UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION

MASTER FILE NO. 3:14-md-02504-DJH JUDGE HALE
MDL NO. 2504

THIS DOCUMENT RELATES TO:
Neal Heimbach, et al. v. Amazon.Com, Inc., et al., 3:14-cv-00204-DJH

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' SUMMARY JUDGMENT MOTION

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTS 3

A. General Background 3

B. The relevant clock-out, rounding, and payroll policies 4

C. The anti-theft screening process 6

1. The primary screenings 7

2. The secondary screenings 9

D. The turnstile swipe process 10

E. From the beginning of the class period until August 8, 2015, warehouse workers accumulated *over 12 million* unpaid minutes incurred between (i) the time at which they stopped getting paid for the day and (ii) the time at which they swiped-out at the exit turnstile 10

F. Heimbach's and Salasky's time data 11

1. Heimbach's data 11

2. Salasky's data 12

III. ARGUMENT 12

A. Unlike the motions in Busk and Vance, Defendants' current motion does *not* implicate the FLSA's Portal-to-Portal amendments 13

B. Plaintiffs and Defendants agree that this case centers on the traditional definition of compensable "work," unadulterated by the Portal-to-Portal Act 14

C. Compensable work does not require "exertion." 15

1. The "exertion" argument contradicts Supreme Court authority 17

2. The "exertion" argument contradicts the pertinent regulatory authority.....19

3. The "exertion" argument contradicts the pertinent Third Circuit authority.20

4. Sixth Circuit authority, even if pertinent, does not support Defendant's "exertion" argument.....21

D. Defendants mischaracterize the anti-theft screening process 24

E. A reasonable factfinder can find that Plaintiffs engaged in compensable work 26

F. Response to a few of Defendant's additional "work" arguments.....28

1. The <u>Frlekin</u> argument.....28

2. The "lack of other cases" argument.....29

3. The <u>Busk</u> argument.....30

4. The "grammatical and interpretive" argument 30

a. Defendants' "grammatical and interpretive" argument conflicts with the Supreme Court's <u>Anderson</u> opinion, which is the very source of the PMWA's regulatory definition 31

b. Even if the Court looks beyond <u>Anderson</u>, Defendants' "grammatical and interpretive" argument is unpersuasive.....33

G. Defendants fail to prove that the *de minimis* defense bars Plaintiffs' claims 34

1. Practical administrative difficulty of recording the additional time 35

2. Aggregate amount of compensable time.....36

3. Regularity of the additional work 36

H. Heimbach is not judicially estopped from pursuing his PMWA claim 37

1. Judicial estoppel does not apply because Heimbach's PMWA claim did not accrue until after he filed his Bankruptcy Court petition.....37

2. Even if the judicial estoppel doctrine can apply to Heimbach's post-petition PMWA claim, imposition of the doctrine would not be appropriate under the facts of this case 38

3. If the Court dismisses Heimbach's PMWA claim under the judicial estoppel doctrine, it should permit Class Counsel to replace Heimbach with a new class representative plaintiff 40

IV. CONCLUSION....................40

TABLE OF AUTHORITIES

Page

CASES:

Abadeer v. Tyson Foods, Inc.,
975 F. Supp. 2d 890 (M.D. Tenn. 2013)........23

Adair v. Charter County of Wayne,
452 F.3d 482 (6th Cir. 2006)........23

Aiken v. City of Memphis,
190 F.3d 753 (6th Cir. 1999)........23

Anderson v. Mount Clemens Pottery Co.,
328 U.S. 680, 66 S. Ct. 2d 1187, 90 L. Ed. 1515 (1946)........Passim

Armour & Co. v. Wantock,
323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118 (1944)........16-17, 19, 22

Ballaris v. Wacker Siltronic Corp.,
370 F.3d 901 (9th Cir. 2004)........24

Bayada Nurses, Inc. v. Commonwealth of Pennsylvania,
8 A.3d 866 (Pa. 2010)........13

Bonds v. GMS Mine Repair & Maintenance, Inc.,
2015 U.S. Dist. LEXIS 127769 (W.D. Pa. Sept. 23, 2015)........13

Brock v. City of Cincinnati,
236 F.3d 793 (6th Cir. 2001)........21

Browning v. Levy,
283 F.3d 761 (6th Cir. 2002)........38

Caiarelli v. Sears, Roebuck & Co.,
46 A.3d 643 (2012)........14

Central Missouri Tel. Co. v. Conwell,
170 F.2d 641 (8th Cir. 1948)........22

Cervantez v. Celestica Corp.,
618 F. Supp. 2d 1208 (C.D. Cal. 2009)........29

Chao v. Akron Insulation & Supply, Inc.,
184 Fed. Appx. 508 (6th Cir. 2006)........22

Chao v. Day,
436 F.3d 234 (D.C. Cir. 2006) 33

Chao v. Tyson Foods, Inc.,
568 F. Supp. 2d 1300 (N.D. Ala. 2008) 24

DeAsencio v. Tyson Foods, Inc.,
500 F.3d 361 (3d Cir. 2007).. 21, 24, 34-36

DeMarco v. Ohio Decorative Prods.,
1994 U.S. App. LEXIS 3848 (6th Cir. 1994) 37

Eubanks v. CBSK Financial Group, Inc.,
385 F.3d 894 (6th Cir. 2004) 38

F. W. Stock & Sons, Inc. v. Thompson,
194 F.2d 493 (6th Cir. 1952) 23

Finney v. Free Enterprise System, Inc.,
2011 U.S. Dist. LEXIS 33858 (W.D. Ky. Mar. 29, 2011) 38

Frlekin v. Apple Inc.,
2015 U.S. Dist. LEXIS 151937 (N.D. Cal. Nov. 7, 2015) 3, 28-29

Garcia v. Tyson Foods, Inc.
474 F. Supp. 2d 1240 (D. Kan. 2007) 23

Garcia v. United States,
469 U.S. 70, 105 S. Ct. 479 83 L. Ed. 2d 472 (1984) 33

Gatewood v. Koch Foods, Inc.,
569 F. Supp. 2d 697 (S.D. Miss. 2008) 24

Hill v. United States,
751 F.2d 810 (6th Cir. 1984) 23

IBP, Inc. v. Alvarez,
546 U.S. 21, 28, 126 S. Ct. 514, 520, 163 L. Ed. 2d 288 (2005)............................ 14-16, 19

In re Cargill Meat Solutions Wage and Hour Litig.,
632 F. Supp. 2d 368 (M.D. Pa. 2008)...14

In re. Sigg Switz (USA), Inc.,
2011 U.S. Dist. LEXIS 2192 (W.D. Ky. Jan. 7, 2011).. 20-21

Integrity Staffing Solutions, Inc. v. Busk,
__ U.S. __, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014) .... Passim

Jackson v. Novastar Mortgage, Inc.,
645 F. Supp. 2d 636 (W.D. Tenn. 2007) 38

Johnson v. Koch Foods, Inc.,
670 F. Supp. 2d 657 (E.D. Tenn. 2009) 23

Johnson v. RGIS Inventory Specialists,
554 F. Supp. 2d 693 (E.D. Tx. 2007) 36

Jordan v. IBP, Inc.,
542 F. Supp. 2d 790 (M.D. Tenn. Mar. 31, 2008) 14, 16, 23

Lugo v. Farmer's Pride, Inc.,
967 A.2d 963 (Pa. Super. 2009) 15

Martin v. Ohio Turnpike Commission,
968 F.2d 606 (6th Cir. 1992) 23

McKinney v. Bayer Corp.,
2011 U.S. Dist. LEXIS 69105 (N.D. Ohio June 29, 2011) 40

Myracle v. General Electric Co.,
1994 U.S. App. LEXIS 23307 (6th Cir. Aug. 23, 1994) 23

Nehmelman v. Penn National Gaming, Inc.,
2011 U.S. Dist. LEXIS 54183 (N.D. Ill. May 20, 2011) 37

Pennycuff v. Fentress Cnty. Bd. of Educ.,
404 F.3d 447 (6th Cir. 2005) 38

Reich v. IBP, Inc.,
38 F.3d 1123 (10th Cir. 1994) 23

Reich v. Monfort, Inc.,
144 F.3d 1329 (10th Cir. 1998) 36

Skidmore v. Swift & Co.,
323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944) 18

Sogevalor v. Penn Cent. Corp.,
137 F.R.D. 12 (S.D. Ohio 1991) 40

Spoerle v. Kraft Foods Global, Inc.,
527 F. Supp. 2d 860 (W.D. Wis. 2007) 35

Stanich v. Travelerse Indem. Co.,
259 F.R.D. 294 (N.D. Ohio 2009) 40

Staunch v. Continental Airlines, Inc.,
511 F.3d 625 (6th Cir. 2008) 20

Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123,
321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949 (1944)... 16-17, 23

Tolan v. Cotton,
__ U.S. __, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) 24, 27

Truman v. DeWolff, Boberg & Associates, Inc.,
2009 U.S. Dist. LEXIS 57301 (W.D. Pa. July 7, 2009) 13

Turner v. Mercy Health System,
2010 Phila. Ct. Com. Pl. LEXIS 146
(Pa. Ct. Common Pleas, Phila. Cty. March 10, 2010) 13

Tyson Foods, Inc. v. Bouaphakeo,
__ U.S. __, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)..12

United States v. Arias,
253 F.3d 453 (9th Cir. 2001) 33

Vance v. Amazon.com, Inc.,
2016 U.S. Dist. LEXIS 48650 (W.D. Ky. Mar. 31, 2016)................................... Passim

Verderame v. Radioshack Corp.,
31 F. Supp. 3d 702 (E.D. Pa. 2014)...13

Weathington v. County of Wayne,
2015 U.S. Dist. LEXIS 79031 (E.D. Mich. April 22, 2015) 13

White v. Wyndham Vacation Ownership, Inc.,
617 F.3d 472 (6th Cir. 2010). 38

Statutes/Codes

29 U.S.C. § 251(a) 14

29 U.S.C. 254(a)(1) 14

29 C.F.R. § 785.1 20

29 C.F.R. §§ 785.14 22

29 C.F.R. § 785.15 20

29 C.F.R. § 785.20 20

29 C.F.R. § 785.47 35

29 C.F.R. § 785.7 20

34 Pa. Code § 231.1(a) ..... Passim

Other

Manuel for Complex Litigation, Fourth (Federal Judicial Center 2008) 20

Allan M. Siegal and William C. Connolly,
New York Times Manual of Style and Usage (5th Ed. 2015) 34

I. INTRODUCTION

Plaintiffs Neal Heimbach ("Heimbach") and Karen Salasky ("Salasky"), both of whom worked at an Amazon.com warehouse in Southeastern Pennsylvania, bring this Pennsylvania Minimum Wage Act ("PMWA") lawsuit in the hope of recovering overtime wages for the time Defendants Amazon.com, Inc., Amazon.com DEDC, LLC, Amazon.com DEDC, Inc. (collectively "Amazon") and Integrity Staffing Solutions, Inc. ("ISS") required them to be inside the warehouse premises after the end of their paid shift.[1] As this MDL Court knows from other cases, Defendants stop paying warehouse workers based on "clock-out" times that do not capture the time associated with mandatory anti-theft screenings. In addition, Defendants apply to these clock-out times "rounding" rules that, in the aggregate, result in workers' clock-out times being rounded backwards more often than they are rounded forward.

The above pay policies have saved Defendants substantial money. From the beginning of the class period until August 2015, Plaintiffs and their coworkers have logged a total of 12,343,546 unpaid minutes (or 205,725 unpaid hours). See Section II.E infra. Moreover, 7,601,161 of these minutes are eligible for overtime pay. See id. Thus, at an average hourly pay rate of $12/hour, the unpaid overtime wages for the class period totals $2,280,348 ([7,601,161/60] **X** $12 **X** 1.5).

Notwithstanding these millions of unpaid minutes, Plaintiffs would be doomed if this were an FLSA case, as the "postliminary" time they complain about is non-compensable under the FLSA's Portal-to-Portal amendments. See Integrity Staffing Solutions, Inc. v. Busk, __ U.S. __, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014). Plaintiffs would be equally doomed if the FLSA's

[1] As Plaintiffs previously informed the Court, they no longer seek any relied for allegedly uncompensated time during meal breaks.

Portal-to-Portal amendments were incorporated into Pennsylvania law in the same manner that this Court has found them to be incorporated into Kentucky law. See Vance v. Amazon.com, Inc., 2016 U.S. Dist. LEXIS 48650 (W.D. Ky. Mar. 31, 2016).

In this Pennsylvania case, however, neither Busk nor Vance control. That's because the PMWA defines compensable "work" in accordance with *traditional* FLSA principles, unadulterated by the subsequent Portal-to-Portal amendments. See infra at Sections III.A-B. Such a conclusion requires no speculation. In fact, Defendants' summary judgment papers do not even attempt to argue that Portal-to-Portal principles apply to Plaintiffs' PMWA claims. See Doc. 59-9. Nor could Defendants make such an argument, since the PMWA's definition of work is copied almost verbatim from the Supreme Court's 1946 decision in Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 66 S. Ct. 2d 1187, 90 L. Ed. 1515 (1946). See Section II.B infra. And, of course, Anderson is the very case that the Portal-to-Portal amendments sought to legislatively reign-in. See Vance, 2016 U.S. Dist. LEXIS 48650, at *14.

Faced with the PMWA's expansive definition of work, Defendants must operate outside of the Portal-to-Portal/Busk/Vance "wheelhouse" that has so far brought them success in other cases. As summarized below and detailed in this brief, this Pennsylvania case should not be disposed of at the summary judgment stage:

First, there is no merit to Defendants' lead argument that compensable "work" under the PMWA requires "exertion." See Doc. 59-1 at pp. 11-14. This argument has been rejected by the Supreme Court, the pertinent regulations, a binding Third Circuit decision, and – to the extent that Sixth Circuit law applies to this case – ample Sixth Circuit authority. See Section III.C infra.

Second, Defendants – ignoring the legal standard applicable to summary judgment

motions – mischaracterize the evidentiary record by presenting the anti-theft screening process as a passive process that requires almost no time or effort. See Section III.D. This characterization simply cannot be squared with the detailed factual record presented by Plaintiffs. See Sections II.A-F and III.D.

Third, when the PMWA's *correct* definition of compensable work is applied to the *actual* evidentiary record presented by Plaintiffs, it becomes clear that a reasonable factfinder can find in Plaintiffs' favor. See Section III.E. Accordingly, summary judgment is not warranted.

Fourth, there is no merit to a collection of stray arguments made by Defendants. These unpersuasive arguments include: (i) the assertion that a California case called Frlekin v, Apple, Inc. is applicable to the PMWA analysis, see Section III.F.1; (ii) the argument that a purported lack of similar PMWA lawsuits is meaningful, see Section III.F.2; (iii) the assertion that Busk is somehow relevant to this ***non-***Portal-to-Portal lawsuit, see Section III.F.3; and (iv) a confusing argument applying purported "grammatical and interpretive" principles to the PMWA's regulatory language, see Section III.F.4.

Fifth, there is no merit to Defendants' alternative *de minimis* time argument, which fails to address any of the three factors applicable to the *de minimis* analysis. See Section III.G.

Finally, Defendants' one-paragraph argument that Heimbach is judicially estopped from pursuing this lawsuit is legally incorrect and factually unjustified. See Section III.F.2.

II. FACTS

A. General Background.

Amazon operates a warehouse in Breinigsville, Pennsylvania. See Amended Complaint ("Am. Cpl.") (Ex. A) at ¶ 12; Amazon's Answer to Amended Complaint ("Amazon Answer") (Ex. B) at ¶ 12. Both Heimbach and Salasky worked at the warehouse. See Am. Cpl. (Ex. A) at

¶¶ 13, 15; Amazon Answer (Ex. B) at ¶¶ 13, 15; ISS's Answer to the Amended Complaint ("ISS Answer") (Ex. C) at ¶ 15. Amazon employed Heimbach, see Am. Cpl. (Ex. A) at ¶ 14; Amazon Answer (Ex. B) at ¶ 14, while ISS – a staffing firm – employed Salasky, see Am. Cpl. (Ex. A) at ¶ 16; ISS Answer (Ex. C) at ¶ 16. Heimbach's compensation started at $12.50/hour and was eventually increased to $13.50/hour. See Deposition of Neal Heimbach ("Heimbach Dep.") (Ex. D) at 62:5-62:11. Salasky's compensation was $12.25/hour. See Deposition of Karen Salasky ("Salasky Dep.") (Ex. E) at 24:25-25:1.

Heimbach and Salasky are among thousands of workers employed at the warehouse. See Amazon Answer (Ex. B) at ¶ 18; Deposition of Amy O'Hay ("O'Hay Dep.") (Ex. F) at 17:6-18:24.[2] Heimbach, Salasky, and other warehouse workers are classified as overtime-non-exempt, see id. at 17:24-18:6, 26:24-27:3, and work over 40 hours per week as necessary, see id. at 56-24-57:11. At the warehouse, they perform duties such as receiving deliveries of merchandise, transporting merchandise to its appropriate location within the Facility, "picking" merchandise from storage locations, and processing merchandise for shipping. See Am. Cpl. (Ex. A) at ¶ 17; Amazon Answer (Ex. B) at ¶ 17; ISS Answer (Ex. C) at ¶ 17.

Plaintiffs have a tough job. During much of the time relevant to this lawsuit, temperatures in the warehouse were extremely high, see Salasky Dep. (Ex. E) at 15:7-15:10, and "people were passing out on a daily basis," id. at 16:6-16:7; see also Article, Allentown Morning Call, "Inside Amazon's Warehouse" (Sept. 18, 2011), attached as Exhibit G.

B. The relevant clock-out, rounding, and payroll policies.

At the end of each shift, all warehouse workers must "clock-out" at time clocks located in

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[2] Ms. O'Hay is employed as the Facility's Human Resources Manager. See Amazon's Initial Disclosures (Ex. V) at p. 2.

the warehouse. See O'Hay Dep. (Ex. F) at 60:6-60:21, 61:18-61:24; 95:20-95:23; see also Am. Cpl. (Ex. A) at ¶ 19; Amazon Answer (Ex. B) at ¶ 19; ISS Answer (Ex. C) at ¶ 19. The clock-out data for all warehouse workers – including those paid by ISS – is maintained and controlled by Amazon. See ISS Interrogatory Responses (Ex. H) at p. 8. Amazon has recorded and maintained this clock-out data throughout the class period. See Amazon Interrogatory Responses (Ex. I) at p. 4.

In determining the time at which a warehouse worker stops being paid for the day, Defendants apply standardized rounding rules to the worker's clock-out time. See O'Hay Dep. (Ex. F) at 61:25-62:5; 127:20-127:24. These rounding rules were changed in Summer 2013. See id. at 63:22-64:3. Here is how the rounding rules work:

Prior to July 2013, Amazon utilized a "seven-minute" rounding rule. See O'Hay Dep. (Ex. F) at 63:16-65:24. This rule applied to all warehouse workers, see id. at 65:20-65:24, and is described in a document entitled "Rounding and Grace Period Policy," see Exhibit J; see also O'Hay Dep. (Ex. F) at 71:21-72:7. The document describes the rounding rules under four possible clock-out scenarios:

- "Associates who clock out **7 minutes or less before their scheduled end time** will be paid through their scheduled end time. For example, an associate who clocks out at 4:54 p.m. will be paid to 5:00 p.m."
- "Associates who clock out **more than 7 minutes before their scheduled end time** will be paid to the nearest quarter hour prior to their scheduled end time. For example, an associate who clocks out at 4:50 p.m. will be paid to 4:45 p.m."
- "Associates who clock out **7 minutes or less after their scheduled end time** will be paid through their scheduled end time. For example, an associate who clocks out at 5:06 p.m. will be paid to 5:00 p.m."
- "Associates who clock out **more than 7 minutes after their scheduled end time** ('Late Departure') will be paid to the nearest quarter hour prior to their scheduled end time whether the late departure was approved or not. For example, an associate

> who clocks out at 5:09 p.m. will be paid to 5:15 p.m."

Exhibit J at p. 2 (emphasis in original); see also O'Hay Dep. (Ex. F) at 66:16-67:10.

Since July 2013, Amazon has utilized a "five-minute" rounding rule. See O'Hay Dep. (Ex. F) at 61:25-63:19. This rule is incorporated into Amazon's standardized "Attendance Policy" document, see id. at 72:8-72:17, a copy of which is attached as Exhibit K. Amazon describes the "five-minute" rounding rule as follows:

> For payroll purposes in punches and out punches which occur within 5 minutes of the start and end time will be rounded to the scheduled shift start or end time (e.g. a time punch that occurs 5 minutes prior to or after the start of the shift will be rounded to the scheduled start time). All other time punches will be coded to the minute.

Exhibit K at p. 3; see also O'Hay Dep. (Ex. F) at 77:23-79:23.

All warehouse workers must clock out ***before*** going through the anti-theft screening process described in subsection C below. See O'Hay Dep. (Ex. F) at 128:20-128:25, 137:15-138:3. There are no exceptions to this rule. See id. at 137:15-138:3.

C. The anti-theft screening process.

After clocking-out for pay purposes, all Facility Workers are required to participate in an anti-theft screening process within the Facility. See Am. Cpl. (Ex. A) at ¶ 20; Amazon Answer (Ex. B) at ¶ 20; ISS Answer (Ex. C) at ¶ 20; O'Hay Dep. (Ex. F) at 136:24-138:3. No Facility Worker may leave the Facility without completing the screening process. See Am. Cpl. (Ex. A) at ¶ 25; Amazon Answer (Ex. B) at ¶ 25; ISS Answer (Ex. C) at ¶ 25. The screening process is overseen by Amazon's Loss Prevention department. See O'Hay Dep. (Ex. F) at 138:5-138:11. As confirmed by photographs provided by Amazon, the screening area is equipped with metal detectors (a.k.a. "magnetometers") that are similar to those found at airports and courthouses. See Exhibit L; O'Hay Dep. (Ex. F) at 149:7-149:14.

Amazon has implemented written "Security Screening Standards" that dictate the anti-theft screening process. See Exhibit M. These Standards "ensure all guards . . . engage in a standardized primary and secondary screening process for individuals as they exit the [warehouse]." Id. at p. 1. The Standards are very detailed and confirm that "Amazon requires security screening of all persons and items exiting the [warehouse] controlled area to deter and detect unauthorized removal of Amazon inventory and company property." Id. at § 2.5.[3]

1. The primary screenings.

Facility workers must remove all metal items prior to approaching the screening area, see Exhibit M at § 8.2, and place the items in plastic trays, see id. at §§ 8.3-8.5; see also Heimbach Dep. (Ex. D) at 110:15-111:2. This includes items such as "watches, keys, cell phones and coins," O'Hay Dep. (Ex. F) at 178:2-178:10, as well as "belts with metal buckles," "key rings," and "key chains," id. at 183:23-184:19. All bags must be inspected, see ISS Answer (Ex. C) at ¶ 22, and certain items "must be physically inspected for false bottoms or hidden compartments," Exhibit M at § 8.7. The security guards may "visually examine" any items resembling Amazon property. See id. at § 8.12. This visual examination may include "looking inside any unsealed opaque packages of a size capable [of] concealing items. This includes water bottles and other liquid containers." Id. at § 8.13. The security guards also may perform "hands-on" searches of certain items. See id. at §§8.14-8.15.

The metal detectors are sensitive and can be set-off by items such as work boots with

[3] In addition to the Security Screening Standards, Amazon has issued other companywide policy documents that detail the anti-theft screening process. These documents, which are collected at Exhibit N, include: "Post Orders" addressing the primary and secondary screening process; a document entitled "Exit Screening–Physical Security Policy;" and a Security Screening Audit Form that "is used in conjunction with the [Security Screening Standards] to assess the standardization of the primary and secondary screening process."

metal eyelets or foil in cigarette packages. See Heimbach Dep. (Ex. D) at 111:25-112:21; 149:12-149:24. If workers "bunch up, it tends to set off the machines." O'Hay Dep. (Ex. F) at 185:6-185:8. Workers set-off the metal detector "all the time." Heimbach Dep. (Ex. D) at 149:6-149:11. Because only one person can go through the metal detector at a time, delays associated with one worker's screening slow down the process for all others in the screening line. See O'Hay Dep. (Ex. F) at 169:16-169:23.

At the screening area, Amazon erects "[p]hysical barriers . . . to assist in traffic control and to prevent by passing of the screening area." Exhibit M at § 3.2. These barriers, referred to as "stanchions" are essentially polls connected by ropes. See O'Hay Dep. (Ex. F) at 170:23-172:17. The barriers prevent workers from "glomming up" and "keep them in a straight line." Id. at 172:10-172:11. The workers must avoid "tailgating." See id. at 184:23-185:8.

Sometimes, the anti-theft screening process runs smoothly, and workers proceed through the metal detectors quickly. See Heimbach Dep. (Ex. D) at 105:113-105:14; 163:12-163:18. On most occasions, however, workers get stuck in lines that form at the metal detectors. See Heimbach Dep. (Ex. D) at 163:12-163:25; 168:24-169:5. According to Salasky: "it was hundreds of people at one time trying to get through only two or three gates, so it was humanly impossible without being rude to get through there as fast as you could." Salasky Dep. (Ex. E) at 52:21-52:24; see also id. at 63:23-64:1 ("It was just so many people at one time and that is what determined how long you could get out without being rude to anyone or starting anything."); id. at 66:6-66:22 (explaining that "you would have to wait in line to get through the metal detector" and estimating line to extend 20-25 feet).

One screening lane may be designated an "Express Lane." See Exhibit M at § 3.7. The Express Lane enables some workers to avoid being slowed down by workers in the other lanes.

See O'Hay Dep. (Ex. F) at 169:4-169:11. Obviously, there would by no need for an "Express Lane" if there were never delays in the other lanes. See, e.g., Salasky Dep. (Ex. E) at 107:13-107:17 (defense counsel asks: "Do you recall there being express lanes so that for people who weren't bringing in things that would set off the metal detector, they could get through security more quickly?").

2. The secondary screenings.

Regardless of the worker's lane, if the metal detector's alarm sounds, the worker is subjected to a "secondary screening" process. See O'Hay Dep. (Ex. F) at 174:12-175:8; Am. Cpl. (Ex. A) at ¶ 24; Amazon Answer (Ex. B) at ¶ 24; ISS Answer (Ex. C) at ¶ 24; Exhibit M at § 8.18. This secondary screening involves an "eight (8) point search pattern" and other strict protocols that security guards must follow. See Exhibit M at §§ 9.1-9.16.

Heimbach is especially familiar with the secondary screening process because he often set-off the metal detector due to some metal in his knee. See Heimbach Dep. (Ex. D) at 106:1-106:4. As Heimbach explained at deposition, workers subject to secondary screenings would be required to wait for others to complete the process. See id. at 107:10-108:19; 164:21-165:19. "There could be five other people there that you had to wait until they passed through." Id. at 107:15-107:16; see also 165:7-165:8.

Salasky encountered the secondary screening process less frequently than Heimbach. See Salasky Dep. (Ex. E) at 80:4-80:7; 133:19-133:23. She explained: "You would have to stand there and wait to be wanded throughout your whole body front and back." Id. at 80:12-80:14. How long this process took depended on how many people were in front of you waiting to be wanded. See id. at 80:18-81:11.

D. The turnstile swipe process.

In order to leave the warehouse, all workers must swipe out at turnstiles located at the Facility's exit doors. See O'Hay Dep. (Ex. F) at 96:9-98:16; Heimbach Dep. (Ex. D) at 165:25-166:5; Salasky Dep. (Ex. E) at 138:1-138:7. Due to crowding at these turnstiles, workers would sometimes have to wait in line to swipe out. See id. Heimbach Dep. (Ex. D) at 69:3-69:23.

The turnstile swipe-outs had no impact on the worker's credited work hours or compensation. See O'Hay Dep. (Ex. F) at 97:6-97:8, 98:12-98:16. However, the turnstile swipe-out data for all workers – including those paid by ISS – is maintained by Amazon. See O'Hay Dep. (Ex. F) at 129:24-130:18; ISS Interrogatory Responses (Ex. H) at p. 8.

E. From the beginning of the class period until August 8, 2015, warehouse workers accumulated *over 12 million* unpaid minutes incurred between (i) the time at which they stopped getting paid for the day and (ii) the time at which they swiped-out at the exit turnstile.

As previously discussed, Amazon maintains precise time data for each workday, including: (i) the time at which the worker clocks-out at the time clock; (ii) the time at which the worker stops getting paid (which often is different from the clock-out time due to the standardized rounding rules); and (iii) the time at which the worker swipes-out at the exit turnstile.

Amazon has produced all of this data through August 8, 2015, and the undersigned law firm has retained a statistician, Liesl M. Fox, Ph.D., to analyze the data and produce an expert report. A copy of Dr. Fox's report is attached as Exhibit O.

As indicated, Dr. Fox analyzed the data for 20,840 Breinigsville warehouse workers during the time period between September 5, 2010 (the beginning of the class period) and August 8, 2015. See Exhibit O at pp. 2-3. According to her analysis, a total of 10,372,019

minutes (or 172,867 hours) transpired between the times at which workers clocked-out at the time clocks and swiped-out at the exit turnstiles. See id. at pp. 3, 6-7. Moreover, because Amazon's rounding rules generally disadvantage workers, a total of **12,343,546 minutes** (or **205,725 hours**) transpired between the times at which workers stopped being paid and swiped-out at the exit turnstiles. See id. at pp. 2-3, 4-5. Finally, Dr. Fox determined that 7,601,161 of these 12,343,546 minutes arose during workweeks in which the worker already was credited with working at least 40 hours. See id. at p. 3.

F. Heimbach's and Salasky's time data.

Dr. Fox also has created documents that isolate the data pertaining to Heimbach and Salasky. Her analysis accompanies supplemental interrogatory responses prepared on behalf of Heimbach, see Exhibit P, and Salasky, see Exhibit Q.

1. Heimbach's data.

As indicated in the table attached to Heimbach's supplemental responses, during 507 workdays ranging from August 21, 2011 until August 2, 2015, a total of 3,204 minutes (or 53.4 hours) expired between the time he clocked-out at the time clock and swiped-out at the exit turnstile. See Declaration of R. Andrew Santillo ("Santillo Dcl.") (Ex. R) at ¶¶ 5-6. Moreover, because Defendants disproportionately rounded Heimbach's clock-out times backwards, these 3,204 minutes translate to 4,065 minutes (or 67.75 hours) of uncompensated time. See id. at ¶ 5.

As can be seen in the column headed "Punch-to-Exit Time Lag Minutes," Heimbach often was able to get from the time clock to the exit turnstile without significant delay. See Exhibit P at pp. 10-21. But there were plenty of occasions in which the data reflects delays of over 10 or over 20 minutes. See id. Because Heimbach consistently left the warehouse as quickly as possible, see Heimbach Dep. (Ex. D) at 103:18-103:21, a reasonable factfinder can

conclude that these "Punch-to-Exit" time gaps reflect time associated with the anti-theft screening process.[4]

2. Salasky's data.

As indicated in the table attached to Salasky's supplemental responses, during 114 workdays ranging from November 14, 2010 until June 12, 2011, a total of 469 minutes (or 7.81 hours) expired between the time she clocked-out at the time clock and swiped-out at the exit turnstile. See Santillo Dcl. (Ex. R) at ¶¶ 7-8. Moreover, because Defendants disproportionately rounded Salasky's clock-out times backwards, these 469 minutes translate to 568 minutes (or 9.46 hours) of uncompensated time. See id. at ¶ 7.

As can be seen in the column headed "Punch-to-Exit Time Lag Minutes," Saklasky often was able to get from the time clock to the turnstile without significant delay. See Exhibit Q at pp. 17-20. But there were 5 occasions in which the data reflects delays of between 10 and 16 minutes. See id. Notably, this seems consistent with Salasky's independent recollection that she was subjected to secondary screenings "approximately maybe five or ten times maybe, if that." Salasky Dep. (Ex. E) at 133:19-133:23. Because Salasky consistently left the warehouse as quickly as possible, see id. at 113:10-113:25, a reasonable factfinder can conclude that her "Punch-to-Exit" time gaps reflect time associated with the anti-theft screening process, see footnote 3 supra.

III. ARGUMENT

Defendants' motion should fail for the reasons described below:

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[4] Because Defendants made no attempt to capture or record the amount of time Heimbach and other workers spent engaged in the anti-theft screenings, Heimbach is merely required to quantify the amount of unpaid work time "'as a matter of just and reasonable inference.'" Tyson Foods, Inc. v. Bouaphakeo, __ U.S. __, 136 S. Ct. 1036, 1047 194 L. Ed. 2d 124, 136 (2016) (quoting Anderson, 328 U.S. at 687, 66 S. Ct. 2d at 1192, 90 L. Ed. at 1522).

A. Unlike the motions in Busk and Vance, Defendants' current motion does ***not*** implicate the FLSA's Portal-to-Portal amendments.

Before going any further, it is very important to observe that Defendants' motion does ***not*** assert that Plaintiffs' alleged unpaid time is non-compensable under the FLSA's Portal-to-Portal amendments. See generally Doc. 59-1. Thus, neither the Supreme Court's decision in Integrity Staffing Solutions, Inc. v. Busk, __ U.S. __, 135 S. Ct. 513, 190 L. Ed. 2d 410 (2014), nor this Court's decision in Vance v. Amazon.com, Inc., 2016 U.S. Dist. LEXIS 48650 (W.D. Ky. Mar. 31, 2016), have any bearing on the current motion. Both Busk and Vance were decided based on the FLSA's Portal-to-Portal amendments,[5] which significantly limit the compensability of "postliminary" activities to those which are "integral and indispensible" to the workers' duties. See Busk, 135 S. Ct. at 515, 190 L. Ed. 2d at 415; Vance, 2016 U.S. Dist. LEXIS 48650, at *20.

It is not surprising that Defendants do not pursue a Portal-to-Portal-based defense. Pennsylvania has a well-established tradition of interpreting the PMWA to be more employee-friendly than the FLSA. See, e.g., Verderame v. Radioshack Corp., 31 F. Supp. 3d 702 (E.D. Pa. 2014); Truman v. DeWolff, Boberg & Associates, Inc., 2009 U.S. Dist. LEXIS 57301 (W.D. Pa. July 7, 2009); Bayada Nurses, Inc. v. Commonwealth of Pennsylvania, 8 A.3d 866 (Pa. 2010); Turner v. Mercy Health System, 2010 Phila. Ct. Com. Pl. LEXIS 146 (Pa. Ct. Common Pleas, Phila. Cty. March 10, 2010). Consistent with this tradition, several judges have observed that the FLSA's Portal-to-Portal amendments do not apply to the PMWA. See, e.g., Bonds v. GMS Mine Repair & Maintenance, Inc., 2015 U.S. Dist. LEXIS 127769, *40 (W.D. Pa. Sept. 23,

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[5] In Vance, this Court held that the Portal-to-Portal amendments applied to the Kentucky wage statute. See Vance, 2016 U.S. Dist. LEXIS 48650, at *20. That case is currently pending on appeal before the Sixth Circuit.

2015); In re Cargill Meat Solutions Wage and Hour Litig., 632 F. Supp. 2d 368, 393-94 (M.D. Pa. 2008); Caiarelli v. Sears, Roebuck & Co., 46 A.3d 643, 648 (2012) (McCaffery, J., dissenting).

B. Plaintiffs and Defendants agree that this case centers on the traditional definition of compensable "work," unadulterated by the Portal-to-Portal Act.

In Vance, this Court did a nice job of explaining that the FLSA Portal-to-Portal amendments do not alter the FLSA's fundamental definition of compensable work:

> Indeed, Congress passed the Portal-to-Portal Act because it found that courts had interpreted the FLSA "in disregard of long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). The Portal-to-Portal Act is simply a clarifying amendment that carves out "preliminary [and] postliminary" activities from the aegis of compensable work. 29 U.S.C. 254(a)(1). ***It does not alter the FLSA's construct or make substantive changes to the FLSA's concepts about work, overtime, or the like.*** It simply clarifies that some activities do not count as "work."

Vance, 2016 U.S. Dist. LEXIS 48650, at *19. The Supreme Court has made similar observations. See IBP, Inc. v. Alvarez, 546 U.S. 21, 28, 126 S. Ct. 514, 520, 163 L. Ed. 2d 288 (2005) ("Other than its express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek,' or to define the term 'workday.'"). So have other district court judges. See Jordan v. IBP, Inc., 542 F. Supp. 2d 790, 803 (M.D. Tenn. Mar. 31, 2008) ("enactment [of Portal-to-Portal Act] did not otherwise alter the Court's previous descriptions of the term 'work'").

Defendants' contend that compensable "work" under the PMWA coincides with the

FLSA's definition of "work," unadulterated by the Portal-to-Portal Act.[6] See Doc. 59-1 at pp. 11-15. ***Plaintiffs agree.*** Indeed, the PMWA's definition of "Hours worked" tracks the definition of work recited by the Supreme Court in the seminal 1946 decision Anderson v. Mount Clemens Pottery Co., 328 U.S. 680, 66 S. Ct. 2d 1187, 90 L. Ed. 1515 (1946). In particular, the Anderson Court wrote:

> Since the statutory workweek includes all *time during which an employee is necessarily required to be on the on the employer's premises, on duty or at a prescribed workplace*, the time spent in these activities must be accorded appropriate compensation.

Id. at 690-91, 66 S. Ct. at 1194, 90 L. Ed. at 1525 (emphasis supplied).

Similarly, the PMWA's applicable regulation defines "Hours worked" as:

> *time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed workplace* . . . .

34 Pa. Code § 231.1(a) (emphasis supplied);[7] accord Lugo v. Farmer's Pride, Inc., 967 A.2d 963, 967 (Pa. Super. 2009) (applying PMWA's "Hours worked" regulation).

Since the Pennsylvania rulemakers have codified the 1946 definition of "work," we turn to the Supreme Court's seminal decisions exploring the scope of compensable work.

C. Compensable work does not require "exertion."

As this Court has observed, the FLSA's traditional concept of compensable work is broad. See Vance, 2016 U.S. Dist. LEXIS 48650, at *18-19 (explaining that Congress passed the Portal-to-Portal Act to reign in broad interpretations of compensable work). The Supreme Court agrees. See Busk, 35 S. Ct. at 516-17, 190 L. Ed. 2d at 416-17; Alvarez, 546 U.S. at 25-

[6] In Vance, this Court referred to such as "the old definitions of work without applying the new(er) exceptions found in Portal-to-Portal." Vance, 2016 U.S. Dist. LEXIS 48650, at *16

[7] The "Hours worked" regulation also addresses compensable travel and meal break time. See 34 Pa. Code § 231.1(a). However, such matters are not relevant to this lawsuit.

27, 126 S. Ct. at 518-19, 163 L. Ed. 2d at 295.

In discussing the scope of compensable work, courts often focus on three cases – Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123, Armour & Co. v. Wantock, and Anderson – decided by the Supreme Court in the wake of the FLSA's passage. In its 2005 Alvarez decision, the Supreme Court summarized these three cases as follows:

> Our early cases defined [the terms "work" and "workweek"] broadly. In Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949 (1944), we held that time spent traveling from iron ore mine portals to underground working areas was compensable; relying on the remedial purposes of the statute and Webster's Dictionary, we described "work or employment" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Id., at 598, 64 S. Ct. 698, 88 L.Ed. 949; see id., at 598, n. 11, 64 S. Ct. 698, 88 L. Ed. 949. The same year, in Armour & Co. v. Wantock, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118 (1944), we clarified that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA. We pointed out that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." Id., at 133, 65 S. Ct. 165, 89 L. Ed. 118. Two years later, in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), we defined "the statutory workweek" to "includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." Id., at 690-691, 66 S. Ct. 1187, 90 L. Ed. 1515. Accordingly, we held that the time necessarily spent by employees walking from timeclocks near the factory entrance gate to their workstations must be treated as part of the workweek. Id., at 691-692, 66 S. Ct. 1187, 90 L. Ed. 1515.

Alvarez, 546 U.S. at 25-26, 126 S. Ct. at 519, 163 L. Ed. 2d at 295; see also Jordan, 542 F. Supp. 2d at 799-800 (M.D. Tenn. March 31, 2008) (discussing Tennessee Coal, Armour, and Anderson).

Focusing on Tennessee Coal – and entirely ignoring Armour – Defendants argue that activities must entail "exertion" in order to constitute compensable "work." See Doc. 59-1 at pp.

11-16. As discussed below, this argument should fail.

1. The "exertion" argument contradicts Supreme Court authority.

Tennessee Coal's reference to "physical or mental exertion (whether burdensome or not)" must be viewed in the context of the Court's actual holding that iron ore miners were entitled to be paid for non-exertional activities such as "await[ing] their turn to ride down the inclined shafts to the mine," Tennessee Coal, 321 U.S. at 595, 64 S. Ct. at 701, 88 L. Ed. at 955, riding down the mine shaft in a cart, see id., and, at the end of the shift, "wait[ing in the mine] until an ore skip or man trip is available to transport them back to the portal," id. at 597, 64 S. Ct. at 702, 88 L. Ed. at 956. All of these relatively passive activities were deemed compensable. See id. at 598-99, 64 S. Ct. at 703-04, 88 L. Ed. at 956-57.

Significantly, Defendants entirely ignore Armour & Co. v. Wantock, a case decided several months after Tennessee Coal in which the Court specifically explained that Tennessee Coal did ***not*** create an "exertion" requirement for compensable work. In Armour, the Court was called upon to decide whether firemen were engaged in compensable "work" under the FLSA for all of the time in which they were required to be in the firehouse. See id. at 127, 65 S. Ct. at 165, 89 L. Ed. at 127-28. The Court described the time at issue this way:

> The litigation concerns the time during which these men were ***required to be on the employer's premises***, to some extent amenable to the employer's discipline, subject to call, ***but not engaged in any specific work***. The Company provided cooking equipment, beds, radios, and facilities for cards and amusements with which the men slept, ate, or entertained themselves pretty much as they chose. They were not, however, at liberty to leave the premises except that, by permission of the watchman, they might go to a nearby restaurant for their evening meal.

Id. at 128, 65 S. Ct. at 166, 89 L. Ed. at 121 (emphasis supplied). The Armour Court framed the question as follows: "Was it error [for the lower court] to count time spent in playing cards and

other amusements, or in idleness, as working time?" Id. at 132, 65 S. Ct. at 168, 89 L. Ed. at 123. In finding no error, the Armour Court rejected the employer's attempt to read Tennessee Coal as creating an "exertion" requirement:

> Here, too, the employer interprets former opinions of the Court as limitations on the Act. It cites statements that the Congressional intent was "to guarantee either regular or overtime compensation for all *actual work* or employment" and that "Congress here was referring to work or employment . . . as those words are commonly used – *as meaning physical or mental exertion* (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" (italics supplied). Tennessee Coal, Iron & R. Co. v. Muscoda Local, 321 U.S. 590, 597, 598. It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading. The context of the language cited from the Tennessee Coal case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts.

Id. at 132-33, 65 S. Ct. at 168, 89 L. Ed. at 123-24. Next, the Armour Court explained that exertion is not a requirement of compensable work:

> Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.

Id. at 133, 65 S. Ct. at 168, 89 L. Ed. at 124; see also id. ("That inactive duty may be duty nonetheless is not a new principle invented for application to [the FLSA].").

Armour's rejection of an exertion requirement was reaffirmed in Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), wherein the Supreme Court explained

that, under certain circumstances, "waiting time" could be compensable under the FLSA. Specifically: "For the reasons set forth in the Armour case decided herewith we hold that no principle of law found either in the [FLSA] or in Court decisions precludes waiting from also being working time." Id. at 136, 65 S. Ct. at 163, 89 L. Ed. at 127.

Anderson comports with Armour's rejection of the notion that compensable work must entail exertion. As already noted, Anderson defined "the statutory workweek" to "includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." Anderson, 328 U.S. at 690-691, 66 S. Ct. at 1194, 90 L. Ed. at 1525. Applying this definition, the Court held that "the time necessarily spent by the employees in walking to work on the employer's premises" constituted compensable work. Id.

Most recently, in Alvarez, the Supreme Court reaffirmed Armour. In fact, although Alvarez is a Portal-to-Portal case, the Court's description of Armour leaves no doubt that exertion is not required for an activity to constitute compensable work under the FLSA:

> The same year, in Armour & Co. v. Wantock, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118 (1944), ***we clarified that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA***. We pointed out that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." Id., at 133, 65 S. Ct. 165, 89 L. Ed. 118.

Alvarez, 546 U.S. at 25, 126 S. Ct. at 519, 163 L. Ed. 2d at 295 (emphasis supplied).

In sum, Defendants' "exertion" argument cannot be squared with Supreme Court authority.

2. The "exertion" argument contradicts the pertinent regulatory authority.

The Wage and Hour Division of the U.S. Department of Labor has issued interpretive regulations that reiterate the above rule that "exertion" is not a requirement of compensable

work. In particular, the Department instructs:

> Subsequently, the Court ruled that ***there need be no exertion at all*** and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen."

29 C.F.R. § 785.7 (emphasis supplied); see also Staunch v. Continental Airlines, Inc., 511 F.3d 625, 630 (6th Cir. 2008) ("The regulations direct a finding that 'all hours are hours worked which the employee is required to give his employer.' 29 C.F.R. § 785.1.").

In another regulation, the Department instructs:

> A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant.

29 C.F.R. § 785.15; see also id. at § 785.20 ("Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.").

Based on the above, Defendants' "exertion" argument cannot be squared with the pertinent regulatory authority.

3. The "exertion" argument contradicts the pertinent Third Circuit authority.

Because this is a "diversity of citizenship" action[8] transferred from the Eastern District of Pennsylvania, this Court must be especially mindful of Third Circuit law. See Manual for Complex Litigation, Fourth (Federal Judicial Center 2008) at § 20.132 ("In diversity cases, the law of the transferor district follows the case to the transferee district."); see also In re. Sigg

[8] Unlike most of the other actions transferred to this Court by the JPML, Plaintiffs' lawsuit never asserted a federal FLSA claim. See Exhibit A.

Switz (USA), Inc., 2011 U.S. Dist. LEXIS 2192, *14 (W.D. Ky. Jan. 7, 2011) (Heyburn, J) ("a change of venue should not affect the advantages afforded to a plaintiff based on her selection of a proper forum").

The seminal Third Circuit opinion addressing compensable work is DeAsencio v. Tyson Foods, Inc., 500 F.3d 361 (3d Cir. 2007). Therein, the Court reversed an FLSA jury verdict for the defendant because the district court improperly instructed the jury that work under the FLSA required exertion. See id. at 366-73. After a thorough review of the applicable jurisprudence, the Third Circuit summarized its findings as follows:

> In light of the broad remedial purpose of the FLSA, . . . we conclude that it was error for the jury instruction to direct the jury to consider whether the gear was cumbersome, heavy, or required concentration to don and doff. This language in effect impermissibly directed the jury to consider whether the poultry workers had demonstrated some sufficiently laborious *degree* of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer; ***Armour demonstrates that exertion is not in fact, required for activity to constitute "work."***

Id. at 373 (emphasis supplied).

Thus, in addition to the Supreme Court and regulatory authority already discussed, DeAsencio puts an end to Defendants' "exertion" requirement.

4. Sixth Circuit authority, even if pertinent, does not support Defendant's "exertion" argument.

Defendants' "exertion" argument fares no better under Sixth Circuit law. Defendants cite to Brock v. City of Cincinnati, 236 F.3d 793 (6th Cir. 2001), in support of their argument. See 59-1 at p. 12. But Brock contains absolutely no analysis or discussion of whether work requires exertion. See id. at 800-01. Instead, the Court merely quotes from the Supreme Court's Tennessee Coal decision without also referencing Armour. See id. There is no suggestion that

the Circuit Court had any intention of addressing whether compensable work requires exertion. Moreover, any such reading of Brock would contradict the Supreme Court's 2005 Alvarez decision, which was issued four years after Brock and reaffirmed Armour's instruction that compensable work does not require exertion. See Section III.C.1 supra.

Defendants also reference the Sixth Circuit's opinion in Chao v. Akron Insulation & Supply, Inc., 184 Fed. Appx. 508 (6th Cir. 2006). See Doc. 59-1 at p. 12. But this case contradicts Defendants' "exertion" argument. In Akron Insulation, the Sixth Circuit cited Armour in holding that employees were entitled to be compensated for non-exertive time spent ***waiting*** around the workplace at the beginning of the workday. The Court explained:

> Following the words of John Milton, "They also serve who only stand and wait," the [FLSA] requires that employees must also be compensated for any "wait time" if it is for the employer's benefit and at its behest. Waiting time is compensable when such waiting is an integral part of an employee's principal activities. 29 C.F.R. §§ 785.14-15; Armour & Co. v. Wantock, 323 U.S. 126, 133, 65 S. Ct. 165, 89 L. Ed. 118 (1944) ("Readiness to serve may be hired."); Central Missouri Tel. Co. v. Conwell, 170 F.2d 641, 645-46 (8th Cir. 1948) (sleeping time compensable if employee required to be on premises and respond to calls). Here, the employees were sometimes required to wait before beginning the day's work, but they were waiting because the employer required it, not, as asserted by Akron Insulation, because they wished to "drink coffee and socialize."

Id. at 511. As notably, the Court observed:

> To the extent that employees were waiting at times during some mornings, ***and drinking coffee and socializing while they waited***, the wait was for defendant's benefit and the time could not be utilized effectively by the employee, making it compensable.

Id. (emphasis supplied).

More importantly, in a case entirely ignored by Defendants, the Sixth Circuit flatly rejected the notion that Tennessee Coal's "exertion" language defines the parameters of

compensable work. In Hill v. United States, 751 F.2d 810 (6th Cir. 1984), the Court explained:

> In Armour & Co., the Supreme Court held that private fire fighters employed by a soap factory were entitled to compensation for time spent on call. The Court cautioned against reading the words of previous opinions out of the context of the facts of the case under discussion. 323 U.S. at 132-33. ***It therefore held that compensability under the FLSA was not limited by the language in Tennessee Coal, Iron & Railroad Co. referring to "physical or mental exertion."*** The Court then held, "Whether time is spent predominantly for the employer's benefit or for the employees is a question dependent upon all the circumstances of the case." 323 U.S. at 133.

Id. at 812-13 (emphasis supplied). Thus, "inactive duty may be compensable." See id. at 813

Hill flatly rejects Defendants' assertion that the Sixth Circuit has somehow endorsed an "exertion" requirement for compensable work.[9] As recognized by other district courts within the Sixth Circuit, the "exertion" argument pushed by Defendants is simply wrong. See Johnson v. Koch Foods, Inc., 670 F. Supp. 2d 657, 670 (E.D. Tenn. 2009) ("'exertion' is not required for an activity to be considered work"); Jordan, 542 F. Supp. 2d at 805 (surveying the law and finding it "crystal clear that exertion is not required for an activity to constitute work").[10]

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[9] See also Adair v. Charter County of Wayne, 452 F.3d 482, 486-87 (6th Cir. 2006) ("Although the FLSA does not state whether time spent on call is working time, the Supreme Court has held that, under some circumstances, waiting time is compensable."); Aiken v. City of Memphis, 190 F.3d 753, 760 (6th Cir. 1999) ("Under certain circumstances, employer restrictions on what is ostensibly an employee's free time can cause such time to count as hours worked."); Myracle v. General Electric Co., 1994 U.S. App. LEXIS 23307, *10 (6th Cir. Aug. 23, 1994) (quoting Armour for proposition that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen"); Martin v. Ohio Turnpike Commission, 968 F.2d 606, 609 (6th Cir. 1992) ("under some circumstances, waiting time is compensable"); F. W. Stock & Sons, Inc. v. Thompson, 194 F.2d 493, 495 (6th Cir. 1952) (applying Armour).

[10] Defendants also reference the Tenth Circuit's decision in Reich v. IBP, Inc., 38 F.3d 1123 (10th Cir. 1994), in support of its "exertion" argument. See Doc. 59-1 at pp. 11-14. This is an outlier opinion that cannot be squared with the Supreme Court's subsequent Alvarez decision, which reiterated that compensable work carries no exertion requirement. Courts have refused to follow this opinion within the Tenth Circuit, see Garcia v. Tyson Foods, Inc. 474 F. Supp. 2d 1240, 1245-47 (D. Kan. 2007), and within the Sixth Circuit, see Abadeer v. Tyson Foods, Inc., 975 F. Supp. 2d 890, 911-12 (M.D. Tenn. 2013); Jordan, 542 F. Supp. 2d at 803-04. A

In sum, Defendants' "exertion" argument cannot be squared with the applicable Supreme Court, regulatory, or Third Circuit authority. Moreover, even if the Court looks to Sixth Circuit law, the argument fares no better.

D. Defendants mischaracterize the anti-theft screening process.

Working from the legally flawed premise that "exertion" is a requirement of compensable work, Defendants set out to characterize the anti-theft screenings as purely "passive" events. See Doc. 59-1 at 15-18. Defendants, for example, repeatedly use the term "passing through security" when they refer to the process. At one point in the brief, Defendants write: "The fact that their gait may be slowed as they walk through the security apparatus or they even may have to stop and have a bag check is hardly exertive activity." Id. at 14.

Defendants' conclusory assertions ignore Plaintiffs' evidence, and, in so doing, Defendants' ignore the well-established principle that "in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" Tolan v. Cotton, __ U.S. __, 134 S. Ct. 1861, 1863, 188 L. Ed. 2d 895, 897 (2014) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202, 216 (1986)).

Plaintiffs' evidentiary record is detailed in Section II supra. In summary, the record demonstrates that Defendants mandate that Plaintiffs and other workers participate in the anti-

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particularly cogent criticism of Reich v. IBP can be found in the Third Circuit's DeAsencio opinion. See DeAsencio, 500 F.3d at 371-72; see also Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 911-12 (9th Cir. 2004) (refusing to follow Reich and rejecting exertion requirement); Gatewood v. Koch Foods, Inc., 569 F. Supp. 2d 687, 693-94 (S.D. Miss. 2008) (same); Chao v. Tyson Foods, Inc., 568 F. Supp. 2d 1300, 1317 (N.D. Ala. 2008) (same). Finally, Defendants cite to various other Circuit Court opinions in support of their "exertion" argument. See Doc. 59-1 at 14 (citing to Smith (10th Cir. 2006), Manning (1st Cir. 2013), Perez (4th Cir.), Blair (8th Cir.), Kellar (7th Cir.), and Von Friewalde (5th Cir.)). None of these decisions address the "exertion" issue.

theft screenings before they can leave the warehouse. In this regard, Defendants have implemented an elaborate primary and secondary screening process that is overseen by security guards who must follow detailed company policies and procedures. Plaintiffs and other workers often would wait in line before arriving at the metal detector. Plaintiffs personally experienced this waiting, and they testified about the waiting lines at deposition. Moreover, their testimony is entirely consistent with the fact that Defendants have used partitions to separate the various waiting lines, have enforced a "no tailgating" rule, and have created an "Express Lane" so that some workers can avoid longer waiting lines. Why would Defendants do any of these things if there were never any waiting lines?

When Plaintiffs and other workers arrive at the airport-style metal detectors, they empty their pockets and remove any metal objects. The security guards inspect these items. Plaintiffs then proceeded through the metal detector. If the alarm sounds – as often happened to Heimbach and less frequently happened to Salasky – Plaintiffs were subjected to a secondary screening process. This might require more waiting and always would require an individual inspection by a security guard.

The "Punch-to-Exit Time" data confirms that on certain days – especially those on which Plaintiffs were subjected to a secondary screening – the above process took time to complete. Heimbach's "Punch-to-Exit Time" gap frequently equaled or exceeded 10 minutes. See Santillo Decl. (Ex. R) at ¶ 7. Salasky – who infrequently was subjected to secondary screening – encountered 5 days in which her Punch-to-Exit Time gap equaled or exceeded 10 minutes. Id. at ¶ 7. And there are many other days in which both Plaintiffs' Punch-to-Exit times exceeded 5 minutes. See Tables attached to Exhibits P and Q.

The above is confirmed by Defendants, who provide the Court with "histograms"

addressing Plaintiffs' punch-to-exit data. See Doc. 59-1 at 4-9. Defendants' analysis of Heimbach, for example, reflects that his punch-to-exit times exceed 5 minutes 48% of the time and exceed 10 minutes 14% of the time, see id. at 5-6. Defendants also demonstrate that Salasky – who was less frequently subjected to secondary screenings – encountered punch-to-exit times exceeding 5 minutes 19.1% of the time, see id. at 7-8, and the histogram reinforces the point, see id. at 8.[11]

Defendants' analysis also compares Plaintiffs to other workers who clocked-out at around the same time as Plaintiffs. See Doc. 59-1 at 5-9. Here again, the analysis helps to make Plaintiffs' case by demonstrating that Plaintiffs are not alone in having lengthy punch-to-swipe times. Other employees also had punch-to-swipe times of over 5 – and often over 10 or 15 – minutes. See id. at pp. 7, 9. In fact, it looks like Salasky's co-workers often had longer punch-to-swipe times than she did. See id. at 8-9. Of course, it is not surprising that, on any given day, workers who clock-out at the same time will experience different punch-to-swipe times. The amount of time any particular worker spends in the screening process depends on various post-clock-out variables, including how quickly his/her line is moving, whether he/she qualifies for the "Express Lane," and whether he/she is subjected to secondary screening.

E. A reasonable factfinder can find that Plaintiffs engaged in compensable work.

To win on summary judgment, Defendants must demonstrate that the facts of this case are so one-sided that time associated with the anti-theft screenings cannot possibly constitute

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[11] Defendants assert: "Salasky also admitted that the actual process of going through the metal detector and having her purse examined took around 15 seconds." Id. at 9. But this 15-second estimate includes absolutely no time spent in line and is strictly limited to the actual physical act of handing over the purse and walking a few feet through the screening device. See Salasky Dep. (Ex. E) at 120:12-120:16. Defendants are really twisting the record here.

compensable PMWA work even after "'all justifiable inferences are to be drawn in [Plaintiffs'] favor.'" Tolan, 134 S. Ct. at 1863, 188 L. Ed. 2d at 897 (quoting Anderson, 477 U.S. at 255, 106 S. Ct. at 2513, 91 L. Ed. 2d at 216). As discussed below, Defendants cannot meet this heavy burden.

Crucially, the PMWA incorporates the FLSA's extremely broad concept of work, as reflected by the fact that the PMWA regulation defining "Hours worked" tracks almost verbatim the definition in the Supreme Court's 1946 Anderson decision. See Section III.B (comparing the pertinent language). As significantly, Defendants ***concede*** that "*the PMWA regulation's definition of 'hours worked' aligns squarely with that of the FLSA*." Doc. 59-1 at 1.

Thus, once Defendants' legally incorrect "exertion" argument is rejected, it becomes obvious that Plaintiffs are engaged in work. As detailed in Section II supra and summarized in Section III.D supra, Plaintiffs are required to go through the anti-theft screenings and may not leave the warehouse until they complete the screening process and swipe-out at the exit turnstile. The screening process has been implemented by Defendants to prevent theft and does not benefit Plaintiffs in any way. On the contrary, the process – which includes waiting in line, emptying pockets, and sometimes being subjected to an additional "secondary" screening – prevents Plaintiffs from leaving the warehouse and heading home. Sometimes, the delays can even take over 10 minutes, and, in the aggregate, the delays have resulted in *over 12 million* uncompensated minutes for the warehouse workers.

For sure, the process of going through Defendants' mandatory anti-theft screening process might not be as physically or mentally demanding as the warehouse work that Plaintiffs do for most of the workday. But that is irrelevant. As discussed in Section III.C.1 supra, in Tennessee Coal – Defendants' lead case – the Supreme Court found that employees engaged in

compensable work when they were "await[ing] their turn to ride down the inclined shafts of the mine," riding down the mine shaft in a cart, and, at the end of the shift, "wait[ing in the mine] until an ore skip or man trip is available to transport them back to the portal." Next, in Armour, the Court found "time spent in playing cards and other amusements" and even in "idleness" to be compensable. Next, in Skidmore, the Court found "waiting time" to be compensable. Next, in Anderson – the very case that the PMWA's "hours worked" definition is copied from – the Court found time spent walking to the assigned work location to be compensable. See Section III.C.1 (discussing Supreme Court's "work" cases).

It cannot be argued that the time Plaintiffs spent in Defendants' mandatory anti-theft screenings is not akin to the activities deemed to constitute work in the lead Supreme Court cases. Because Defendants concede that these traditional notions of work apply to Plaintiffs' PMWA claim, their summary judgment motion should fail.

F. Response to a few of Defendant's additional "work" arguments.

Defendants' summary judgment motion primarily relies on the tactic of applying a distorted factual record to an incorrect legal rule that work requires "exertion." Hopefully, Plaintiffs have sufficiently debunked this approach.

In addition, Plaintiffs will address some of Defendants' other "work" arguments.

1. The Frlekin argument.

First, Defendants emphasize Frlekin v. Apple Inc., 2015 U.S. Dist. LEXIS 151937 (N.D. Cal. Nov. 7, 2015), a case that found post-shift bag checks in a retail setting not to be compensable work under California law. See Doc. 59-1 at 14, 24-25. But Frlekin is inapplicable to Plaintiffs' PMWA claim. Unlike the PMWA, which adopts Anderson's definition of work, the California law at issue in Frlekin emphasized the employer's level of "control" over the

employees' activity. See Frlekin, 2015 U.S. Dist. LEXIS 151937, at *9-36. The PMWA – like Anderson – has no such requirement. See Section III.B supra. Moreover, even if employer "control" is required under the PMWA, Frlekin would not help Defendants. In finding insufficient employer "control," the Frlekin Court emphasized that the screenings were not mandatory and that the retail employees could easily avoid the screenings by leaving their bags and phones at home. See Frlekin, 2015 U.S. Dist. LEXIS 151937, at *16-18. Here, in contrast, Defendants' anti-theft screenings are mandatory for ***all employees***, and there is no plausible way to avoid the screenings. See Section II.C supra. In this respect, Plaintiffs' facts are analogous to Cervantez v. Celestica Corp., 618 F. Supp. 2d 1208 (C.D. Cal. 2009), a case that the Frlekin court specifically distinguished. In Cervantez, as here, the post shift security screenings were mandatory for ***all*** employees, giving them a viable claim for unpaid wages.

2. The "lack of other cases" argument.

Defendants provide Your Honor with the following instruction: "The Court should ask itself why there are no other cases – or counsel – ever alleging that passing through security clearance is compensable work under the PMWA.?" Doc. 59-1 at 17. And that is not all: "The Court should further ask itself whether so many capable Pennsylvania lawyers for so long just missed this claim that otherwise would have been so obvious and universal if anyone actually thought that such a claim was viable." See id.

The undersigned is a "Pennsylvania lawyer" – maybe even a "capable Pennsylvania lawyer" – who has handled hundreds of wage and hour lawsuits and interviewed thousands of Pennsylvania workers from all walks of life. If Defendants' suggested questions were posed to me, I would answer it this way: Even if it is true that no similar lawsuits have been filed under the PMWA, the reason is because almost no Pennsylvania employers have so little trust in their

workforce that they require their employees to go through an airport-style, anti-theft screening process at the end of every shift. Indeed, even though my firm has represented many warehouse and retail workers over the years, this case represents the first time we have ever encountered clients who were subjected to anti-theft screenings. Defendants' heavy-handed security practices really are out of the mainstream, and that is why there have been no other lawsuits.

3. The Busk argument.

At various points in their brief, Defendants reference the Supreme Court's Busk opinion. For example, Defendants criticize Plaintiffs for "cling[ing] to their theory" in the wake of Busk. See Doc. 59-1 at 1.

This is a red herring. Busk is strictly decided under the Portal-to-Portal amendments to the FLSA, and, as Defendants concede, such amendments do not apply to the instant lawsuit. See Sections III.A-B supra.

In fact, Busk actually can be interpreted as supporting Plaintiffs' case. First of all, Busk reaffirms the expansive definition of work in the absence of the Portal-to-Portal amendments. See Busk, 135 S. Ct. at 516, 190 L. Ed. 2d at 416. Moreover, if the Amazon anti-theft screenings at issue in Busk did not constitute "work" under the traditional FLSA definitions, there would have been no need for the Court to undertake a Portal-to-Portal analysis. Put differently, Busk is predicated on the assumption that the anti-theft screenings are compensable work in the absence of the Portal-to-Portal amendments.

4. The "grammatical and interpretive" argument.

Defendants brief includes a confusing argument that applies purported "grammatical and interpretive" principles to the PMWA regulation defining "Hours worked." See Doc. 59-1 at 18-24. The relevant portion of the PMWA's "Hours worked" definition provides that

compensation should be paid for, among other things, "*time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed workplace.*" 34 Pa. Code § 231.1(a) (emphasis supplied).[12] In essence, Defendants read this provision as requiring that a worker seeking compensation establish ***both*** (i) that she was required to be "on the premises of the employer" ***and*** (ii) that she was either "on duty" or "at the prescribed workplace." See Doc. 59-1 at 18-24. As discussed below, this interpretation of the regulatory language in wrong for several independent reasons.

a. Defendants' "grammatical and interpretive" argument conflicts with the Supreme Court's Anderson opinion, which is the very source of the PMWA's regulatory definition.

There is no need to speculate about the Pennsylvania rulemakers' intentions in drafting the above regulatory language. As was previously explained, the rulemakers simply copied from the Supreme Court's definition of compensable work in the 1946 Anderson opinion. See Section III.B supra. This is beyond question. The Pennsylvania rulemakers write: "time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed workplace." 34 Pa. Code § 231.1(a). Meanwhile, the Anderson Court writes: "time during which an employee is necessarily required to be on the on the employer's premises, on duty or at a prescribed workplace." Anderson, 328 U.S. at 690-91, 66 S. Ct. at 1194, 90 L. Ed. at 1525.

Thus, this Court does not need to engage in any "grammatical and interpretive" maneuvers to know how to apply the PMWA regulation. This Court can just look to Anderson, and Anderson clearly holds that workers must be paid for all time that they are required to be on

[12] The "Hours worked" regulation also addresses compensable travel and meal break time. See 34 Pa. Code § 231.1(a). However, such matters are not relevant to this lawsuit.

the employer's premises. Indeed, the workers in Anderson sought pay for walking time that occurred away from the location where they performed their primary work duties. The Court described the walking time as follows:

> The employees then walk to their working places along clean, painted floors of the brightly illuminated and well ventilated building. They are free to take whatever course through the plant they desire and may stop off at any portion of the journey to converse with other employees and to do whatever else they may desire.

Anderson, 328 U.S. at 683, 66 S. Ct. at 1190, 90 L. Ed. at 1520-1521. The Court made it abundantly clear that this walking time was entirely distinct from the "the actual productive work performed." Id. at 689, 66 S. Ct. at 1193, 90 L. Ed. at 1524. More importantly, the Court explained that it was enough for the workers to simply prove that walking time necessarily arose on the employer's premises:

> The employees did prove, however, that it was necessary for them to be on the premises for some time prior and subsequent to the scheduled working hours. The employer required them to punch in, walk to their work benches and perform preliminary duties during the 14-minute periods preceding productive work; the same activities in reverse occurred in the 14-minute periods subsequent to the completion of productive work. Since the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation.

Id. at 690-691, 66 S. Ct. at 1194, 90 L. Ed. at 1524-1525.

In sum, Defendants' reading of the PMWA's "Hours worked" definition as requiring something beyond a showing the mandatory anti-theft screenings arose "on the premises of the employer" should fail because such a reading cannot be squared with Anderson, the very source of the pertinent regulatory language.

b. Even if the Court looks beyond Anderson, Defendants' "grammatical and interpretive" argument is unpersuasive.

Looking beyond Anderson, Defendants "grammatical and interpretive" arguments lack merit for additional reasons.

First, Defendants argument contradicts a basic rule of construction: If a statute lists a series of terms and the last and second-to-last terms are separated by the word **"OR"** (rather than the word "and"), then the listed terms are disjunctive (rather than conjunctive) and only one of the listed terms needs to be satisfied. See, e.g., United States v. Arias, 253 F.3d 453, 457 (9th Cir. 2001); see also Garcia v. United States, 469 U.S. 70, 73, 105 S. Ct. 479, 481, 83 L. Ed. 2d 472, 476 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner ne given separate meanings."). This rule puts an end to Defendants' argument. The PMWA defines "Hours worked" to include: "time during which an employee is required by the employer to be on the premises of the employer, to be on duty ***OR*** to be at the prescribed workplace." 34 Pa. Code § 231.1(a) (emphasis supplied). Thus, it is enough for Plaintiffs' to prove that they were required by Defendants "to be on the premises of the employer."

Second, the disjunctive nature of the above language is further highlighted by the way in which the rulemakers place the term **"to be"** in front of each of the three alternatives: "time during which an employee is required by the employer ***to be*** on the premises of the employer, ***to be*** on duty or ***to be*** at the prescribed workplace." 34 Pa. Code § 231.1(a) (emphasis supplied). This repetitive use of the same introductory term emphasizes that each of the three alternatives stands alone. See, e.g., Chao v. Day, 436 F.3d 234, 236 (D.C. Cir. 2006) ("Congress plainly framed [the language] in the *alternative*, and it further bifurcated the subsection with the parallel inclusion of the verb 'exercises' at the beginning of both the discretionary and disposition

clauses.").

Third, there is no significance to Defendants' emphasis that no comma has been placed in-between the phrases "to be on duty" and "to be at the prescribed workplace." First of all, the lack of a comma in the PMWA regulation is easily explained by the fact that the Anderson Court also did not use a comma. Anderson, 328 U.S. at 690-91, 66 S. Ct. at 1194, 90 L. Ed. at 1525. More significantly – and as the Court probably knows based on its own observations – writers have different styles when it comes to the placement of commas in a list of terms. Many writers – including editors at the *New York Times* – omit the comma. See Allan M. Siegal and William C. Connolly, New York Times Manual of Style and Usage (5th Ed. 2015) at 67 ("In general, do not use a comma before *and* or *or* in a series"). The placement or omission of a comma in front of an "or" or an "and" represents a stylistic choice and nothing more.

In sum, even if Anderson does not control the Court's interpretation of the PMWA's "Hours worked" definition, Defendants "grammatical and interpretive" arguments should fail.

G. Defendants fail to prove that the *de minimis* defense bars Plaintiffs' claims.

Defendants argue that, even if the uncompensated time at issue in this lawsuit is compensable under the PMWA, Plaintiffs still should lose because the time they seek to recover is *de minimis*. See Doc. 59-1 at 26-28. As explained below, this argument should be rejected.

In DeAsencio, the Third Circuit explained that courts considering an employer's *de minimis* defense must consider three factors: (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work. DeAsencio, 500 F.3d at 374. The Third Circuit further explained that the *de minimis* defense

> applies only where there are uncertain and indefinite periods of time

> involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

Id. (quoting 29 C.F.R. § 785.47).

As discussed below, a reasonable factfinder applying Plaintiffs' factual record to the three factors listed above can easily reject Defendants' *de minimis* defense:

1. Practical administrative difficulty of recording the additional time.

Defendants do not even attempt to demonstrate that it would be administratively difficult to capture the time Plaintiffs spend engaged in the anti-theft screenings. In fact, Defendants *already* record the time when Plaintiffs leave the warehouse through the turnstiles. See Section II.E supra. Moreover, in addition to paying workers to the turnstile swipe-out times, there may be other ways in which Defendants can capture the time Plaintiffs and other workers spend in the anti-theft screening process. As just one example, Defendants might move the time clocks to the other side of the screening area so that workers clock-out *after* they go through the screening process.

Anyway, the Court need not speculate about what steps Defendants might take. What matters for the purposes of this summary judgment motion is that Defendants have not even attempted to produce evidence of "practical administrative difficulty." See Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 869 (W.D. Wis. 2007) ("Because defendant has not adduced any evidence that it would be difficult to compensate plaintiffs for donning and doffing the personal protective equipment, I cannot conclude that those activities are 'de minimis' as a matter of law.").

2. Aggregate amount of compensable time.

The next *de minimis* factor requires the Court to consider "the aggregate amount of compensable time" sought by Plaintiffs. DeAsencio, 500 F.3d at 374. In Reich v. Monfort, Inc., 144 F.3d 1329 (10th Cir. 1998), the Tenth Circuit explained that, in class action litigation, this factor requires the court analyze *both* (i) the individual Plaintiff's aggregate uncompensated time during the entire relevant period and (ii) the aggregate uncompensated time of the entire class. See id. at 1334; accord Johnson v. RGIS Inventory Specialists, 554 F. Supp. 2d 693 (E.D. Tx. 2007) (looking at plaintiff's aggregate unpaid time "over a three-year period").

Defendants entirely ignore the aggregation factor, see Doc. 59-1 at 26-28, and this failure should be fatal to their argument. However, if the Court analyzes this factor, the inapplicability of the *de minimis* defense becomes clear. Heimbach has presented evidence that, from the beginning of the class period until August 8, 2015, he logged 67.75 uncompensated hours, while Salasky – whose duration of employment was shorter – logged 7.81 uncompensated hours. See Section II.F supra. As significantly, from the beginning of the class period until August 8, 2015, the class of Pennsylvania warehouse workers logged **205,725** uncompensated hours. As such, Defendants cannot satisfy the second *de minimis* factor.

3. Regularity of the additional work.

The final *de minimis* factor requires the Court to consider the "regularity" of the anti-theft screenings. See DeAsencio, 500 F.3d at 374. Where, as here, the activities resulting in the allegedly uncompensated work occur on a daily basis, this factor cannot be satisfied. See, e.g., Monfort, 144 F.3d at 1334.

In sum, Defendants do not satisfy any of the three factors that Pennsylvania courts consider in analyzing the *de minimis* defense.

H. Heimbach is not judicially estopped from pursuing his PMWA claim.

Defendants' brief also includes a one-paragraph argument asserting that Heimbach is judicially estopped from pursuing his PMWA claim in this Court because he failed to disclose such claim as an asset in a prior bankruptcy proceeding. See Doc. 59-1 at 11. As explained below, this argument should fail.

1. Judicial estoppel does not apply because Heimbach's PMWA claim did not accrue until after he filed his Bankruptcy Court petition.

In DeMarco v. Ohio Decorative Products, Inc., 1994 U.S. App. LEXIS 3848 (6th Cir. 1994), a sales representative filed a lawsuit alleging that a corporate defendant owed him unpaid commissions. See id. at * 1. The defendant asserted that the sales representative was judicially estopped from pursuing this claim due to his failure to disclose the claim in his bankruptcy proceeding. See id. at *24-26. The Circuit Court rejected this argument, explaining that judicial estoppel did not apply because the sales representative's right to the allegedly unpaid commissions did not accrue until after he filed his bankruptcy petition. See id. at *25-26; accord Nehmelman v. Penn National Gaming, Inc., 2011 U.S. Dist. LEXIS 54183, *11-16 (N.D. Ill. May 20, 2011).

Based on the above, Defendants' judicial estoppel argument should be summarily rejected. Heimbach filed for personal bankruptcy in September 2010. See Declaration of Neal Heimbach ("Heimbach Dcl.") (Ex. S) at ¶ 6; Heimbach Dep. (Ex. D) at 14:9-14:13; Bankruptcy Court Docket Sheet (Ex. U) at Entry 1. At this time, Heimbach was not yet working for Amazon. See id. at 162:10-162:23; Amazon Answer (Ex. B) at ¶ 13. Thus, Heimbach's PMWA claim against Amazon could not have accrued at the time he commenced the bankruptcy proceedings.

2. Even if the judicial estoppel doctrine can apply to Heimbach's post-petition PMWA claim, imposition of the doctrine would not be appropriate under the facts of this case.

It is common for defendants in employment rights lawsuits to assert that the plaintiff is judicially estoppel from pursuing employment claims due to their failure to disclose the claims in bankruptcy proceedings. In another overtime rights lawsuit, Judge Simpson described the applicable principles:

> The doctrine of judicial estoppel "bars a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.'" Eubanks v. CBSK Financial Group, Inc., 385 F.3d 894, 897 (6th Cir. 2004) (quoting Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990)). The Sixth Circuit has held that judicial estoppel may warrant the dismissal of a plaintiff's claim if the plaintiff fails to disclose the existence of the claim to the bankruptcy court. See id. at 898. However, "judicial estoppel is inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence." Browning v. Levy, 283 F.3d 761, 776 (6th Cir. 2002). When determining whether the conduct was the result of mistake or inadvertence, the court considers whether "(1) [plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith." White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 478 (6th Cir. 2010). "Judicial estoppel is an equitable doctrine to be invoked by [the] court at its discretion," Pennycuff v. Fentress Cnty. Bd. of Educ., 404 F.3d 447, 453 (6th Cir. 2005), and "should be applied with caution to 'avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.'" Eubanks, 385 F.3d at 897 (quoting Teledyne, 911 F.2d at 1218).

Finney v. Free Enterprise System, Inc., 2011 U.S. Dist. LEXIS 33858, *3-4 (W.D. Ky. Mar. 29, 2011). Under the above principles, district courts within the Sixth Circuit have excused plaintiffs' inadvertent failures to disclose employment rights claims in their personal bankruptcy proceedings. See, e.g., Finney, 2011 U.S. Dist. LEXIS 33858, at *8-11; see also Jackson v. Novastar Mortgage, Inc., 645 F. Supp. 2d 636, 643 (W.D. Tenn. 2007).

Here, Heimbach is not judicially estopped from pursuing his PMWA claim in this lawsuit because he acted in good faith. The factual background described below supports such a conclusion:

Heimbach filed for personal bankruptcy in September 2010. See Heimbach Dcl. (Ex. S) at ¶ 6; Heimbach Dep. (Ex. D) at 14:9-14:13; Bankruptcy Court Docket Sheet (Ex. U) at Entry 1. At this time, Heimbach was not yet working for Amazon. See id. at 162:10-162:23; Amazon Answer (Ex. B) at ¶ 13. Eleven months later, in August 2011, Heimbach started working for Amazon. See id. In September 2013, Heimbach went to see an Allentown, Pennsylvania lawyer to discuss a workplace injury. See Heimbach Dcl (Ex. S) at ¶¶ 1-2. This Allentown lawyer referred Heimbach to the undersigned Winebrake & Santillo firm. See Heimbach Dcl (Ex. S) at ¶ 3. Upon consulting with the Winebrake & Santillo firm, Heimbach learned ***for the first time*** that Amazon's failure to pay him for his post-clock-out time might violate the PMWA. See id. at ¶ 4. Heimbach retained the Winebrake & Santillo firm, see id. at ¶ 5, and, on September 27, 2013, he started this PMWA lawsuit in the Philadelphia Court of Common Pleas, see id. at ¶ 7; see also Original Complaint (Ex. T).

When Heimbach started this PMWA lawsuit on September 27, 2013, he understood that his bankruptcy case was closed, and he did not know that he should disclose the PMWA lawsuit to the Bankruptcy Court. See Heimbach Dcl. (Ex. D) at ¶¶ 7-8. This is entirely understandable. In fact, the Bankruptcy Trustee's final report was completed in August 2013. See Bankruptcy Court Docket Sheet (Ex. U) at Entry 87. However, the Bankruptcy Court did not approve the Trustee's report and formally close the case until October 30, 2013. See id. at Entry 89.

In sum, Heimbach started the bankruptcy proceedings before he got his job at Amazon. When, almost three years later, he learned about his potential PMWA claim, he thought the

bankruptcy proceedings were finished. In fact, Heimbach was wrong, and the bankruptcy proceedings would not be formally terminated until approximately one month later. These facts clearly establish that Heimbach's failure to report his potential PMWA claim to the Bankruptcy Court in the waning days of his bankruptcy proceeding was entirely inadvertent and was not undertaken in bad faith. Under these circumstances, judicial estoppel is not warranted.

3. If the Court dismisses Heimbach's PMWA claim under the judicial estoppel doctrine, it should permit Class Counsel to replace Heimbach with a new class representative plaintiff.

If the Court were to find that Heimbach is judicially stopped from pursing his PMWA claim, Heimbach respectfully requests that the court allow him to file a motion seeking leave to amend the complaint to add a new class representative. See Stanich v. Travelerse Indemnity Co., 259 F.R.D. 294, 322-23 (N.D. Ohio 2009); Sogevalor v. Penn Cent. Corp., 137 F.R.D. 12, 13-14 (S.D. Ohio 1991); Weathington v. County of Wayne, 2015 U.S. Dist. LEXIS 79031, * 3-4 (E.D. Mich. April 22, 2015); McKinney v. Bayer Corp., 2011 U.S. Dist. LEXIS 69105, * 6-7 (N.D. Ohio June 29, 2011).

IV. CONCLUSION

For the above reasons, Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment.

Date: May 27, 2016

Respectfully submitted,

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