UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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ORETHA BEH, RUBY CASON, BRIANA KINCANNON and KIMBERLY BALKUM, individually and on behalf of all persons similarly situated,

Plaintiffs,

-versus- **No. 1:19-CV-01417 JLS MJR**

COMMUNITY CARE COMPANIONS INC., ALEXANDER J. CARO, MARK GATIEN, INTERIM HEALTHCARE OF ROCHESTER, INC., and JAMES WATSON,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DECERTIFY COLLECTIVE ACTION

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PRELIMINARY STATEMENT

Throughout Defendants' memorandum of law in support of their Motion to "Decertify" the Collective Action [Doc. # 582][1], they employ the "certification" terminology of Fed. R. Civ. P. 23 in a transparent attempt to create the (mis)impression that the *collective action* which Plaintiffs seek to maintain pursuant to *29 U.S.C. § 216(b)* is analogous to a *Rule 23 class action* and that the standards which govern certification of the latter should therefore govern Plaintiffs' motion. As the Supreme Court has cautioned, however, courts should be careful not to allow use of Rule 23 terminology to obscure the "significant differences between certification under [Rule] 23 and the joinder process under § 216(b)." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 70 n.1 (2013);[2] *see also Campbell v. City of Los Angeles*, 903 F.3d 1080, 1100-02 (9th Cir. 2018) (explaining the "common misconceptions" arising from "misappropriation" of Rule 23 terminology in litigation concerning maintenance of a collective action pursuant to § 216(b)).

The Second Circuit has in fact expressly held that "it is error for courts to equate the requirements of § 216(b) with those of Rule 23." *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 520 (2d Cir. 2020). *Scott* provides the controlling standard for maintaining a collective action in this Circuit: Plaintiffs and opt-in Plaintiffs need only be "alike in regard to some material aspect of their litigation." 954 F.3d at 516. This Court is indisputably bound by that standard – a reality which Defendants have obscured in their memorandum. Remarkably,

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[1] Though Defendants style their motion as one to "decertify," in reality, Defendants' "motion" is nothing more than an opposition to Plaintiffs' pending motion for leave to maintain a collective action [Doc. # 572]. The Court never "certified" any collective, even conditionally, that could now be "decertified." Rather, following Plaintiffs' filing of a motion to disseminate notice to potential opt-ins, Defendants, recognizing they had no non-frivolous objections thereto, stipulated to the dissemination. [Doc. 136]. The Court thereupon endorsed the parties' stipulation without purporting to "certify" anything. [Doc. 137].

[2] The Court's full footnote was as follows:

"Lower courts have borrowed class-action terminology to describe the process of joining co-plaintiffs under 29 U.S.C. § 216(b). While we do not express an opinion on the propriety of this use of class-action nomenclature, we do note that there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b)."

Defendants fail to refer in any way to *Scott* or its progeny. Instead, Defendants exclusively rely upon decisions that were abrogated by *Scott*, including several that *Scott* expressly disavowed. To give credence to the legal standard that Defendants proffer would be plain error.

Plaintiffs submit this memorandum of law in response to Defendants' motion. This memorandum should be considered in conjunction with the Declaration of Jessica Harris dated September 11, 2024 filed contemporaneously herewith ("Harris Decl. Opp'n").

STATEMENT OF FACTS

Plaintiffs in this action were employed as home care workers ("aides") in Defendants' Buffalo and Rochester locations between October 14, 2017 and February 3, 2021 ("the relevant period")[3]. As set forth below, at all relevant times, all Plaintiffs were subject to the same scheduling, timekeeping, and compensation policies and practices of Defendants.

At each of the Rochester and Buffalo offices, CCC employed a branch manager, several payroll employees, and a handful of coordinators (also called schedulers). FRCP 30(b)(6) Deposition Testimony of Buffalo Branch Manager Karen Billups ("Billups 30(b)(6) Dep."), Ex. B to Harris Decl. Opp'n, at 115:12-116:8; Deposition Testimony of Karen Billups as an Individual ("Billups Dep."), Ex. F to Harris Decl. Opp'n, at 19:12-20:20; Deposition Testimony of Rochester Branch Manager Mark Cuevas ("Cuevas Dep."), Ex. A to Harris Decl. Opp'n, at 16:5-11, 32:11-33:6. In addition, hundreds of aides were assigned to the Rochester and Buffalo offices and served patients in those areas. *See* Billups 30(b)(6) Dep. at 175:10-25.

I. Policies or Practices Regarding Rates and Scheduling

When an aide was hired, CCC set the default hourly rate for that aide to the state minimum wage. Cuevas Dep. at 108:6-12; Billups 30(b)(6) Dep. at 111:19-113:1. Aides could

[3] *See* Harris Decl. Opp'n ¶ 63 n.13.

earn more than the minimum wage in two circumstances: (1) if the patient's contract provided for a higher rate, or (2) if a coordinator agreed to paid an aide an incentive rate for a particular patient or shift. Cuevas Dep. at 109:8-14, 116:12-20, 118:2-8; Billups 30(b)(6) Dep. at 116:9-22.

Where the coordinators negotiated individually with aides to provide an above-minimum rate, their slapdash method of communicating that rate to the payroll staff could take one of several forms. Defendants' coordinators might scribble down the higher rate on a spare piece of paper or on a sticky note, and then hand-deliver it to the payroll staff; or tell the payroll staff verbally (on the phone or by dropping by their desk); or send them an email, to communicate the rate change. Deposition Testimony of Rochester Payroll Supervisor Daline Martinez-Ramos ("Martinez-Ramos Dep."), Ex. C to Harris Decl. Opp'n, at 171:18-177:23; Cuevas Dep. at 113:6-116:8. From there, payroll staff would have to enter the adjusted rate into the system in order for the aide to be paid the correct amount. Billups 30(b)(6) Dep. at 117:22-118:1. Unless and until the new rate was entered, the aide would be paid the minimum wage for the shift. *Id*.

This system, was not materially different than that used by CCC's predecessor, Interim, was described by BlackTree Healthcare Consulting ("BlackTree")[4] as follows:

- When employee rates are updated in RSO, they revert back to the original rate when the schedule is rolled over.
    - This leads to payroll having to go into a high number of visits to update rates which is incredibly time consuming
    - These rates are inputted based off employee knowledge of staff which can lead to incorrect rates
- This can lead to either an under or overpayment to staff

Caro Dep. Ex. 19 at 15. The predictable result of this system was that aides were often paid the incorrect rate for their work, and a subsequent rate adjustment had to be performed, leading

[4] BlackTree conducted an operational assessment of the company in March 2017, upon which CCC relied in deciding to acquire Interim. Deposition Testimony of Defendants and CCC co-owner Alexander Caro ("Caro Dep."), Ex. O to Harris Decl. Opp'n, at 119:2l-123:3, 124:20-125:10 and Caro Exs. 18 & 19.

Plaintiffs to be paid a portion of their wages after their regular pay date. *See* Billups 30(b)(6) Dep. at 111:6-13; Cuevas Dep. at 61:5-16; *see also* Exhibit K to Harris Decl. Opp'n.

Although, under CCC's policies or practices, payroll staff were supposed to denote these rate adjustments in the system with a comment, that did not always happen. Billups 30(b)(6) Dep. at 118:2-8. To the extent that it did, there was little rhyme or reason to it. Defendants used at least 10 different codes to identify rate adjustments in RSO. *Id.* at 62:6-12 ("payitem"); 64:15-22 ("payitem adjustment"); 119:24-120:10 ("ERP"); 121:24-122:2; 124:3-14 ("pay rate adjustment"); 124:15-18 ("rate corrections"); 125:18-20 ("reimbursement"); 125:21-24 ("retro"); 126:7-127:17 ("ERR"); 128:21-23 ("owe"); 128:24-129:2 ("pay rate differential"); and 125:25-126:3 (still perhaps others). In Viventium (Defendants' payroll system), rate adjustments might be denoted as "special" or "TT," or under other codes. *Id.* at 239:24-240:8; 247:5-249:23; *see also* Ex. K to Harris Decl. Opp'n.

Coordinators were each assigned approximately 20-30 patients, *see* Deposition Testimony of Rochester Payroll Specialist Delilah Cruz ("Cruz Dep."), Ex. D to Harris Decl. Opp'n, at 31:11-19, and were responsible for finding aides to take on shifts with those patients, negotiating rates with aides and notating rate changes (as discussed above), communicating with aides and patients about schedule changes and adjusting the scheduled time in the homecare management software accordingly, communicating with patients and aides about aides who were late to a shift or did not show up to a shift or failed to submit their time for a shift, and communicating with patients and aides about variances between an aide's scheduled and reported time (discussed in more detail below), Cruz Dep. at 32:24-33:8; Cuevas Dep. at 45:18-50:2.

As Rochester Branch Manager Mark Cuevas testified, between all these duties, "the calls never stopped, our phones never stopped ringing. So you just never had enough lines and never

enough hands." Cuevas Dep. at 45:46-9; *see also* Cruz Dep. at 25:17-26:3 (testifying that the Rochester office did not have enough coordinators for the amount of work assigned to them). As a result, often, when an aide called the office, no one answered the phone, Cuevas Dep. at 43:25-44:5, 44:14-25, leaving an aide who was calling to communicate a schedule change unable to do so; moreover, even when an aide *was* able to communicate a schedule change to a coordinator, the coordinator sometimes failed to record the change in the homecare management software, *id*. at 46:20-51:5. When this happened, as discussed in more detail below, the aide's timesheet for the week would be flagged in the initial timesheet review as inconsistent with the schedule, increasing the chances the aide would be paid late for her work. *Id*. at 51:6-53:6.

II. Policies or Practices Regarding Submission and Verification of Time Records

At all relevant times, CCC's workweek ran from Saturday to Friday, and Plaintiffs were paid for their work the following Friday. Billups 30(b)(6) Dep. at 28:21-29:5. Each week, Plaintiffs were required to submit their time worked during the preceding workweek to CCC by no later than Monday at 10 am (later changed to 12 pm). *See* Cuevas Dep. at 59:14-16; Billups 30(b)(6) Dep. at 166:15-22, 188:20-23; Harris Decl. Opp'n ¶¶ 16, 53.

A. The RSO Period

During approximately the first year of the relevant period (the "RSO period"),[5] when Defendants used Riversoft ("RSO") as their homecare management software, all Plaintiffs were required to report their shift hours and activities to Defendants using paper timesheets. Billups 30(b)(6) Dep. at 165:18-22. Plaintiffs typically dropped those timesheets off at a designated drop box. Billups 30(b)(6) Dep. at 168:20-24; Martinez-Ramos Dep at 39:15-24. Each pay period, each of the Buffalo and Rochester offices received hundreds or thousands of aides' timesheets –

[5] The RSO period ran from Oct. 14, 2017 to Oct. or Nov. 2018. Billups 30(b)(6) Dep. at 18:24-19:14.

at least one timesheet, but often two or more, for every aide who had worked for Defendants in the prior work week. Billups 30(b)(6) Dep. at 175:12-25; Cuevas Dep. at 62:21-65:7.

A CCC staff member collected these timesheets several times each week and transported them (for a period, using a plastic garbage bag) back to CCC's office. Billups 30(b)(6) Dep. at 173:12-174:20.; Martinez-Ramos Dep. at 38:15-43:25; 50:5-51:5; *see also* Harris Decl. Opp'n ¶¶ 18, 55. Defendants' general practice was not to record the date of receipt of timesheets. *See* Billups 30(b)(6) Dep. at 199:20-25; *see also* Harris Decl. Opp'n ¶ 28.

On Monday afternoon each week, Defendants' payroll personnel would begin the week's payroll process in earnest. After retrieving the timesheets, CCC staff members were tasked with emptying the garbage bag of its hundreds or thousands of timesheets, dividing the timesheets amongst themselves, and alphabetizing them - a process that took until about 3 pm on Monday. Cruz Dep. at 56:19-57:3. Additional timesheets were added to the mix as staff returned to the drop boxes to collect them. Cuevas Dep. at 125:20-126:6; Martinez-Ramos 40:24-44:18. Next, usually toward the end of the day on Monday afternoon, two staff members began the lengthy process of "verifying" the hundreds or thousands of timesheets, by carefully reviewing and manually comparing each shift on each timesheet against the "master schedule," an electronic database that contained information about when and where each aide had been assigned to work that week. Cruz Dep. at 42:5-10. This process was not automated, requiring the two individuals involved to visually review hundreds or thousands of timesheets and compare hundreds or thousands of shifts against the master schedule. *Id.* at 57:11-17.

Under CCC's policy or practice, aides' timesheets were not verified unless they contained all of the following information: (1) the client's name and signature, (2) the aide's name and signature, (3) the dates and the times that the work was performed, and (4) the tasks that the aide

completed during that shift; and the dates and times on the timesheet precisely matched the dates and times at which the aide was scheduled to work. *Id.* at 40:17-42:10 and Cruz Ex. 1; Cuevas Dep. at 121:7-17. Unless and until an aide's timesheet was verified, it was CCC's policy or practice not to pay her for her time worked. Billups 30(b)(6) Dep. at 60:25-61:7; Billups Dep. at 45:5-13; Cuevas Dep. at 53:3-6, 121:7-122:22.

If a timesheet was missing *any* of the required information – even just the tasks completed during the shift – or if it did not precisely match what was in the system, the payroll staff brought the timesheet in question to the assigned coordinator to follow up with the patient and aide. Martinez-Ramos Dep. at 36:15-37:9. However, because the initial review of the timesheets was so time consuming, it was sometimes not until Wednesday that the coordinator received the timesheets that required follow up. Cruz Dep. at 58:15-19. As verified timesheets had to be submitted to corporate payroll by Wednesday afternoon, Billups 30(b)(6) Dep. at 84:20-25, this left little time for any corrections to be made, *see* Cruz Dep. at 64:13-16.

Nevertheless, it was CCC's policy or practice that where a timesheet could not be confirmed upon initial review, the coordinator would need to first speak to the patient to confirm that the aide worked the shift, Cuevas Dep. at 51:22-52:23, then speak to the aide to confirm the same, and then the aide would need to report to the office, pick up and correct their timesheet, bring the timesheet to the patient's house for their signature, and finally, return it to the office. *Id.* at 55:22-56:5; Billups Dep at 52:22-54:3.

If a timesheet was missing altogether or a shift was missing from a timesheet, CCC's policy or practice was to document the missing timesheet or shift with a "comment" in Riversoft, *see* Billups 30(b)(6) Dep. at 75:12-76:21, call the aide to find out if the aide had worked, and if they had, instruct them to bring in a signed timesheet, *id*. at 187:13-188:1; Billups Dep. at 45:5-

13, 52:22-54:3. Until the corrected, signed timesheet was received and verified, CCC's policy or practice was not to pay the aide, even if the aide orally confirmed to the coordinator the times they had worked, Billups 30(b)(6) Dep. at 60:25-61:1, and even if the reason the shift was not verified in the first place was a coordinator error, Cuevas Dep. at 48:13-50:23.

The unsurprising result of this system seemingly designed to delay payment to aides was that aides were not always paid their wages, including overtime, on their regular pay day. *See* Ex. K to Harris Decl Opp'n. Indeed, CCC had been forewarned, by BlackTree Healthcare Consulting in its March 2017 report that this cumbersome system (the same system as had been used by Interim) "delays payroll and opens up exposure to lost time slips." Caro Dep. Ex. 19 at 14.

B. The HHA Period

Beginning in October or November 2018 and continuing through the end of the relevant period (ie February 3, 2021) ("the HHA Period"), CCC utilized a homecare management system called HHA Exchange, Billups 30(b)(6) Dep. at 18:24-19:14 (sometimes referred to in Defendants' memorandum as "HHAX"). HHA Exchange allowed aides to clock in and out of their shifts using one of three electronic visit verification ("EVV") methods: calling an automated number from the patient's phone, using a fob installed in the patient's residence, or using the HHA Exchange app on the aide's cell phone. Billups 30(b)(6) Dep. at 200:18-201:15. Defendants could view, both in real time and after the fact, aides' EVV data. *Id.* at 201:20-24.

After aides clocked in and out using EVV, under CCC's policies or practices, the EVV, like the paper timesheets, had to be verified. Cuevas Dep. at 122:23-123:5. CCC only verified a shift if the aide clocked in and out using EVV, and the aide entered at least five plan of care tasks. *Id*. If an aide forgot to clock in or out at the time they arrived or left their shift, they could still clock in or out retroactively, as long as it was still the same day. Billups 30(b)(6) Dep. at

202:6-21. After the date of their shift, however, the only way an aide could submit their time was by paper timesheet. *Id.*; Cuevas Dep. at 56:2-5.

CCC's policy or practice was to call the patient of any aide who was scheduled to work a shift but had not clocked in within 15 minutes of the start of the shift, to confirm the aide's presence. Billups 30(b)(6) Dep. at 201:25-202:5; Cuevas Dep. at 177:19-181:13. Even if the patient confirmed that the aide was present, however, CCC's policy or practice was not to "verify" the aide's time unless and until the aide clocked in or submitted a paper timesheet. Billups 30(b)(6) Dep. at 201:25-202:5; Cuevas Dep. at 177:19-181:13. And, as was true during the RSO period, CCC's policy or practice was not to pay an aide for any shift that had not been verified. Billups 30(b)(6) Dep. at 201:25-202:5; Cuevas Dep. at 177:19-181:13.

In addition to calling the patient when an aide failed to clock in or out, per CCC policy or practice, the coordinator also contacted the aide to remind them to clock in and out and documented that communication in HHA Exchange using the note reason "EVV reminder." Billups Dep. at 79:2-9, 84:3-86:4; Exs. 11 and 12 to Billups Dep.

Use of EVV became mandatory in Buffalo on October 23, 2018 and in Rochester on October 30, 2018, and remained so despite frequent problems with HHA Exchange. Billups Dep. at 66:19-68:8; Cuevas Dep. at 156:6-157:21. For example, Cuevas testified that aides' clock ins and clock outs failed to register in HHA Exchange "with some frequency." Cuevas Dep. at 54:2-55:19. In addition, in 2019, there was an "ongoing problem" with HHA's "geofencing" about which aides "frequently complained," that prevented aides from clocking in or out using the app. *Id*. at 158:13-159:23. As well, HHA Exchange sometimes erroneously failed to automatically clock aides out and back in when they had back-to-back shifts for a single client, leading the shift not to be verified. *See* Billups 30(b)(6) Dep. at 301:14-303:11. When an aide's EVV clock in or

clock out failed due to an issue with HHA Exchange, under CCC policy or practice, the aide was required to call the office to notify CCC, and then "come to the office, collect a timesheet, go to the patient's home, get signatures and [then] return it back" to CCC. Cuevas Dep. at 54:17-58:11. Until the aide did all of those things, CCC's policy or practice was not to verify the shift, and until the shift was verified, the aide was not paid. *Id.*

III. Policies or Practices Regarding Deadline for Submission of Time Records

CCC required all verified timesheets and EVV to be submitted corporate payroll by Wednesday afternoon. Billups 30(b)(6) Dep. at 84:17-85:5. Although timesheets verified after that time could still be paid by the regular payday (Friday) if CCC used a manual check, *id*. at 190:5-191:14, it was not its regular practice to do so, *see* Martinez-Ramos Dep. at 46:16-47:2.

IV. Policies or Practices Regarding Travel From One Client to the Next

CCC's policy or practice was to schedule aides to work multiple shifts for different patients in a single day. Defendants routinely scheduled aides for shifts that were so close together temporally that aides could not reasonably use the limited time between them for personal purposes, requiring them to travel directly from one client to the next. *See* Declaration of Oretha Beh [Doc. # 573] ¶ 7; Declaration of Kimberley Balkum [Doc. # 574] ¶ 5; Plaintiffs' Interrogatory Responses, Ex. P to Harris Decl., at 1-43 (*see* Responses to Interrogatory No. 7).

Notwithstanding, CCC's policy or practice during the RSO period was not to generally pay aides for their time spent traveling from one client to the next – regardless of how much gap time there was between shifts. *See* Defs.' Mem. of Law in Support of Motion to Decertify the Conditionally Certified Collective Action [Doc. 582] ("Defs.' Br.") at 17.[6] During the HHA period, however, in tacit recognition of the reality that aides could not reasonably return home

[6] When referring to pages of Defendants' brief herein, Plaintiffs use the ECF page numbering.

between shifts when there was an hour or less of gap time, it was CCC's policy or practice to pay aides for the gap time between their shifts for different clients, as long as the gap was one hour or less. *See* Billups 30(b)(6) Dep. at 34:21-23. Aides were not required to submit timesheets for this travel time. *Id*. at 213:23-214:1.

Travel pay was not automatically included in the aides' paychecks, however. CCC's policy or practice was not to pay aides for travel time unless and until CCC ran a "travel time report" in HHA Exchange. *See* Martinez-Ramos at 164:19-165:19; Deposition Testimony of Finance Clerical Klay Eguizabal ("Eguizabal Dep."), Ex. E to Harris Decl. Opp'n, at 62:5-8. If a report was not run, the aides were not paid for their travel time. *Id*. Likewise, if the report was run late, the aides were paid late. *Id*. Additionally, throughout the relevant period, it was CCC's policy or practice not to reimburse aides for expenses incurred traveling between clients, even if Defendants paid the aide for her travel time. *See* Billups 30(b)(6) Dep. at 224:16-225:1.

ARGUMENT

I. Defendants' Basic Premise that § 216(b)'s "Similarly Situated" Requirement Is Comparable to Fed. R. Civ. P. 23's Commonality and Typicality Requirements Is Fundamentally Mistaken.

Defendants' memorandum is predicated upon the idea that in determining whether Plaintiffs are entitled to maintain a collective action against CCC pursuant to § 216(b), "[t]he analysis of whether employees are similarly situated is comparable to the 'typicality' and 'commonality' requirements of a Rule 23 class certification…" Defs.' Br. at 21 n.22. As shown below, the memorandum is thereby founded upon a fundamental failure to grasp the vast difference between the § 216(b) similarly-situated requirement on the one hand and the Rule 23 commonality and typicality requirements on the other and, more basically, the difference between a § 216(b) collective action and a Rule 23 class action.

Moreover, it is founded upon caselaw that predated, and is inconsistent with (and, indeed, in some instances was expressly abrogated by) the Second Circuit's decision in *Scott*, *supra*.[7] Defendants begin their argument by asserting:

> In deciding whether decertification is appropriate, courts generally consider . . . : (1) whether the factual and employment settings of the named and opt-in plaintiffs are similar or disparate; (2) whether defendants may assert various defenses that appear to be individual to each Plaintiff; and (3) whether fairness and procedural considerations support or go against proceeding as a collective action.

Defs' Br. at 22. Defendants then spend the entire "Argument" section of their memorandum discussing these three factors (*i.e.*, the "ad hoc approach") as applied to this case. *See id.* at 22-48. Thus, Defendants blithely ignore that in *Scott*, the Court of Appeals explicitly criticized use of this very approach to determining whether a collective action might be maintained.

Defendants, for example, rely heavily upon *Mendez v. U.S. Nonwovens Corp*., No. 12-cv-5583 (ADS) (SIL), 2016 WL 1306551, at *1 (E.D.N.Y. Mar. 31, 2016), citing it *nine* times in their memorandum, and *Ruiz v. Citibank, N.A*., 93 F. Supp. 3d 279 (S.D.N.Y. 2015), which they cite three times. But both cases were expressly cited in *Scott* as examples of decisions that had erroneously "imported the more rigorous requirements of Rule 23 into the similarly situated inquiry . . . conflat[ing] the requirements for class certification under Rule 23 with the requirements to proceed as a collective under § 216(b)."[8] 954 F.3d at 518 and n.8.

As several courts in this Circuit have noted, "the Second Circuit's criticism of the ad hoc approach makes clear that a district court pursuing such an approach – in the face of *Scott* –

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[7] Though it is controlling caselaw, Defendants, egregiously, do not cite *Scott* once in their brief.

[8] Likewise, Defendants rely on a number of cases that, while not expressly abrogated by *Scott*, employ the same ad hoc approach relied upon by Defendants that *Scott* rejected. *See, e.g., Hernandez v. Fresh Diet, Inc*., No. 12-CV-4339 (ALC) (JLC), 2014 WL 5039431 (S.D.N.Y. Sept. 29, 2014); *DeSilva v. N. Shore-LIJ*, 27 F. Supp. 3d 313 (E.D.N.Y. 2014); *Stevens v. HMSHost Corp*., No. 10 CV 3571 ILG VVP, 2014 WL 4261410, at *5 (E.D.N.Y. Aug. 27, 2014); *Zivali v. AT & T Mobility, LLC*, 784 F. Supp. 2d 456, 460 (S.D.N.Y. 2011); *Lugo v. Farmer's Pride Inc*., 737 F. Supp. 2d 291, 300 (E.D. Pa. 2010).

would likely be committing error." *Foster v. City of New York*, No. 14 CIV. 4142 (PGG), 2021 WL 1191810, at *7 n.9 (S.D.N.Y. Mar. 30, 2021); *Savinova v. Nova Home Care, LLC*, No. 3:20-CV-1612 (SVN), 2024 WL 1341113, at *6 (D. Conn. Mar. 29, 2024), *reconsideration denied*, No. 3:20-CV-1612 (SVN), 2024 WL 3552425 (D. Conn. July 26, 2024) (same); *see Mikityuk v. Cision US Inc*., No. 21-CV-510 (LJL), 2021 WL 5449606, at *3 (S.D.N.Y. Nov. 22, 2021) ("The Circuit has specifically rejected the 'ad hoc' approach . . . .").

Section 216(b) provides that an action to recover on the overtime compensation liability created by 29 U.S.C. §§ 207 and 216(b) "may be maintained against any employer… by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." Thus, at the current stage of this litigation, the issue is whether each Opt-In Plaintiff in a putative collective is similarly situated to Balkum and/or Beh within the meaning of § 216(b). It is *not* whether each Opt-In Plaintiff is similarly situated to other Opt-In Plaintiffs in a putative collective.[9] This reading of the statutory language is confirmed by *Scott*, 954 F.3d at 521 ("On remand, the district court shall reconsider whether named plaintiff and opt-in plaintiffs are 'similarly situated'…") and *id*. at 522 ("If named plaintiffs and opt-in plaintiffs are similar in some respects material to the disposition of their claims, collective treatment may be to that extent appropriate…"); *accord: Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010). Defendants do not dispute this. *See, e.g.,* Defs.' Br. at 20.

In a Rule 23 class action, the commonality prerequisite in Rule 23(a)(2), requiring that there be questions of law or fact common "to the class," focuses only on the relationships among

[9] In addition to initiating this action by filing the Complaint (Doc. 1) with two other named plaintiffs, Balkum and Beh filed consents to opt in to the collective action. (Docs. 38, 40). They did so only because the FLSA has been read by some courts to require a named plaintiff to file such a consent to become a party plaintiff to a collective action. *E.g., Harkin v. Riverboat Services, Inc*., 385 F.3d 1099 (7th Cir. 2004). Nevertheless, because Balkum and Beh were among the individuals who filed this action and whose names therefore appear in the caption, this MOL refers to them as the "Named Plaintiffs."

absent class members. Thus the commonality prerequisite of Rule 23(a)(2) is wholly unlike the similarly situated requirement of § 216(b) which, as the parties agree, concerns the relationship between a named plaintiff and opt-in members of a putative collective.

The typicality prerequisite in Rule 23(a)(3), requiring that claims of "the representative parties" are typical of the claims "of the class," focuses on the relationship between named plaintiffs and absent class members. Nonetheless, it is readily apparent that "typicality" is unlike "similarly situated" in material ways. In a Rule 23 class action, a named plaintiff is a designated representative of absent class members, who are non-parties. The latter may not obtain counsel of their choosing; they are represented by class counsel who must be approved by the court and who are among the attorneys already representing the named plaintiffs. The purpose of the typicality prerequisite, like that of the adequacy-of-representation prerequisite in Rule 23(a)(4), is to protect the legal interests of absent class members, precisely because the latter are not party plaintiffs and have no ability to choose the class counsel who will represent them.

That concern is not implicated in a collective action where an opt-in plaintiff acts affirmatively and individually to join the action, thereby becoming a party plaintiff, and who thereby is free to choose to be represented by counsel for the named plaintiffs or to be represented by separate counsel of his/her own choosing. *Scott*, 954 F.3d at 517 ("Rule 23(a)'s requirements of adequacy and typicality" have "no application to the FLSA"); *id*. at 519 ("Rule 23's requirements of adequacy and typicality are included to protect the due process rights of absent class members, which is not a consideration in a nonrepresentative action such as a collective action."). Because the purpose of the Rule 23(a)(3) requirement is entirely unrelated to the purpose of § 216(b)'s similarly-situated requirement and because a class action under the modern-day Rule 23 is wholly unlike a collective action under § 216(b), Defendants cannot

seriously contend that the former is comparable to the latter.

In short, "[t]he present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Advisory Committee's Note to 1966 Amendment to Rule 23, 39 F.R.D. 98, 104 (1966). *Accord: Scott*, 954 F.3d at 520 ("[W]e hold that the requirements for certifying a class under Rule 23 are unrelated to and more stringent than the requirements for 'similarly situated' employees to proceed in a collective action under § 216(b). Accordingly, it is error for courts to equate the requirements of § 216(b) with those of Rule 23 in assessing whether named plaintiffs are 'similarly situated' to opt-in plaintiffs under the FLSA.").[10]

II. Defendants' Argument that this Court Should Not Authorize Maintenance of a Collective Action Pursuant to § 216(b) Because the Named Plaintiffs and the Members of the Putative Collective Were Not Victimized by a Common Employer Policy or Practice as that Term Is Used in Rule 23 Caselaw Is Incorrect as a Matter of Law.

Defendants contend that, in order to maintain a collective action pursuant to § 216(b), Plaintiffs must show that all opt-in members of a proposed collective and the Named Plaintiffs were victimized by CCC pursuant to a common policy on practice. *See* Defs.' Br. at 17-18, 22, 23, 32-39. While a common employer policy or practice may help an FLSA plaintiff show that "named plaintiffs and opt-in plaintiffs are alike with regard to some material aspect of their litigation," *Scott,* 954 F.3d at 516, the argument that such a common policy or practice is the only path to demonstrating the similarity required by § 216(b) is incorrect.

[10] There is no small irony in the attempt by Defendants to analogize the modern-day Rule 23 requirements of commonality and typicality for certification of a class action to the similarly-situated requirement in § 216(b) for maintenance of a collective action. As the court in *Turner v. Chipotle Mexican Grill, Inc.*, 123 F., Supp. 3d 1300, 1306 (D. Col. 2015) recognized, the criteria under Rule 23 for a so-called spurious class action under the pre-1966 version of that Rule were analogous to the § 216(b) standard. Rule 23(a)(3) (1965) allowed plaintiffs to litigate *en masse* where they asserted a "several" right, shared a "common question of law or fact affecting the several rights" and sought "common relief." *See* 308 U.S. 645, 689 (1939). Moreover, unlike true class actions but like § 216(b) collective actions, spurious class actions involved joinder whereby each plaintiff joined the litigation on their own initiative and individually. *See also In re Chipotle Mexican Grill, Inc.,* No. 17-1028, 2017 WL 4054144, at *2 (10th Cir. Mar. 27, 2017) (approving analogy of spurious class action to § 216(b) collective action). *However by the 1966 revision of Rule 23, the spurious class action was eliminated from Rule 23. See Scott,* 594 F.3d at 519.

We have already shown that the commonality and typicality requirements of Rule 23 are not comparable to the § 216(b)'s similarly-situated requirement. Therefore, to the substantial degree that Defendants rely on that supposed 'comparability' as the basis for their 'common policy or practice' contentions, such reliance is misplaced (even assuming *arguendo* that Rule 23 requires a showing of such a policy or practice as a precondition to class certification).

If Defendants mean to argue that Plaintiffs must demonstrate a common policy or practice as that concept has been discussed in Rule 23 caselaw (even if, as shown above, there is no comparability between Rule 23(a) and § 216(b)), it should be noted that several courts have rejected that argument and expressly held that a plaintiff seeking leave to maintain a collective action under § 216(b) *need not* demonstrate a common policy or practice by the employer. *E.g., O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) (cited approvingly by *Scott*, 954 F.3d at 518) (while lead plaintiff bears burden of showing opt-in plaintiff similarly situated to lead plaintiff, "[s]howing a 'unified policy' of violations is not required"); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095 (11th Cir. 1996) ("We… hold that a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)").[11] As the court in *Harris v. Med. Transp. Mgmt., Inc.*, No. 17-cv-01371 (APM), 2021 WL 3472381 (D.D.C. Aug. 6, 2021, stated:

> Nor is the court persuaded . . . that there *must* be evidence of a common FLSA-violating policy or practice to satisfy the similarly situated standard. . . . Although a common policy or practice might be *sufficient* to show party plaintiffs are similarly situated, this case illustrates why a common policy or practice is not *necessary.*

Id. at *6 (emphases in original); *see also Savinova*, 2024 WL 1341113, at *5 ("[M]embers of an FLSA collective need not bring identical claims or identify a singular policy that affects all

[11] The Court of Appeals referred to "discrimination" because *Grayson* involved a claim of age discrimination under the Age Discrimination in Employment Act. That Act expressly incorporates the § 216(b) opt-in collective action and its similarly-situated requirement. *See* 29 U.S.C. § 626(b).

plaintiffs uniformly; rather, the plaintiffs need only 'share one or more similar questions of law or fact material to the disposition of their FLSA claims'" (quoting *Scott*, 954 F.3d at 521)).

Notably, in *Scott*, after setting forth the standard for determining whether a named plaintiff and opt-in members of a putative collective were similarly situated within the meaning of § 216(b), to wit, whether "the opt-in plaintiffs are similar to the named plaintiffs in some respects material to the disposition of their claims," 954 F.3d at 516, the Court of Appeals noted that standard was "consistent" with *McGlone v. Contract Callers, Inc.*, 49 F. Supp. 3d 364, 367 (S.D.N.Y. 2014). *McGlone* had noted that named and opt-in plaintiffs were similarly situated under the FLSA where they "were common victims of a FLSA violation pursuant to a systematically-applied company policy or practice, *such that there exist common questions of law and fact that justify representational litigation*." 954 F.3d at 516 (quoting *McGlone*, 49 F. Supp. 3d at 367) (emphasis added). In short, the key question is whether "there exist common questions of law and fact that justify" a collective action under §216(b), and a company policy or practice is relevant only to the extent it may help answer that question.

In addition to *Scott*,[12] several other appellate courts have explained in great detail *how* and *why* collective actions are "quite unlike" Rule 23 class actions. And the differences highlighted by those courts in turn explain why a common policy or practice need not be demonstrated in order to maintain a collective action under § 216(b).

In *Vanegas v. Signet Builders, Inc.*, No. 23-2964, 2024 WL 3841024 (7th Cir. Aug. 16, 2024), the Seventh Circuit explained at length the important distinctions between a collective action under the FLSA and a class action under Rule 23. Although *Vanegas* concerned whether a court must have specific jurisdiction over the claim of each opt-in plaintiff in an FLSA collective

[12] *See* Plaintiffs' Memorandum of Law in Support of Motion for Leave to Maintain Collective Action [Doc. # 576] at 13-17 for a detailed discussion of *Scott*.

action, *id*. at *2, which is not at issue here, its analysis is pertinent. The Seventh Circuit began by comparing a collective action to two other forms of aggregate litigation: (1) a California procedure called a "mass action" and (2) a Rule 23 class action. *Id.* After describing so-called "mass actions" as actions concerning "individual cases, brought by individual plaintiffs," *id*., the Court "f[ou]nd that an FLSA collective tracks with a mass action – *and is quite unlike* a class action, *id.* at *3 (emphasis added).

> We start… with the text that creates the FLSA collective action, which sheds light on its structural parallels with the mass action. Specifically, 29 U.S.C. 216(b) provides:
>
> > An action . . . may be maintained against any employer… by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought we.
>
> Notably, the statute calls the prospective opt-ins "party plaintiffs." . . . Section 216(b) . . . , [unlike Rule 23], confers on opt-in plaintiffs the rights and duties of parties. *See* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1807 (3d ed. 2005) ("[E]very plaintiff who opts into a collective action has party status, whereas unnamed class members in Rule 23 class actions do not.").
>
> * * *
>
> Consider, too, what § 216(b) omits. Nothing in the statute ensures adequate representation. Once an employee "gives his consent in writing" . . . his interest merges into the suit – quite unlike the Rule 23 process, where "lead plaintiffs earn the right to represent the interests of absent class members by satisfying all four criteria of Rule 23(a) and one branch of Rule 23(b)." [*Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th Cir. 2020)]. "Section 216(b) has nothing comparable to Rule 23(b)(3)'s requirements of predominance or superiority," *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 519 (2d Cir. 2020). The "two provisions bear little resemblance to each other," *Fischer* [*v. Fed. Express Corp.*, 42 F.4th 366, 376 (3d Cir. 2022)] (quoting *Scott*, 954 F.3d at 519) . . . . .
>
> The statute's history . . . further confirms that FLSA collectives work differently from class actions. "In response to excessive representative litigation, Congress added the opt-in provision to the FLSA in 1947." *Canaday* [*v. Anthem Cos., Inc.*], 9 F.4th [392,] 402 [(6th Cir. 2021)]. When the first FLSA suits were brought in the late 1930s and early 1940s, they often *were* representative, and

> plaintiffs not wishing for the judgment to bind them had to opt out. In those days, the statute "gave employees and their 'representatives' the right to bring actions to recover amounts due under the FLSA." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989). The Portal-to-Portal Act of 1947 effected that change, essentially giving plaintiffs in representative actions 120 days to become party plaintiffs or find their claims time-barred. . . .
>
> The whole idea was "limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffmann-La Roche Inc. v. Sperling,* 493 U.S. 165, 173 (1989). Setting out to curtail representative suits, Congress chose to "create a system of 'permissive joinder' rather than creating 'so-called class actions.'" *Fischer*, 42 F.4th at 379 (quoting *Fink v. Oliver Iron Mining Co*., 65 F. Supp. 316, 318 (D. Minn. 1941)). To ensure FLSA plaintiffs were real parties in interest, Congress made them real *parties*.
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> * * *
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> What is more, in practice courts treat FLSA collectives as agglomerations of individual claims. For one thing, "each FLSA claimant has the right to be present in court to advance his or her own claim." Wright & Miller § 1807. Further, the statute of limitations on opt-in plaintiffs' claims enjoys tolling only after the plaintiff files her consent, which goes to show the focus on a plaintiff's own management of her claim. *See Mickles v. Country Club, Inc.,* 887 F.3d 1270, 1281 (11th Cir. 2018). Rule 23 class actions work the opposite way: "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974). Finally, "there are no anonymous plaintiffs" in a collective action. *Anderson v. Montgomery Word & Co., Inc.,* 852 F.2d 1008, 1016 (7th Cir. 1988). From filing to judgment, "collective actions permit individualized claims and individualized defenses." *Canaday*, 9 F.4th at 403…
>
> In short: FLSA collective actions are unlike class actions. . . [A] collective action is no more than a consolidation of individual cases . . . .

Vanegas, 2024 WL 3841024, at *3-5 (emphases in original).

Canaday v. Anthem Cos., Inc., 9 F.4th 392 (6th Cir. 2021), likewise identified and analyzed material differences between § 216(b) and Rule 23. Under the FLSA,

> "[o]nce they file a written consent, opt-in plaintiffs enjoy party status as if they had initiated the action. The Act says that each similarly situated employee who opts in amounts to an "individual claimant," whose lawsuit counts as "commenced" on the day the employee files her written consent to join the collective action. *See* [29 U.S.C.] § 256.

Id. at 394.

> A Rule 23 class action is representative, while a collective action under the FLSA is not. From 1938 until 1947, the FLSA "gave employees and their 'representatives' the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute." *Hoffmann-LaRoche Inc. v. Sperling,* 493 U.S. 165, 173 (1989). In response to excessive representative litigation, Congress added the opt-in provision to the FLSA in 1947. *Id. Knepper v. Rite Aid Corp*., 675 F.3d 249, 255 (3d Cir. 2012) (noting that the amendment "banned what it termed 'representative actions'"); *Scott v. Chipotle Mexican Grill, Inc*., 954 F.3d 502, 519 (2d Cir. 2020) ("Congress amended § 216(b) in 1947 expressly to put an end to representational litigation in the context of actions proceeding under § 216(b)."). The amendment served the "purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffmann-La Roche*, 493 U.S. at 173. . . .
>
> That means all plaintiffs in an FLSA collective action must affirmatively choose to "become parties" by opting into the collective action. *Genesis Healthcare*, 569 U.S. at 75; *accord Bigger v. Facebook, Inc*., 947 F.3d 1043, 1047 n.1 (7th Cir. 2020). Once they opt in, these plaintiffs become "party plaintiff[s]" 29 U.S.C. § 216(b), enjoying "the same status in relation to the claims of the lawsuit as do the named plaintiffs," *Prickett v. Dekalb Cnty*., 349 F.3d 1294, 1297 (11th Cir. 2003). That is a distant cry from how a Rule 23 class action works.
>
> Class actions also include procedural protections that collective actions do not. Rule 23 requires plaintiffs to establish numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). Plaintiffs in an FLSA collective action need only show that their employment makes them similarly situated to one another. *See* 29 U.S.C. § 216(b); *see also O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) ("While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA."); *Swales v. KLLM Transp. Servs., L.L.C*., 985 F.3d 430, 433 (5th Cir. 2020).
>
> Statutes of limitations also operate differently in the two settings, confirming that the two actions represent distinctions in kind, not degree. . . . To like effect, Rule 23 classes must be represented by "class counsel," Fed. R. Civ. P. 23(g), while opt-in plaintiffs in an FLSA collective action have "the right to select counsel of their own choosing," *Fenley v. Wood Grp. Mustang, Inc.*, 170 F. Supp. 3d 1063, 1073 (S.D. Ohio 2016). . . . [C]ollective actions permit individualized claims and individualized defenses, "in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases." *Campbell,* 903 F.3d at 1105. Class actions, on the other hand, present "a unitary, coherent claim" that moves through litigation at the named plaintiff's direction and pace. *Lyngaas* [*v. Curaden Ag*,]*,* 992 F.3d [412,] 435 [(6th Cir. 2021)].

Id. at 402-03 (emphases in *Campbell*).

In *Scott*, in defining the standard for collective actions under § 216(b), the Court of Appeals adopted the holding of and analysis in *Campbell,* which also discussed at length the differences between a § 216(b) collective action and a Rule 23 class action.

> The contrast with class action practice is instructive. Rule 23 allows for representative actions in which class members' interests are litigated by the named plaintiff… [T]he district court must initially approve the creation of a class and the appointment of an adequate representative. Proceeding as a class action is thus conditioned on the court's approval and results in a less active role in the litigation for members of the class than if litigating individually.
>
> A collective action, on the other hand, is not a comparable form of representative action. Just the opposite: Congress added the FLSA's opt-in requirement with the express purpose of "bann[ing]" such actions under the FLSA. Portal-to-Portal Act of 1947, Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87; *Hoffmann-La Roche Inc. v. Sperling,* 493 U.S. 165, 173 (1989). A collective action is more accurately described as a kind of mass action, in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases – capitalizing on efficiencies of scale, but without necessarily permitting a specific, named representative to control the litigation, except as the workers may separately so agree. *See Abraham v. St. Croix Renaissance Grp., L.L.L.P.*, 719 F.3d 270, 272 n. 1 (3d Cir. 2013). . . .

Campbell, 903 F.3d at 1105 (emphases in original, citations omitted).

The principal lesson to be drawn from these appellate decisions is that, by § 216(b), Congress chose to create a system of "permissive joinder" rather than a system of class actions. *Vanegas*, 2024 WL 3841024, at *4 (quoting *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 379 (6th Cir. 2022)). As a consequence, FSLA collective actions are simply "agglomerations of individual claims." *Id*. In other words, "a collective action is no more than a 'consolidation of individual cases, brought by individual plaintiffs.'" *Id.* at *5 (quoting *Mussat v. IQVIA, Inc*., 953 F.3d 441, 446 (7th Cir. 2020)). Accordingly, "collective actions permit individualized claims and individualized defenses," *Vanegas*, at *4 (quoting *Canaday*, 9 F.4th at 403), at least where individualized claims share legal and factual similarities material to the disposition of those claims, *Scott*, 954 F.3d at 516, and/or individualized defenses share legal and factual similarities

material to the disposition of those defenses. *Vanegas*, at *4 (quoting *Canaday*, 9 F.4th at 403). Plaintiffs have already shown that FLSA overtime compensation claims of Beh and/or Balkum share legal and factual similarities with the same claims asserted by 28 other Opt-Ins. *See* Doc. 576 at 17-21. And the defenses asserted to the claims of Balkum and Beh share legal and factual similarities with the defenses asserted to the claims of those 28 other Opt-Ins. *See infra* at 23-29.

If Balkum and/or Beh and those other 28 Opt-In Plaintiffs had jointly filed a single complaint, making the same FLSA overtime compensation claims each of them asserts here, they could have litigated and tried those claims in a single action. Given that reality, there is no persuasive reason Plaintiffs should not be permitted to do so here by way of a collective action. *See Scott*, 954 F.3d at 520 (§216(b) standard for joinder of parties less stringent than standard for permissive joinder and trial consolidation set forth in Fed. R. Civ. P. 20 and 42, respectively); *Campbell*, 903 F.3d at 1112 and nn.14, 15 (citing appellate authorities) (same). Congress created the §216(b) collective action to improve the efficiency of judicial proceedings involving FLSA claims. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). This was for the benefit of the courts as much as for litigants. *Id*. Requiring the 28 other Opt-Ins to start anew more than 4 ½ years after joining this action, requiring Defendants to defend multiple new individual actions, requiring witnesses to make repeated appearances to give testimony at separate trials, and imposing on the courts the burden of adjudicating those multiple individual actions, all notwithstanding the overlapping legal and factual similarities in both the individual employees' claims and in the defenses asserted to those claims, would hardly be consistent with Congress's aim in enacting §216(b).

III. The Members of the Putative Collective Are Similarly Situated to the Named Plaintiffs – Whether or Not a Common Policy or Practice is Required.

Though as shown in Point II, above, it is unnecessary to prove the existence of a common

policy or practice – at least as that phrase is used in the Rule 23 context – even if there were such a requirement, Plaintiffs here have satisfied it with respect to all their claims.[13]

A. Plaintiffs' Claims for Late Payment of Overtime

With respect to Plaintiffs' claims for late payment of overtime, Plaintiffs have shown, based on CCC's payroll records, that CCC paid each Plaintiff overtime late on one or more occasions. *See* Declaration of Jessica Harris in Support of Plaintiffs' Motion to Maintain Collective [Doc. # 575] ¶¶ 37-43, 74-97 & Exs. 5, 5a, 5b, and 5c thereto. This is not disputed (as far as Plaintiffs are aware).

Defendants state, however, that they intend to raise the affirmative defense that they are not liable under the FLSA because when overtime payments were made after the regular pay period, it was because the correct amount of overtime could not be determined until some time after the regular pay period, and that they paid the excess overtime compensation as soon after the regular pay period as was practicable. *See* Defs.' Br. at 30 (citing 29 C.F.R. § 778.106).[14] Presumably, Defendants' argument is based on their contention that when overtime was paid late it was typically because the Plaintiff had failed to timely submit their timesheet or EVV, and that absent such timesheet or EVV, Defendants could not timely determine the correct amount of overtime to pay the Plaintiff. In making this argument, however, Defendants necessarily must

[13] Defendants address in their motion several claims Plaintiffs are not raising, namely: claims regarding training compensation, preliminary and postliminary work, and compensation for laundering uniforms at home. As these are not the bases for Plaintiffs' FLSA compensation claims, they are not addressed herein.

[14] Though Defendants do not characterize this as an affirmative defense, as this Court has previously recognized, it is an affirmative defense. *See* Report and Recommendation on Plaintiffs' Motion for Class Certification [Doc. # 487] at 33. *See also Parker v. City of New York*, No. 04 CV 4476 (BSJ) (DCF), 2008 WL 2066443, at *11 (S.D.N.Y. May 13, 2008) (cited by Defendants at pg. 40) (finding that Defendants had met their burden under 29 C.F.R. § 778.106 of demonstrating that they could not have paid the overtime sooner); *Inclan v. New York Hosp. Grp., Inc.*, 95 F. Supp. 3d 490, 500 (S.D.N.Y. 2015) ("*Defendants* do not—and could not—argue that the Restaurant's claimed practice of making *ad hoc* corrections to unlawfully low pay when prompted by employees met objective standards of prompt payment." (Emphasis added)); *see also Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc*., 7 F.4th 50, 63 (2d Cir. 2021) ("An affirmative defense is a defense that will defeat the plaintiff's ... claim, even if all allegations in the complaint are true, rather than an attack on the truth of the allegations, or a rebuttal of a necessary element of the claim." (Internal quotation marks omitted)).

rely on generalized evidence of their timekeeping and payroll policies and practices (*see, e.g.,* Defs.' Br. at 40-41) because they did not maintain records of when Plaintiffs submitted their timesheets, *see* Billups 30(b)(6) Dep. at 199:20-25; *see also* Harris Decl. Opp'n ¶ 28. Nor, of course, does any individual Plaintiff recall such information with respect to any particular date. *See, e.g.,* Plaintiffs' Interrogatory Responses, Ex P to Harris Decl. Opp'n, at 44-59 (*see* Responses to Interrogatory No. 10).

As a result, Plaintiffs, in response, also necessarily rely on generalized evidence of CCC's policies or practices. For example, Plaintiffs argue that it is reasonable to conclude, based on CCC's policies or practices applicable to all Plaintiffs (as detailed below), that in those instances in which Plaintiffs were paid overtime late, CCC knew or should have known that Plaintiffs had worked more than 40 hours and were entitled to overtime compensation, and CCC *could have* timely calculated and paid Plaintiffs the overtime owed to them; that under CCC's policies or practices, the majority of late payments *could not have been* the result of a late timesheet, *see* Harris Decl. ¶¶ 28–46 and Exhibit K thereto; that although CCC's policies or practices often make it impossible to identify why any particular payment was late, there is no basis for concluding in those instances that CCC *could not have* timely paid the Plaintiffs; and that CCC's policies or practices made it likely that Plaintiffs would sometimes be paid late even when CCC knew or should have known that the Plaintiffs had performed overtime. In short, Plaintiffs were common victims of CCC's policy not to pay them for overtime unless and until CCC "verified" their timesheets or EVV – regardless of whether CCC knew or should have known in time to pay Plaintiffs by their regular payday, that they performed overtime work.

Plaintiffs' claims (and Defendants' defenses), accordingly, raise numerous similar issues of fact and law (regardless of whether a common policy or practice is required). *Foster* is

instructive on this point. 2021 WL 1191810. In that (post-*Scott*) case, the plaintiffs contended that the City of New York had violated the FLSA by failing to pay overtime for work performed before and after shifts and during off-the-clock meals. *Id*. at *1. Under the City's policies, the City did not automatically pay employees for all time between their punch-in and punch-out; rather, employees had to obtain pre-approval for all overtime work, as well as submit an overtime slip which also had to be approved. *Id*. at *2. On these facts, the Court ruled that the plaintiffs had "presented persuasive evidence of a common policy or practice that deprived them of full compensation for all their overtime," and thus that collective treatment was appropriate, *id*. at *6-7, even though the City did pay employees for their overtime work when it was approved (and therefore did not have a policy of not paying overtime in any circumstance).

As to similar issues of fact, in a Report and Recommendation adopted by the district court, Magistrate Judge Lehrburger noted the following:

> [A]ll Plaintiffs . . . were subject to the same CityTime-keeping and compensation policies, including mandatory use of CityTime, mandatory pre-approval of overtime, automatic deduction of one hour for meals, and the City's failure to compensate Plaintiffs for performing all non-pre-approved pre-shift, meal-period, and post-shift work about which supervisors and managers had knowledge.

Id. at *6 (quoting *Foster v. City of New York*, No. 14-CV-4142 (PGG) (RWL), 2020 WL 8173266, at *6 (S.D.N.Y. Oct. 30, 2020)); *see id*. at *7. The district court also found that the plaintiff "share[d] a 'similar issue of law' with respect to the City's obligation under the FLSA to pay for all overtime about which it had knowledge, regardless if pre-approved or not." *Id*. at *7.

So, too, here. Plaintiffs all share a similar issue of law that is material to the resolution of their claims with respect to Defendants' obligation under the FLSA to timely pay for all overtime about which they knew or should have known, regardless of whether the overtime was "verified" by CCC. Plaintiffs here, like those in *Foster*, also share a number of similar issues of fact that are

material to their claims with respect to Defendants' policies and practices. As Defendants admit, (and as in *Foster*) all Plaintiffs were required to use the same timekeeping systems – initially, paper timesheets, and later HHA Exchange. *See* Billups 30(b)(6) Dep. at 164:25-165:22, 200:14; Billups Dep. at 66:19-68:5; Cuevas Dep. at 63:21-64:22, 156:6-157:21. Plaintiffs were, in one or more workweeks, paid overtime on a date later than their regular payday. *See* Pls.' Mem. Supp. Mot. to Maintain Collective [Doc. #576]. All Plaintiffs were subject to the same compensation policies and practices (as in *Foster*), including:

- CCC's policy or practice of not paying Plaintiffs for their work until they submitted a timesheet or EVV and that timesheet or EVV was verified by Defendants – regardless of whether Defendants knew or should have known prior to Plaintiff's regular payday that the work was performed. Billups 30(b)(6) Dep. at 60:25-61:7; Billups Dep. at 45:5-13; Cuevas Dep. at 121:24-123:16.
- CCC's policies or practices regarding when and how Plaintiffs could submit timesheets or EVV, including CCC's policy of not accepting aides' oral statements regarding their work time, even if HHA Exchange was not working. *See, e.g.*, Billups 30(b)(6) Dep. at 166:11-22, 168:20-169:25, 183:24-186:20, 200:14-202:21, 210:15-210:20, 211:9-212:7; Cuevas Dep. at 51:22-53:18, 55:22-58:11, 122:23-123:16, 126:2-8; Cruz Dep. at 47:6-48:13, 49:22-50:7, 63:23-64:12; *see also* Harris Decl. Opp'n ¶¶ 16, 19-21, 48, 53, 56.
- CCC's policies or practices regarding when and how Plaintiffs' timesheets were collected, including CCC's practice of collecting hundreds of timesheets in large garbage bags, at multiple different times, creating a likelihood that timesheets could be lost. *See, e.g.*, Martinez-Ramos Dep. at 38:12-43:25, 48:14-50:23; Billups 30(b)(6) Dep. at 173:12-174:20; Cuevas Dep. at 126:2-6; *see also* Harris Decl. Opp'n ¶¶ 18, 55.

- CCC's policy or practice of tasking just a few staff members with manually reviewing, inputting, and comparing timesheets to the master schedule and then delivering timesheets to coordinators to contact patients and aides, despite CCC's knowledge that this system created a great deal of delay and opened up exposure to lost time slips. *See, e.g.*, Billups 30(b)(6) Dep. at 115:17-20; Cruz Dep. at 17-21, 39:3-54:12; Caro Dep. at 119:2l-123:3 and Caro Exs. 18 & 19 (*see especially* Caro Ex. 19 at 14 ("[The payroll] process . . . delays payroll and opens up exposure to lost time slips")).
- CCC's general policy or practice of not recording the date of receipt of timesheets. *See* Billups 30(b)(6) Dep. at 199:20-25; *see also* Harris Decl. Opp'n ¶ 28.
- CCC's policy or practice of not verifying timesheets or EVV that were missing information based on Plaintiffs' oral corrections, and instead requiring Plaintiffs to go to the office, pick up a timesheet, bring it back to the patient's house, and then return it to CCC's office before the Monday deadline, even though in these circumstances CCC knew or should have known the aide had worked. *See* Cuevas Dep. at 55:22-58:11, 122:23-123:16; *see also* Harris Decl. Opp'n ¶¶ 19-21.
- CCC's policy or practice of not verifying timesheets or EVV if missing care tasks, or an aide's or a client's signature, even if the aide stated their hours of work on the timesheet and/or EVV (and therefore CCC knew or should have known they worked). *See* Cruz Dep. at 40:17-42:4, 47:6-48:13, 49:22-50:7, 63:23-64:12, and Cruz Ex. 1; Cuevas Dep. at 55:22-58:11, 122:23-123:16; *see also* Harris Decl. Opp'n ¶¶ 19-21.
- CCC's policy or practice of requiring aides to submit their time through HHA Exchange despite CCC's knowledge that the app frequently did not function properly. *See* Billups Dep. at 57:17-58:4, 66:19-68:8; Cuevas Dep. at 61:17-62:4, 54:2-55:19, 156:6-160:12,

161:16-21; *see also* Harris Decl. Opp'n ¶¶ 47-48.

- CCC's policy or practice of calling aides if they did not clock in or out of a shift to ask if they were present at the shift, and of calling aides if they failed to turn in a timesheet to find out if they had worked, as well as its policy or practice of refusing to pay aides for time orally reported to CCC during such calls unless a paper timesheet was submitted and verified. *See* Billups 30(b)(6) Dep. at 60:25-61:1, 185:7-20, 187:13-188:1, 201:25-202:5; Cuevas Dep. Tr. 177:19-181:13; Billups Dep. at 45:5-13, 52:22-54:3.
- CCC's policy pr practice during the RSO period of documenting with a "comment" when a scheduled shift did not appear on an aide's submitted timesheet, *see* Billups 30(b)(6) Dep. at 75:12-76:21, and its policy during the HHA period of documenting in HHA Exchange all communications with aides concerning an aide's failure to clock in or out using the note reason: "EVV reminder" (thereby permitting a factfinder to identify those shifts that were paid late because of a late timesheet submission), Billups Dep. at 79:2-9, 84:3-86:4 and Exs. 11 and 12 to Billups Dep; *see* Harris Decl. Opp'n ¶ 46.
- CCC's policies or practices with respect to setting and adjusting aides' rates of pay, including its policy or practice of setting the default rate for all aides at the minimum wage rate and then having to adjust, for each contract, the rate applicable to that contract, Billups 30(b)(6) Dep. at 111:19-113:22; Cuevas Dep. at 107:15-109:4, 116:12-118:8; its practice of permitting numerous different coordinators to negotiate rate changes with aides, and its practice of recording coordinators' agreement with aides to pay incentive rates on post-it notes and by hand on pieces of paper rather than entering them directly into the system, creating conditions ripe for errors and leading CCC to underpay aides on many occasions (and thereafter, having to correct those underpayments, leading to late

payment of wages to aides), Billups 30(b)(6) Dep. at 116:9-118:1; Cuevas Dep. at 109:8-116:8; Martinez-Ramos Dep. at 171:18-177:23; *see also* Caro Dep. at 119:2l-123:3, 124:20-125:10 and Caro Exs. 18 & 19 (*see especially* Caro Ex. 19 at 15 (system described above "can lead to either an under or overpayment of staff")).

- CCC's policies or practices with respect to how rate corrections were denoted in Riversoft and Viventium. *See* Billups 30(b)(6) Dep. at 118:2-141:11, 240:6-8, 249:21-23 (relevant to showing which late payments were the result of rate corrections, and thus could not have been due to a late timesheet).
- CCC's policy or practice, during the HHA Exchange period, of not paying aides for travel time until CCC ran a travel time report in HHA Exchange, such that if a report was not timely run, the aides were not timely paid for their time spent traveling from one client to another. *See* Martinez-Ramos at 165:16-19; Eguizabal Dep. at 61:11-62:8.
- CCC's policy or practice of not requiring aides to submit timesheets for travel time (such that any travel time paid late could not have been the result of a late timesheet). Billups 30(b)(6) Dep. at 213:23-214:1.
- CCC's policy or practice of scheduling aides' shifts with different clients so close together that it was often not possible or practical for the aides to return home in between shifts, thereby necessitating travel from one client to the next. *See* Beh Decl. [Doc. # 573] ¶ 7; Balkum Decl. [Doc. # 574] ¶ 5; Plaintiffs' Interrogatory Responses, Ex. P to Harris Decl., at 1-43 (*see* Responses to Interrogatory No. 7).

To the extent Plaintiffs claim a need for some individualized inquiry (such as the review of individual payroll records), such inquiry would not be inconsistent with a collective action. *See Savinova*, 2024 WL 1341113, at *5 ("[I]ndividualized differences amongst collective

members in cases seeking the payment of wages for uncompensated work generally does not warrant decertification after *Scott*."). Like the plaintiffs in *Foster*, Plaintiffs "easily meet the particularly 'low bar' of the *Scott* similarly situated standard" because the plaintiffs "share multiple material issues of both fact and law." 2020 WL 8173266, at *8, *report and recommendation adopted*, 2021 WL 1191810; *see id.* at *8 (rejecting City's argument that plaintiffs were not similarly situated because "whether and to what extent a Plaintiff is entitled to unpaid overtime is dependent on a host of individual factors, such as the employee's practices with respect to start time, end time and lunch; the employee's time-keeping practices; . . . and whether the employee's supervisor observed or otherwise had knowledge or reason to know that the employee worked overtime for which they were not compensated.").

Defendants argue, however, that Plaintiffs' late payment claim must fail, and "decertification" is required, because Defendants maintained reasonable practices to ensure Plaintiffs were timely paid. Defs.' Br. at 40-41. For this dubious proposition, Defendants cite *Parker v. City of New York*, No. 04-cv-4476, 2008 WL 2066443 (S.D.N.Y. May 13, 2008). There, the court considered whether the employer violated the FLSA by issuing overtime payments in the paycheck otherwise comprising the pay period following the one in which the overtime was worked. *Id.* at *10. Per 29 C.F.R. § 778.106, the court granted summary judgment to the employer based on its finding that the employer had demonstrated that it made the payments "as soon after the regular pay period as is practicable." *Id.* at *11-*12. In so finding, the court credited the employer's explanation as to why it could not pay the overtime any sooner over the "theoretical alternatives" raised by the plaintiffs, which, according to the court, were "eminently impracticable." *Id.* at *12. This decision is a straightforward application of § 778.106 and in no way supports Defendants' claim that "[i]f CCC's processes were reasonable then there was no

unlawful policy and no actionable late payment claim." Defs.' Br. at 40.

Defendants cite two other cases for the same proposition. Neither case is apposite. The first of those decisions, *Dominici v. Bd. of Educ. of City of Chicago*, 881 F. Supp. 315 (N.D. Ill. 1995) states that where "bureaucratic inertia" is the cause of late payments, the employer is liable. *Id*. at 320. *Dominici* by no means states that where there is an absence of "bureaucratic inertia," an employer automatically meets its obligations under the FLSA; nor does it state that only where there is "bureaucratic inertia" does an employer violate its obligations under the FLSA. And in *Cahill v. City of New Brunswick*, 99 F. Supp. 2d 464 (D.N.J. 2000), denying summary judgment, the court enumerated case-specific considerations that would help the factfinder determine whether the employer made payments as soon as practicable in accordance with § 778.106. *Id.* at 475. The court did not – despite Defendants' implication otherwise – find that the late payments were caused by issues of "employee accountability;" nor did the court relieve the employer of liability because its system was fundamentally reasonable. It is not clear why Defendants believe either of these cases supports their position.

B. Plaintiffs' Claims for Unpaid Overtime Arising From CCC's Failure to Fully Compensate them for Travel Time

With respect to Plaintiffs' claims for unpaid overtime arising from CCC's failure to fully compensate them for travel time, Plaintiffs allege, and Defendants admit, that during the RSO period, it was CCC's policy – applicable to all Plaintiffs – generally not to pay Plaintiffs for their time traveling from one client to the next. *See* Defs.' Br. at 17. Plaintiffs further allege – and will prove through representative testimony – that where there was one hour or less between shifts, the Plaintiff necessarily had to travel directly from one client to the next because it was not possible or practicable to return home in between. *See* Beh Decl. [Doc. # 573] ¶ 7; Balkum Decl. [Doc. # 574] ¶ 5; Plaintiffs' Interrogatory Responses, Ex. P to Harris Decl., at 1-43 (*see*

Responses to Interrogatory No. 7). CCC recognized as much by maintaining a policy during the HHA period of compensating Plaintiffs for the time between shifts for different clients as long as the gap was one hour or less. *See* Billups 30(b)(6) Dep. at 34:21-23.

Plaintiffs have shown that during the HHA, that while Defendants' formal policy was to compensate Plaintiffs for all travel time between clients where the gap between shifts was one hour or less, in practice, Defendants did not always compensate Plaintiffs for all such travel time – despite the fact that Defendants knew or should have known that Plaintiffs had to perform such travel in order to get from one shift to the next.

Plaintiffs' claims thus share a common issue of law regarding Defendants' obligation to pay Plaintiffs for all travel time between clients about which Defendants knew or should have known. Plaintiffs' claims additionally share multiple common issues of fact. As noted above, and as Defendants admit, all Plaintiffs were required to use the same timekeeping systems and were subject to the same compensation policies. Plaintiffs were, in one or more workweeks, not fully compensated for all overtime arising out of Plaintiffs' travel from one client to another. *See* Declaration of Jessica Harris in Support of Plaintiffs' Motion to Maintain Collective [Doc. # 575] ¶¶ 14-27, 45-60 & Exs. 3, 3a, 3b, and 3c thereto. And, Plaintiffs were all subject to the same travel compensation policies and practices, including:

- CCC's policy or practice of scheduling aides' shifts with different clients so close together that it was often not possible or practical for aides to return home between shifts, thereby necessitating travel from one client to the next. *See* Beh Decl. ¶ 7; Balkum Decl. ¶ 5; Plaintiffs' Interrogatory Responses at 1-43 (*see* Responses to Interrog. No. 7).
- CCC's policy or practice of not requiring Plaintiffs to submit timesheets for travel time. Billups 30(b)(6) Dep. at 213:23-214:1.

- CCC's policy or practice during the RSO period of generally not paying aides for time spent traveling from client to client, regardless of how much gap time there was between shifts. *See* Defs.' Br. at 17.
- CCC's policy or practice during the HHA period of paying aides for the gap time between their shifts for different clients, as long as the gap time was one hour or less. *See* Billups 30(b)(6) Dep. at 34:21-23.
- CCC's policy and practice, during the HHA Exchange period, of not paying aides for travel time until CCC ran a travel time report in HHA Exchange, such that if a report was not run, the aides were not paid for their time spent traveling from one client to another. *See* Martinez-Ramos at 165:16-19; Eguizabal Dep. at 61:11-62:8.

As such, Plaintiff's claims are plainly appropriate for collective treatment.

C. Plaintiffs' Claims for Unpaid Overtime Arising From CCC's Failure to Reimburse them for Travel Expenses

Finally, with respect to Plaintiffs' claims for unpaid overtime arising out of CCC's failure to fully compensate them for travel time – which Defendants, notably, do not address at all in their memorandum – Defendants admit that their policy or practice at all relevant times was not to reimburse Plaintiffs for expenses incurred traveling from one client to the next, even if Defendants paid the Plaintiff for her time traveling from that client to the next. *See* Billups 30(b)(6) Dep. at 224:16-225:1. This policy or practice (like Defendants' policy or practice of scheduling Plaintiffs for shifts so close together that it was impossible or impractical for the plaintiff to return home between shifts) applied equally to all Plaintiffs.

As such, Plaintiffs' claims all share a similar issue of law, namely, Defendants' obligation to reimburse Plaintiffs for all travel time between clients about which Defendants knew or should have known. Plaintiffs' claims additionally share several similar issues of fact. As noted above,

and as Defendants admit, all Plaintiffs were required to use the same timekeeping systems and were subject to the same compensation policies. Plaintiffs were, in one or more workweeks, not fully compensated for all overtime arising from Defendants' failure to reimburse Plaintiffs for travel expenses incurred in traveling from one client to the next. *See* Harris Decl. in Support of Pls.' Mot. to Maintain Collective ¶¶ 28-36, 61-73 & Exs. 4, 4a, 4b, and 4c thereto. Further, Plaintiffs were all subject to the same travel compensation policies or practices, including:

- CCC's policy or practice of scheduling aides' shifts with different clients so close together that it was often not possible or practical for the aides to return home in between shifts, thereby necessitating travel from one client to the next, *see* Beh Decl. [Doc. # 573] ¶ 7; Balkum Decl. [Doc. # 574] ¶ 5; Plaintiffs' Interrogatory Responses at 1-43 (*see* Responses to Interrogatory No. 7); and
- CCC's policy or practice of not reimbursing aides for expenses incurred traveling from one client to the next, even where CCC knew or should have known about the travel, and even in those instances in which CCC compensated the aide for her time traveling from that client to the next. Billups 30(b)(6) Dep. at 224:16-225:1.

Plaintiffs' claims are thus appropriate for collective treatment.

IV. Defendants' Remaining Legal Arguments Are Patently Without Merit.

A. Representative evidence to prove merits

Defendants argue that the merits of Plaintiffs' individual FLSA claims must be proven by representative testimony. *E.g.,* Defs.' Br. at 9, 10, 22, 23. This argument is plainly incorrect. Until the Supreme Court decided *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), employers defending class and/or collective wage and hour claims actually regularly insisted that a plaintiff's use of representative evidence to prove such claims was *improper*. In *Tyson Foods*, the

employer and its *amici* "maintain[ed] that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence." *Id*. at 454. The Court rejected that contention. "A categorical exclusion of that sort, however, would make little sense." *Id*.

Defendants now say that the merits of class or collective actions may *only* be proven by use of representative evidence. This would turn *Tyson Foods* on its head, converting its holding that representative evidence *may* be used in appropriate circumstances to prove class-wide claims into a rule that such claims may be proven *only* through use of such evidence. However, just as the Supreme Court in *Tyson Foods* rejected a *prohibition* on use of representative evidence to prove class-wide wage and hour claims, so too it disapproved a converse rule that would *require* use of representative evidence to prove such claims.

> A representative…sample, like all evidence, is *a* means to establish or defend against liability. Its *permissibility* turns not on the form a proceeding takes—be it a class *or* individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. . . . .
>
> It follows that the Court would reach too far were it to establish *general* rules governing the use of…so-called representative evidence, in *all* class-action cases. Evidence of this type is used in various substitute realms of the law…*Whether and when* [representative] evidence *can* be used to establish class-wide liability will depend on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action"…

Id. at 454-55 (emphases added, citation omitted).

In short, it is up to a plaintiff when proving his/her case and to the defendant when proving a defense to determine whether he/she/it wishes to proffer representative evidence and, in a case involving class-wide claims, such evidence may or may not be admissible. But there is nothing whatsoever that supports the notion that representative evidence *must* be used. Defendants are unable to find a single case supporting such a notion.

As such evidence need not be used by a plaintiff to prove a claim being litigated on a

class-wide basis under Rule 23, *a fortiori* such evidence need not be used by a plaintiff to prove a claim being litigated in a collective action pursuant to § 216(b).

B. Representative evidence to prove damages

Defendants also assert that Plaintiffs may prove damages in a collective action *only* by use of representative evidence. *E.g.,* Defs.' Br. at 43-44. This assertion is flatly inconsistent with Supreme Court and Second Circuit case law. Even where a plaintiff is proceeding on a class-wide basis under Rule 23, that plaintiff may prove damages without representative evidence. "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) *even though other important matters will have to be tried separately, such as damages….*'" *Tyson Foods*, 577 U.S. at 453-54 (quoting 7AA C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1778, pp. 123-124 (3d ed. 2005)) (emphasis added). Even prior to the decision in *Tyson Foods,* the Second Circuit held that a plaintiff may establish damages in a Rule 23 class action by individualized proof. *See Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 138 (2d Cir. 2015) ("Common issues – such as liability – may be certified, consistent with Rule 23, even where other issues – such as damages – do not lend themselves to classwide proof."); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (class certification pursuant to Rule 23(b)(3) may not be denied merely because damages must be ascertained on individual basis).

A fortiori a collective action pursuant to § 216(b) may not be denied merely because damages must be ascertained on an individual basis. *See Campbell*, 903 F.3d at 1116-17 ("Nor are individualized damages calculations inherently inconsistent with a collective action. . . . [I]f a common question regarding the employer's liability is answered in the plaintiffs' favor, individualized calculations of work hours may readily be addressed with any of the practices

developed to deal with Rule 23 classes facing similar issues."); *Aboah v. Fairfield Healthcare Servs., Inc.*, 662 F. Supp. 3d 192, 204 (D. Conn. 2023) ("[If] individualized inquiries as to precisely how much additional overtime pay, if any, [plaintiffs] may be owed . . . were an obstacle to collective resolution in FLSA overtime cases, few cases could ever be decided on a collective basis." (Internal quotation marks omitted)).

C. Individualized defenses

Defendants, relying on pre-*Scott* caselaw abrogated by *Scott* (*see supra* at 12-13), assert that an individualized defense to an FLSA claim defeats a § 216(b) collective action on such a claim. *E.g.,* Defs.' Br. at 44-46. Defendants' memorandum is, however, founded upon an erroneous understanding of collective actions under § 216(b). "'[C]ollective actions permit individualized claims *and individualized defenses*.'" *Vanegas*, at * 4 (quoting *Canaday*, 9 F.4th at 403) (emphasis added). Where, as here, Plaintiffs' *prima facie* case is entitled to collective action treatment (because Balkum and Beh and the members of the putative collective "share legal or factual similarities material to the disposition of their claims," *Scott*, 954 F.3d at 516), that entitlement does not disappear if Defendants assert a defense which is individualized. As the Second Circuit squarely held in *Scott*, alleged "dissimilarities" do not defeat collective action treatment where, as here, that treatment is otherwise supported by shared legal or factual similarities material to the disposition of plaintiffs' claims. 954 F.3d at 516.[15]

D. "Conditional certification" as a predicate to maintenance of a collective action

Defendants say a claim cannot be the subject of a collective action unless it was

[15] Even in a Rule 23 class action, an individualized defense does not defeat class certification. *Tyson Foods*, 577 U.S. at 453-54. ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) *even though other important matters will have to be tried separately, such as … some affirmative defenses peculiar to some individualized class members.*" (Emphasis added, citation omitted).

"conditionally certified," by which they mean that it was a subject of a notice to potential opt-ins approved by a court. *See* Defs.' Br. at 29 n.33. This is but one more argument for which Defendants proffer no case support. Even putting aside that the subject of Plaintiffs' § 216(b) motion is the overtime compensation claims under the FLSA and that said claims were also the subject of the notice to potential opt-ins approved by Magistrate Judge Scott, Defendants' argument is truly bizarre. The opt-in mechanism in § 216(b) was in effect for at least three decades before the propriety of sending a notice to potential opt-ins was considered by the courts. In other words, for that considerable period of time, there were no efforts to obtain "conditional certification," which means that, according to Defendants, every case from 1947 to the late 1970's wherein a court granted leave to maintain a collective action *was wrongly decided*, as leave was granted despite the absence of a "conditional certification"! Unsurprisingly, Defendants' remarkable argument has been rejected.

> [N]othing in the text of the statute prevents plaintiffs from opting in to the action by filing consents with the district court, even when the notice described in *Hoffmann-La Roche* has not been sent, so long as such plaintiffs are "similarly situated" to the named individual plaintiff who brought the action.

Myers v. Hertz Corp., 624 F.3d 537, 555 n.10 (2d Cir. 2010).[16]

E. Procedural unfairness

Defendants allege that "procedural" and "fairness" considerations militate against Plaintiffs' maintenance of a collective action. Defs.' Br. at 46-48. The only circumstance Defendants cite is a supposed "myriad" of factual issues that would have to be decided on an "individualized" basis. *Id.* at 46. There are several problems with this contention.

In *Scott*, the Court of Appeals criticized use of so-called procedural and fairness

[16] It may be noted that *Myers* is cited in Defendants' memorandum. *See* Defs.' Br. at 20, 20-21.

considerations in determining whether a court should grant leave to maintain a collective action, because such use risked losing sight of the concept of collective action and invited importing through the back door considerations with no application to the FLSA including, for example, the Rule 23(b)(3) requirements of superiority and predominance. 954 F.3d at 517. "[I]f named plaintiffs and party plaintiffs share legal or factual similarities material to the disposition of their claims, 'dissimilarities in other respects should not defeat collective treatment.'" *Id*. at 516 (citation omitted). In other words, where named and party plaintiffs share legal or factual similarities material to disposition of their claims, such plaintiffs are similarly situated for purposes of § 216 notwithstanding dissimilarities that may also exist.

Defendants' approach is inconsistent with this holding: while not disputing the numerous similarities of fact and law material to the disposition of Named and Opt-In Plaintiffs' FLSA claims, Defendants argue that maintenance of a collective action should be denied on the basis of *other* circumstances they allege would have to be determined on an individualized basis. While Defendants cite three cases in support of this argument, all of which predated *Scott*, *see* Defs.' Br. at 48, two of these[17] only involved actions where courts held that *Rule 23* certification should be denied (or was properly denied) because the individual issues predominated over the common issues. Under *Scott*, superiority and predominance are irrelevant to maintenance of a collective action. While *Diaz v. Elec. Boutique of Arm., Inc.*, 2005 U.S. Dist. LEXIS 30382 (W.D.N.Y. Oct. 13, 2005) at least involved a potential collective action under § 216(b), the court in that case mistakenly treated the standards for a § 216(b) collective action and for a Rule 23 class action as essentially the same, even referring repeatedly to the former as a "class action." Moreover, while pointing to the burdens that would assertedly arise in trying the very large number of FLSA

[17] *See Vinole v. Countrywide Home Loans, Inc*., 571 F.3d 935, 947 (9th Cir. 2009); *Marlo v. UPS*, 251 F.R.D. 476, 486 (C.D. Cal. May 19, 2008).

claims in *Diaz* in a single action, the court failed to acknowledge that, were those FLSA claims adjudicated in multiple separate actions, the burdens would be substantially greater.

Indeed, "the United States Supreme Court has identified 'the advantage of lower individual costs to vindicate rights by the pooling of resources' as a purpose of the FLSA collective action." *Dieffenbauch v. Rhinehart R.R. Constr., Inc.,* No. 8:17-CV-1180 (LEK) (CFH), 2021 WL 365850, at *5 (N.D.N.Y. Feb. 3, 2021) (quoting *Hoffmann-La Roche Inc.*, 493 U.S. at 170). As in *McGlone*, and as discussed above at page 22, "[l]itigating overtime claims for each of these Plaintiffs individually would be burdensome on Plaintiffs, Defendants, and the courts." 49 F. Supp. 3d at 369. Given the common issues of fact and law enumerated above and in Plaintiffs' Motion to Maintain the Collective, "the costs of a collective action will surely be lower than individual trials, which would result in duplicative evidence and legal arguments. . . . Proceeding as a collective, therefore, is fair to the employees and helpful for purposes of judicial economy." *Campbell v. City of New York*, No. 16-CV-8719 (AJN), 2020 WL 2792978, at *8 (S.D.N.Y. May 29, 2020); *see also Pino v. Harris Water Main & Sewer Contractors Inc*., No. 17-CV-5910 (KAM) (RER), 2020 WL 5708889, at *7 (E.D.N.Y. Sept. 23, 2020) ("Fifteen plaintiffs have joined this action, and this court finds that litigating overtime claims for each of these plaintiffs individually would be unduly burdensome on all parties.").

CONCLUSION

For the foregoing reasons and those in Plaintiffs' Memorandum of Law in Support of Motion to Maintain Collective Action, the Court should grant Plaintiffs' Motion for Leave to Maintain Collective Action and deny Defendants' Motion to Decertify the Collective Action.

Dated: September 11, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I am more than eighteen (18) years of age and not a party to this action and that this document filed through the ECF system on September 11, 2024 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Nat Buchbinder
Nat Buchbinder