopped from asserting a meal break claim because the Plaintiffs were responsible for recording their own time. Moreover, Commanders who are members of the Meal Break Subclass have testified that they are not aware of when their employees are on break. [DeLeon 8/16/07 Depo. p. 70.]. In fact, Commanders are aware that employees will resume their breaks when interrupted. [DeLeon 8/16/07 Depo. p. 71]. Where Plaintiffs failed to record time for which they now claim compensation, Plaintiffs are estopped from pursuing their claims. This is an inherently individualized defense.

Equally important, LFUCG has asserted that Plaintiffs' claims are subject to the *de minimis* defense. Any tasks performed, such as getting coffee for trustees, dropping off razors, signing break sheets, or responding to tones is *de minimis*. LFUCG's defense will necessarily entail an examination of the tasks allegedly performed on each meal break and the length of time it took each Plaintiff to perform those tasks. This defense cannot be considered on a collective or classwide basis.

Several courts have refused to certify collective actions based on the fact that the defenses would be fact intensive and require an individualized inquiries. *See Morisky v. Pub. Service Elec. and Gas Co.*, 111 F. Supp. 2d 493 (D. N.J. 2000); *Basco v. Wal-Mart Stores, Inc.*, 2004 WL 1497709 (E.D. La. 2004). In *Basco*, the potential class included store clerks and managers in all Louisiana Wal-Mart stores who alleged that they worked off the clock at the end of the night because they had to wait for management to unlock the doors. The plaintiffs also alleged that they missed their rest and meal breaks and that management altered their time records. *Basco*, 2004 WL 1497709, at \*2. Based on the familiar second step factors of disparate

factual and employment settings; various defenses; and fairness and procedural considerations, the court held that the action should not proceed as a collective action. *Id.* at \*8. The court found that each store faced different pressures and that the type of employees and departments were too divergent. Furthermore, even within one store, a manager in one department may enforce or react to company policy in a different way. *Id.* Finally, the court found that Wal-Mart's defenses would be individualized because the defendant would be entitled to: contest whether any off the clock work occurred; assert defenses to each plaintiff as to what constituted work; show that the supervisors did not know about the work or that the plaintiffs did not report their time; prove that the activities were preliminary or postliminary to their principal activities; show that the uncompensated time was de minimis; prove that the statute of limitations was exhausted; show that the managers acted in good faith. *Id.* Further, the court found, there was no evidence of a policy or plan. The court concluded:

The members of the proposed class come from different departments, groups, organizations, sub-organizations, units and local offices within the Wal-Mart organization. The potential opt-in plaintiffs performed different jobs at different geographic locations and were subject to different managerial requirements which occurred at various times as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis. This case should not be certified; it would be an exercise in gross mismanagement of judicial and litigant time and money to certify the class as requested given the overwhelming evidence brought before the court.

*Id.*

Plaintiffs' claims are rife with issues that require individual proof. The work experiences of hundreds of current and former employees in different classifications working under different Commanders performing different tasks at different times will have to be examined to determine whether any off-the-clock work occurred and, if so, whether LFUCG should compensate that employee. Whether and to what extent each employee allegedly worked through a meal period, whether Commanders were aware of any work being performed, whether Plaintiffs failed to

report time allegedly worked on meal breaks, and the length of time allegedly spent performing work on meal breaks necessarily varies from employee to employee. Due to the individualized nature of the claims and the individualized defenses, the Meal Break Subclass should be decertified.

Where, as here, the interests of putative class members potentially conflict, certification is routinely denied. *See Donaldson v. Microsoft Corp.*, 205 F.R.D.558, 568 (W.D. Wash. 2001) (finding that adequacy could not be established where there are current or former managers in a proposed class with non-supervisors). The meal break subclass includes sergeants, who are non-exempt supervisors. If the Court determines that any of the captains or lieutenants who are Plaintiffs are non-exempt, then they would be part of the meal break subclass, too. The interests of these supervisors conflict with the interests of the other members of the subclass.

**1. Plaintiffs Who Have Filed Bankruptcy Cannot Act as Class Representatives.**

Certain class representatives are also subject to the individualized defense that they lack standing to pursue their claims. It is axiomatic that one without standing to assert a claim on his own behalf cannot assert that claim on behalf of others. Crawford has filed bankruptcy [Crawford Depo. Vol. I 6]. Jessica and Brian Herbel filed bankruptcy [J. Herbel Depo. 6; B. Herbel 6-7]. Lennon has filed bankruptcy. [Lennon Depo 12/14/06 p 6] Reynolds has filed bankruptcy [Reynolds Depo. 6]. Grillo has filed bankruptcy [Grillo Depo. 11/30/06 p 6]. Bartlett has filed bankruptcy. [Bartlett Depo. 6-7]. Their claims belong to the bankruptcy Trustee, and cannot be pursued individually. Crawford, the Herbels, Lennon, Reynolds, Bartlett, and Grillo are hardly adequate class representatives when they lack standing to assert claims on behalf of the class.

When a bankruptcy petition is filed, virtually all property of the debtor at that time becomes property of the bankruptcy estate. Section 541 of the Bankruptcy Code defines ‘property of the estate’ broadly to include all of the debtor’s interests, legal and equitable. ... A debtor’s contingent interest in future income has consistently been found to be property of the bankruptcy estate. ... In fact, every conceivable interest of the debtor, future, non-possessory, contingent, speculative, and derivative, is within the reach of § 541. *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993) (citations omitted). All causes of action belonging to the debtor that accrued prior to the filing of the bankruptcy become property of the bankruptcy estate. *See In re RCS Engineered Prods. Co., Inc.*, 102 F.3d 223, 225 (6th Cir. 1996); *Jones v. Harrell*, 858 F.2d 667, 669 (11th Cir. 1988); *Correll v. Equifax Check Servs., Inc.*, 234 B.R. 8, 10 (D. Conn. 1997). As a result, Plaintiffs’ claims against LFUCG became property of the bankruptcy estate, and they no longer have standing to assert those claims. *See Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988) (“[O]nly the trustee has standing to prosecute or defend a claim belonging to the estate” in Chapter 7 liquidation proceedings.); *Cable v. Ivy Tech State Coll.*, 200 F.3d 467, 472 (7th Cir. 1999) (“The debtor has no standing to pursue such causes of action.”).

To the extent Plaintiffs’ failed to schedule any of the purported claims in their bankruptcy, they lack standing to maintain this action and are precluded from serving as a class representative. *See Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224, 229 (D. Mass. 1996) (“[P]roperty that is not formally scheduled is not abandoned and therefore remains part of the estate.”) (internal quotations omitted). *See also In re Cundiff (Cundiff v. Cundiff)*, 227 B.R. 476, 478 (6th Cir. B.A.P. 1998); *Hester v. Farmers Home Admin.*, 49 B.R. 593, 599 (E.D. Mo. 1985). “Accordingly, courts have held that because an unscheduled claim remains the property of the bankruptcy estate, the debtor lacks standing to pursue the claims after emerging from

bankruptcy, and the claims must be dismissed.” *Welsh*, 199 B.R. at 229 (internal quotations omitted). Absent standing, Plaintiffs may not represent the class they seeks to certify. Accordingly, the class should be decertified.

**C. Fairness and Procedural Considerations Require Decertification.**

The Meal Break Subclass should be decertified because it will be an impossible task to present proof regarding the different classifications, Bureaus, and Commanders to the jury on a collective basis without prejudice and confusion. Although Plaintiffs will undoubtedly claim that it is more efficient to proceed collectively, given the myriad of factual issues that must be determined, proceeding on a classwide basis is unmanageable and inefficient.

Moreover, each of the Plaintiffs have already demonstrated their intent to proceed on an individual basis by joining the action on an individual basis. As each Plaintiffs’ claim must be individually adjudicated, there is nothing to be gained by adjudicating claims collectively. Pursuing claims on an individual basis, as Plaintiffs are doing, is wholly inconsistent with the basic concept of certified collective actions and further demonstrates that Plaintiffs are not similarly situated. *Cf. Rees v. Souza’s Milk Transportation, Co.*, 2007 WL 4374063 (E.D. Ca. 2007) (holding that pursuit of class claims individually undermines class process because by pursuing claims individually while remaining a member of the class, class members would be permitted to “cherry pick” the result). Because Plaintiffs have already determined that they will be pursuing their claims individually, the collective action must be decertified.

**CONCLUSION**

No overarching policy or procedure regarding the meal break period of employees in the Custody, Intake, and Master Control Bureaus exists. Instead, compensability of meal breaks depends on how long employees have to eat, what they are doing while on break, and for whose benefit. These are inherently factual issues that are individualized to the class member, shift,

Commander, and unit. Determining whether employees are similarly situated will necessarily involve an inquiry into facts such as the length of particular meal periods; whether some were shorter or longer than others; what the employees did during the meal periods; whether they were required to perform work, and if so, who required them to perform tasks during their meal break; whether they had adequate time to eat; whether they had an opportunity to resume their break; and whether they were paid for their break. These individualized questions, along with the LFUCG's individualized defenses, mandate that the collective action be decertified.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been electronically filed through the ECF system this 15th day of June, 2008, which will send a notice of electronic filing to all parties' counsel in the electronic filing system in this case:

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