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 SUPPORT OF MOTION FOR LEAVE TO MAINTAIN COLLECTIVE ACTION

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INTRODUCTION

Oretha Beh and Kimberley Balkum (sometimes "Named Plaintiffs") have asserted claims for redress of violations of, *inter alia,* their rights guaranteed by Section 7 of the Fair Labor Standards Act, as amended ("FLSA" or "the Act"), Title 29 U.S.C. § 207, to compensation at one and one-half times their respective regular rates of pay for time worked in each workweek in excess of 40 hours. Named Plaintiffs now move pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), for leave to maintain a collective action on the § 207 claims on behalf of themselves and all other persons similarly situated who filed with this Court in this action a written consent to become a party plaintiff and did not thereafter accept an offer of judgment.

This memorandum of law in support of said motion consists of three parts: a description of Named Plaintiffs and their FLSA overtime claims (Statement of Named Plaintiffs' Claims); an exposition of the standard established by the Second Circuit for determining whether an opt-in plaintiff is similarly situated to a named plaintiff within the meaning of §216(b) (Argument, Section A); and a demonstration why, under that standard, the Opt-In Plaintiffs whom Named Plaintiffs seek to represent are each similarly situated to Beh and/or Balkum and leave to maintain a collective action should therefore be granted (Argument, Section B). This MOL should be read in conjunction with the contemporaneously-filed declarations of Oretha Beh (dated July 25, 2024), Kimberley Balkum (dated July 27, 2024), and Jessica Harris (dated August 7, 2024).

STATEMENT OF NAMED PLAINTIFFS' CLAIMS

Beh and Balkum were home care workers employed by defendant Community Care Companions, Inc. ("CCC") in the Western District of New York in Fall, 2017 and/or thereafter. The tasks home care workers performed for CCC clients at their respective residences consisted

of giving clients baths or showers, washing and drying their clothes, dressing them to go outside of their residences, preparing clients' meals and cleaning up afterwards (including cooking, washing and putting away plates, glasses, eating utensils, pots and pans), ensuring clients took their medications in the proper amount, assisting clients in getting into and out of bed, in getting dressed and undressed, in standing up and moving around their residence, in eating meals (where they were not able to do this by themselves), and in getting into and out of the bathtub or shower stall. *See* Declaration of Oretha Beh ("Beh Decl.") ¶ 3; Declaration of Kimberly Balkum ("Balkum Decl.") ¶ 3. Occasionally, they would pick up clients' medications at a pharmacy, shop for client groceries or assist a client in traveling to and from a medical appointment. *See id.*.

Both Beh and Balkum provided home care services to several CCC clients in any given workweek and, usually, provided such services to several CCC clients in a single workday. Beh Decl. ¶ 5; Balkum Decl. ¶ 4. Conversely, each CCC client was serviced by several CCC home care workers in a given workweek and, frequently, by multiple home care workers on a single workday. *See id.*

The length of shifts worked by the Named Plaintiffs varied from shift to shift, and the amount of time between their assigned shifts ("gap") also varied. *See generally* RSO Reports, Exs. 3a, 4a, and 5a to Declaration of Jessica Harris ("Harris Decl."); HHA Reports, Exs. 3b, 4b, and 5b to Harris Decl.; Beh Decl. ¶¶ 4, 6; Balkum Dec. ¶ 4. Depending upon the amount of time between shifts, the Named Plaintiffs traveled from the residence of one CCC client to the residence of her next CCC client or went home between such shifts. *See* Beh Decl. ¶¶ 7-8; Balkum Decl. ¶ 5. If the gap between shifts was an hour or less, there typically was not enough time for it to be possible or practical for Beh or Balkum to return home between shifts. *See id.* In recognition of this reality, CCC's policy (albeit inconsistently followed) was to compensate

home care workers for time expended on travel between clients where the gap time between the shifts was one hour or less. *See* Testimony of CCC FRCP 30(b)(6) witness Karen Billups ("Billups Tr."), Ex. 1 to Harris Decl., at 34:21-23. Accordingly, Plaintiffs, including Beh and Balkum, claim they were entitled to be compensated for time expended on travel from one CCC client's residence to the residence of another CCC client where the gap between the end of the shift worked at the first residence and the start of the shift worked at the second residence was no more than one hour.

CCC home care workers, including Beh and Balkum, were paid wages on a weekly basis for a workweek beginning on a Saturday and ending on the following Friday. The regular payday was the first Friday following the workweek in which the wages were earned, in other words, one week after the Friday which constituted the final day of the workweek in which the wages were earned. *See* Harris Decl. ¶ 10; Ex. 1 to Harris Decl. at 28:21-29.

In one or more workweeks, each Named Plaintiff was employed by CCC for more than 40 hours but was not compensated by CCC at 1 ½ times her regular rate of pay for all time worked in excess of 40 hours. *See* Harris Decl. ¶¶ 45-49, 62-64, 74-75; Exs. 3-5 to Harris Decl. Beh and Balkum claim these failures by CCC violated their rights to overtime compensation under § 207. They contend each of them was employed by CCC for performance of domestic services in the households of CCC clients within the meaning of 29 U.S.C § 202(a)[1] and 29 C.F.R. § 552.3[2] and, therefore, CCC was under the statutory duty to compensate each of them

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[1] To be an employee covered by § 207, an employee must be "engaged in commerce or in the production of goods for commerce" or be "employed in an enterprise engaged in commerce or in the production of goods for commerce" in the workweek in question. 29 U.S.C. §207(a)(1). Congress has expressly found that "the employment of a person in domestic service in households affects commerce." 29 U.S.C.§ 202(a).

[2] Title 29 C.F.R. § 552.3 defines domestic service employment as "services of a household nature performed by an employee in or about a private home (permanent or temporary). The term includes

for their performance of domestic services at 1 ½ times her regular rate of pay for each hour worked in a workweek in excess of 40 hours. *See* 29 U.S.C. § 207(l) ("No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with [§207(a)]").

CCC's failures to compensate each Named Plaintiff at 1 ½ times her regular rate of pay for all time worked in a workweek in excess of 40 hours resulted from one or more of the following practices by CCC:

(i) **Failure to Fully Compensate Employees for Time Spent Traveling from One Client to Another**. When determining how many hours, if any, Beh or Balkum worked in a workweek in excess of 40, and/or the amount of overtime compensation to which they were entitled, CCC failed to fully credit as work time all time expended on travel from the private residence of one CCC client for whom the Named Plaintiff had provided domestic services to the private residence of another CCC client in order to provide domestic services to that other client. *See* Harris Decl. ¶¶ 45-49; Exs. 3 and 3a to Harris Decl. Plaintiffs claim each such failure violated the FLSA. *See* 29 C.F.R. § 778.223 ("Under the Act an employee must be compensated for all hours worked."); *Singh v. City of New York*, 524 F.3d 361, 368 n.3 (2d Cir. 2008) (Sotomayor, J.) (travel between work sites during normal working hours "is fully compensable under the FLSA"); *Barry v. S.E.B. Serv. of N.Y.*, No. 11-cv-5089 (SLT) (JMA), 2013 WL 6150718, at *8 (E.D.N.Y. Nov. 22, 2013); *see also* 29 C.F.R. § 785.38 ("Time spent by an

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services performed by employees such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, and chauffeurs of automobiles in family use. This listing is illustrative and not exhaustive." *See Murphy vs. AllStaff Homecare, Inc.*, Civ. Act. No. 16-cv-2370 (WJM) (MEH), 2019 WL 4645440, at *6-9 (D. Col. Sept. 24, 2019), and cases cited therein.

employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked."). As used in *Singh*, "fully compensable" means an employee is entitled to be paid at their non-overtime rate(s) of pay for time expended on such travel (before his/her entitlement to overtime compensation is determined and calculated). *E.g.*, *Kalloo v. Unlimited Mach. Co. of N.Y.*, 977 F. Supp. 2d 187, 203 (E.D.N.Y. 2013); *Mendez v. Radec Corp.*, 232 F.R.D. 78, 88 (W.D.N.Y. 2005) (collecting cases). As Judge Larimer stated:

> Employees who travel[ ] to a site during normal working hours, whether on a working day or not, are entitled to the appropriate compensation… Plaintiffs are correct that compensable travel time is to be included in determining the number of hours an employee has worked in a given week. There is no basis to treat travel time differently from employees' other work-related activities, and those hours count in determining whether the employee is entitled to overtime.

Mendez, id.

(ii) **Failure to Reimburse Employees for Expenses Incurred in Traveling from One Client to Another**. Beh and Balkum necessarily incurred transportation costs in connection with their travel between the private residences of CCC clients, such as the cost of gas for driving between such residences or the cost of an Uber, a taxi or a bus for transportation between such residences. *See* Harris Decl. ¶¶ 15-16, 28-30, 61-64; Exs. 4 and 4a to Harris Decl. However, CCC failed to reimburse each Named Plaintiff for such expenses; indeed, CCC concedes as much. *See* Billups Tr. at 224:16-225:1.

Plaintiffs claim that the result of each such failure in a workweek in which either Beh or Balkum worked more than 40 hours was the violation of § 207. As made clear by 29 C.F.R. § 531.35,[3] when an employee works more than 40 hours in a workweek and an employer fails to

[3] 29 C.F.R. § 531.35 provides: "Whether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear.' . . . For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the . . . overtime wages required to be paid him under the Act."

reimburse that employee for an expense incurred for the employer in that workweek traveling from one job site to the next, § 207 is violated because it requires an employer to compensate an employee for overtime worked at 1 ½ times the regular rate of pay "free and clear" of, inter alia, expenses incurred primarily for the employer's benefit. E.g., *Salazar-Martinez v. Fowler Bros.*, 781 F. Supp. 2d 183, 186, 191 n.5 (W.D.N.Y. 2011) (Telesca, J.) ("Under the FLSA, there is no legal difference between a deduction from an employee's paycheck and requiring the employee to bear the expense of the item directly out of his own wages, as wages are required to be paid "free and clear."); *Marine v. Vieja Quisqueya Rest. Corp.*, No. 20-cv-4671 (PKC) (RML), 2022 WL 17820084, at *7 (E.D.N.Y. Sept. 8, 2022), *Report and Recommendation adopted*, No. 20-cv-4671 (PKC) (E.D.N.Y. Sept. 23, 2022) (finding employer liable for unreimbursed bicycle maintenance expenses incurred by delivery driver where expenditures cut into the overtime wages he was owed); *Jiaren Wei v. Lingtou Zhengs Corp.*, No. 13-cv-5164 (FB) (CLP), 2015 WL 739943, at *13 (E.D.N.Y. Feb. 20, 2015) (same); *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175, 185 (W.D.N.Y. 2011) (Siragusa, J.); *Ayres v. 127 Rest. Corp.*, 12 F. Supp. 2d 305, 310 (S.D.N.Y. 1998) (Chin, J.); accord: *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 899 (9th Cir. 2013); *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1236-37 (11th Cir. 2002); *Marshall v. Root's Rest.*, 667 F.2d 559, 560 (6th Cir. 1982). Stated another way, when an employer fails to reimburse an employee for transportation costs incurred in the performance of compensable travel, the net effect is to reduce the wages paid to the employee for work performed in the week in which the travel occurred. See *Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 257-58 (S.D.N.Y. 2008) (where employer fails to reimburse employee for expenses incurred while performing work for employer, those expenses must be deducted from wages when determining whether employer complied with FLSA). And/or:

(iii) **Late Payment of Overtime Compensation**. Although Plaintiffs' regular payday was the first Friday following the final day of each workweek in which wages were earned, CCC frequently failed to pay Beh and/or Balkum on or before her regular payday all of the overtime wages she had earned in the corresponding workweek. *See* Harris Decl. ¶¶ 74-75; Exs. 5 and 5c to Harris Decl. When CCC would tardily pay at least some wages due but not paid on the regular payday, such tardy payments were not made on any regular or particular schedule: the length of the delays in payment beyond the regular payday varied from one week to several months. *See* Ex. 5 to Harris Decl. (Weeks Late column). Plaintiffs claim that CCC's failures to pay Beh and/or Balkum on or before the regular payday for all overtime wages due to her or them on that payday violated the FLSA. "It is clear that the FLSA requires [minimum and overtime] wages to be paid in a timely fashion." *Rogers v. City of Troy*, 148 F.3d 52, 57 (2d Cir. 1998). "Section 7 of the Act, 29 U.S.C. § 207, plainly contemplates that overtime compensation shall be paid in the course of employment and not accumulated beyond the regular payday." *Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943). *Accord*: *U.S. v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 491-92 (2d Cir. 1960); *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993) ("[U]nder the FLSA wages are 'unpaid' unless they are paid on the employees' regular payday."); *id* at 1539-1543; *see also* 29 C.F.R. § 778.106 (Under the FLSA, "[t]he general rule is that overtime compensation earned in a particular workweek must be paid on the regular payday for the period in which such workweek ends."). "Under the [FLSA], late wages are considered a form of unpaid wages." *Rosenbaum v. Drav Meir*, 658 F. Supp. 3d 140, 147 (E.D.N.Y. 2023) (citing *Rigopoulos,* 140 F.2d at 507, and *Rogers*, 148 F.3d at 57).

ARGUMENT

EACH MEMBER OF THE PUTATIVE COLLECTIVE IS SIMILARLY SITUATED TO BEH AND/OR BALKUM WITHIN THE MEANING OF 29 U.S.C. § 216(b) WITH RESPECT TO THEIR CLAIMS FOR OVERTIME COMPENSATION PURSUANT TO 29 U.S.C. § 207 AND, THEREFORE, PLAINTIFFS' MOTION FOR LEAVE TO MAINTAIN A COLLECTIVE ACTION ON THE § 207 CLAIMS SHOULD BE GRANTED.

A. An Opt-In Plaintiff is Similarly Situated to a Named Plaintiff Where the Former and the Latter Share a Similar Issue of Law or Fact Material to the Disposition of Their FLSA Claims.

Pursuant to 29 U.S.C. § 216(b), a named plaintiff asserting an FLSA minimum wage or overtime compensation claim against his/her employer may maintain an action on behalf of him/herself and other employees asserting claims against the same employer where the other employees are "similarly situated" to the named plaintiff and have given their respective consents in writing to become such parties which consents are filed in the court in which such action is brought. Such a group lawsuit is known as a "collective action." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013); *see also* 29 U.S.C. § 257.

As noted above, each member of the proposed collective, *see* pages 12-13 *infra*, gave his/her consent in writing to become a plaintiff on the FLSA overtime compensation claims and each such consent was filed in this action. The only remaining question posed by Plaintiffs' motion is whether those members are similarly situated to Beh and/or Balkum within the meaning of § 216(b) with respect to those FLSA claims. The controlling precedent for resolving that issue is the Court of Appeals' ruling in *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502 (2d Cir. 2020). The Court there observed that "in granting employees the right to proceed as a collective," Congress's goal "was to provide them 'the advantage of lower individual costs to vindicate rights by the pooling of resources.' This results in the 'efficient resolution in one

proceeding of common issues of law and fact arising from the same alleged' FLSA violation."

Id. at 515-16 (quoting *Hoffmann-La Roche vs. Sperling*, 493 U.S. 165, 170 (1989)).

> This result – the efficient resolution in one proceeding of common issues of law and fact arising from the same FLSA violation – can only be achieved to the extent that named plaintiffs and opt-in plaintiffs share *one or more issues* of law or fact that are material to the disposition of their FLSA claims. Thus, to be 'similarly situated' means that named plaintiffs and opt-in plaintiffs are alike with regard to some material *aspect* of their litigation. That is, party plaintiffs are similarly situated and may proceed in a collective to the extent they share *a* similar issue of law or fact material to the disposition of their FLSA claims.

Scott, 954 F.3d at 516 (emphasis added, citation and footnote omitted).

> It follows that if 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.' If the opt-in plaintiffs are similar to the named plaintiffs in some respects material to the disposition of their claims, collective treatment may be *to that extent* appropriate, as it may *to that extent* facilitate the collective litigation of the party plaintiffs' claims.

Id. (emphasis in original, citation and footnote omitted).

For example, in *Umbrino v. L.A.R.E. Partners Network, Inc.*, 585 F. Supp. 3d 335 (W.D.N.Y. 2022), a court in this District authorized named plaintiffs to maintain a collective action on FLSA overtime compensation claims "because [those plaintiffs and the opt-in plaintiffs] 'have one or more similar questions of law or fact material to the disposition of their FLSA claims,'" *id.* at 365 (quoting *Scott*, 954 F.3d at 521), notwithstanding that the named plaintiffs and the opt-in plaintiffs differed in respect to the periods during which they were employed. *Accord: Cardenas v. A.J. Piedimonte Agric. Dev., LLC*, No 1:18-cv-00881 (EAW), 2020 WL 3469681, at * 4-5 (W.D.N.Y. Jun. 25, 2020) (approving maintenance of FLSA collective action based on conclusion that named plaintiffs and opt-in plaintiffs were "alike with regard to some material aspect of their litigation." (quoting *Scott*, 954 F.3d at 516)).

In *Scott*, the Court of Appeals noted that some lower courts had determined whether a

collective action should be maintained by resort to a so-called "ad hoc" approach by which a court would consider disparate factual and employment settings of individual plaintiffs, defenses which appeared to be individual to each plaintiff, and fairness and procedural considerations counseling for or against collective treatment. *See Scott*, 954 F.3d at 517. The Circuit rejected such an approach for two reasons. First, "rather than considering the ways in which the opt-in plaintiffs are *similar* in ways material to the disposition of their FLSA claims, district courts employing the ad hoc factors consider the ways in which the plaintiffs are factually *disparate* and their defenses are *individualized*." *Id.* (emphasis by Court of Appeals). In short, the *ad hoc* approach tended to focus on "what the term 'similarly situated' does not mean [rather than] what it does mean." *Id.* (citation omitted, bracket by Court of Appeals). The second flaw in the *ad hoc* approach was that it imported "through the back door" requirements that have "no application to the FLSA." *Id.* As examples of factors considered under the *ad hoc* approach that have no application to determination of whether a collective action under the FLSA should be authorized, the Second Circuit cited adequacy, typicality, superiority and predominance. *Id.*

The Second Circuit's rejection of each of those factors as a basis for determining whether a collective action should be authorized was part of that court's broader and emphatic rejection of the notion that a collective action should be determined by resort to Fed.R.Civ.P. 23 criteria for class certification:

> [T]he FLSA's "similarly situated" requirement is "independent of, and unrelated to" Rule 23's requirements, *Kern v. Siemens Corp.*, 393 F.3d 120, 128 (2d Cir. 2004), and … is "quite distinct" from "the much higher threshold of demonstrating that common questions of law and fact will 'predominate' for Rule 23 purposes." *Myers*, 624 F.3d at 555-56.

Id. at 518.

> Section 216(b) has nothing comparable to Rule 23(b)(3)'s requirements of predominance or superiority. And Rule 23's requirements of adequacy and

> typicality are intended to protect the due process rights of absent class members, which is not a consideration in a nonrepresentative action such as a collective action under §216(b).

Id. at 519.

> Analogies to Rule 23, including the sliding scale analogy, are inconsistent with the language of § 216(b) and … the question of whether plaintiffs may proceed as a collective under the FLSA is to be analyzed under the separate and independent requirements of § 216(b).

Id. at 518.[4]

> [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 of § 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.

Id. at 520. *Accord*: *Stock v. Xerox Corp.*, 516 F. Supp. 3d 308, 312 (W.D.N.Y. 2021); *Bethel v. BlueMercury, Inc.*, No. 21 Civ. 2743 (KPF), 2022 WL 3594575, at * 4 (S.D.N.Y. Aug. 22, 2022) ("Unlike class actions brought under Federal Rule of Civil Procedure 23, FLSA collective actions need not satisfy the standards of numerosity, typicality, commonality or representativeness."); *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005) (same); *see also* Advisory Committee's Note to 1966 Amendment to Rule 23, 39 F.R.D. 98, 104 (1966) (in discussing the amendments to Rule 23 that transformed the Rule into its present terms, the Advisory Committee noted: "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended."). Indeed, "the FLSA not only imposes a lower bar than Rule 23, it imposes a bar lower in some sense even than Rules 20 and 42, which set forth the relatively loose requirements for permissive joinder and consolidation for trial." *Scott*, 954 F.3d at 520 (quotation omitted).

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[4] The "sliding scale" analogy which the Second Circuit rejected was the notion that the greater the number of opt-ins in a proposed collective, the more an analysis under § 216(b) should mirror analysis under Rule 23. *See Scott*, 954 F.3d at 518.

The Second Circuit pointed out that unlike Rule 23, "which provides a general procedural mechanism … subject to the sound discretion of the district court," § 216(b),

> by contrast, is tailored specifically to vindicating federal labor rights, and where the conditions of § 216(b) are met, employees have a substantive "right" to proceed as a collective, a right that does not exist under Rule 23.

Scott, 954 F.3d at 519-20 (citing, *inter alia, Hoffmann-La Roche*, 493 U.S. at 173 (noting Congress provided employees with a "right" to proceed collectively) and *Campbell v. City of Los Angeles*, 903 F.3d 1080, 1112 (9th Cir. 2018) (FLSA "declares a right to proceed collectively on satisfaction of certain conditions.")); *accord*: *Scott*, 954 F.3d at 515.

That Rule 23 criteria do not apply when a court determines whether to authorize maintenance of a § 216(b) collective action is highlighted by the Court of Appeals' conclusion that a collective action might be maintained in *Scott* notwithstanding that a Rule 23 class action could not. *Compare id.* at 522 (vacating decertification of collective action and remanding) *with id.* at 512-14 (affirming denial of class certification).

B. Each Member of the Putative Collective Is Similarly Situated to Beh and/or Balkum Because Each Such Member and Beh and/or Balkum Share One or More Similar Issues of Law and/or Fact Material to the Disposition of Their FLSA Overtime Compensation Claims.

The group of individuals that Beh and Balkum have moved to represent includes the following persons each of whom executed and caused to be filed in this action a written consent to become a party plaintiff on the FLSA overtime compensation claims asserted in the Second Amended Collective and Class Action Complaint:

Kimberley Balkum (Doc. # 38)
Oretha Beh (Doc. # 40)
Velma Brinson (Doc. # 60)
Vernetta Brown (Doc. # 180)
Connie Burnett (Doc. # 217)
Jamika Cameron (Doc. # 170)
Raychelle Carmichael (Doc. # 153)
Yolanda Lathrop (Doc. # 31)
Cynthia McAllister (Doc. # 46)
Adeline Montgomery (Doc. # 143)
Jazmine Moss (Doc. # 208)
Denaijah Murray (Doc. # 82)
Daisy Ortiz (Doc. # 27)
Teresa Palmo (Doc. # 178-1)

Gloria Chambers (Doc. # 207)
Ashley Cohen (Doc. # 186-1)
Linda Eaton (Doc. # 218)
Frances Gregg (Doc. # 20)
Sheri Harrison (Doc. # 180-2)
Tonya Hawkins (Doc. # 75)
Brian Hilton (Doc. # 155)
Tan'ya Jackson (Doc. # 213)
Deonne Rudolph (Doc. # 179-8)
Alexus Scott (Doc. # 177-2)
Zarie Snow (Doc. # 33)
Wendolynne Thomas (Doc. # 209)
Helen Thornton (Doc. # 179-9)
Laticia Walker (Doc. # 69)
Ashley Washington (Doc. # 76)
Rina Wisotzke (Doc. # 54)

None of the foregoing individuals accepted an offer of judgment if one was made to her/him. *Compare* Doc. Nos. 260-61 and Doc. Nos. 429-445.

Like the Named Plaintiffs: (i) each of the other Opt-In Plaintiffs listed above was employed by CCC to provide home care services in the Western District of New York in Fall, 2017 and/or thereafter for CCC clients to whom they were assigned. *See* Exs. 3-5 to Harris Decl.; (ii) each was compensated on a weekly basis, with the workweek commencing on a Saturday and concluding on the following Friday, Harris Decl. ¶ 10; Ex. 1 to Harris Decl. at 28:21-29:5;; (iii) the regular payday for each was the first Friday following the conclusion of each workweek, that is, seven days following the Friday which was the last day of the workweek, Harris Decl. ¶ 10; Ex. 1 to Harris Decl. at 28:21-29:5; (iv) each worked one or more workweeks in which the time worked in that week exceeded 40 hours, *see* Exs. 3-5 to Harris Decl.; and (v) in one or more workweeks in which they worked more than 40 hours, each was not compensated by the regular payday or subsequently at one and one-half times the applicable regular rate of pay for the time (s)he worked in one or more workweeks in excess of 40 hours, *see* Exs. 3-5 to Harris Decl.

Like each Named Plaintiff, each other member of the putative collective claims that CCC's failure to compensate him/her at one and one-half times the applicable regular rate of pay for the time (s)he worked in each workweek in excess of 40 hours, either at all or by the regular payday, violated § 207.

Like each Named Plaintiff, in one or more of the workweeks in which (s)he worked more

than 40 hours, (i) each member of Subset One (plaintiffs with claims for unpaid overtime due to uncompensated time spent traveling between clients) or Subset Two (plaintiffs with claims for unpaid overtime due to unreimbursed travel expenses for travel between clients) of the putative collective[5] frequently provided home care services to multiple CCC clients in their respective private residences in a single workweek, *see, e.g.*, Exs. 3a, 3b, 4a and 4b to Harris Decl.; (ii) each such member frequently provided home care services to more than one CCC client in a single workday, *see, e.g.,* Exs. 3a, 3b, 4a and 4b to Harris Decl.; (iii) the length of shifts worked by each such member varied from one shift to another, and the gap between shifts, that is, between the conclusion of a shift at one client's residence and the start of the shift at the next client's residence, also varied from gap to gap, *see, e.g.*, Exs. 3a, 3b, 4a and 4b to Harris Decl.; (iv) on occasions where the gap between shifts was one hour or less, each such member necessarily traveled from one client's residence to the next client's residence because it was not possible or practical to return home and still arrive at the residence of the next client by the time the next shift started, *see* Harris Decl. ¶ 15; Beh Decl. ¶ 7; Balkum Decl. ¶ 5; (vii) in one or more such instances, CCC failed to fully compensate each member of Subset One for such travel, that is, failed to pay them for all such travel at the applicable non-overtime rate, *see* Harris Decl. ¶¶ 50-60; Exs. 3, 3a, 3b, and 3c to Harris Decl.; and (viii) on each such occasion when a member of Subset Two traveled from one CCC client's residence to another CCC client's residence, she thereby incurred transportation costs regardless of the mode of transportation, and CCC failed to

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[5] In addition to Beh and Balkum, Subset One includes Jamika Cameron, Tonya Hawkins, Tan'ya Jackson, Adeline Montgomery, Jazmine Moss, Alexus Scott, Wendolynne Thomas, Ashley Washington and Rina Wisotzke.

In addition to Beh and Balkum, Subset Two includes Cameron, Hawkins, Jackson, Montgomery, Moss, Scott, Thomas, Washington, Wisotzke, Raychelle Carmichael, Frances Gregg, Brian Hilton, Deonne Rudolph, Helen Thornton and Laticia Walker.

reimburse him/her for such expenses, *see* Harris Decl. ¶¶ 31(d), 64-73; Exs. 4, 4a, 4b, and 4c to Harris Decl.; Ex. 1 to Harris Decl. at 224:16-225:1.

Like Beh and Balkum, each of the other members of Subset One claims that CCC's failure to fully compensate him/her for all time (s)he expended on travel between the respective residences of CCC clients in a workweek when (s)he worked in excess of 40 hours where the gap between the shifts at those residences was no more than one hour caused CCC to fail to compensate that member of Subset One at one and one-half times the applicable regular rate of pay for all time (s)he worked in a workweek in excess of 40 hours and thereby violated § 207.

Like Beh and Balkum, each of the other members of Subset Two claims that CCC's failure to reimburse him/her for the expenses (s)he incurred on account of travel between CCC client residences where the gap between the shifts at those residences was no more than one hour caused CCC to fail to compensate that member of Subset Two at one and one-half times the applicable regular rate of pay for all time (s)he worked in a workweek in excess of 40 hours and thereby violated § 207.

Like each Named Plaintiff, in one or more of the workweeks in which (s)he worked more than 40 hours, CCC failed to pay each member of Subset Three (plaintiffs who claim CCC failed to pay them overtime by their regular pay day) of the putative collective[6] by his/her regular payday for all compensation (s)he earned in each such workweek for time worked in excess of 40 hours. *See* Harris Decl. ¶¶ 76-97; Exs. 5, 5a, 5b, and 5c to Harris Decl.

Like each Named Plaintiff, each of the other members of Subset Three claims that each failure by CCC to pay him/her by his/her regular payday for all compensation (s)he earned in

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[6] In addition to Beh and Balkum, Subset Three includes Cameron, Gregg, Montgomery, Rudolph, Scott, Thornton, Washington, Wisotzke, Velma Brinson, Vernetta Brown, Connie Burnett, Gloria Chambers, Ashley Cohen, Linda Eaton, Sheri Harrison, Yolanda Lathrop, Cynthia McAllister, Denaijah Murray, Daisy Ortiz, Teresa Palmo and Zarie Snow.

each corresponding workweek for time worked in excess of 40 hours caused CCC to fail to compensate that member of Subset Three at one and one-half times the applicable rate of pay for all time (s)he worked in each such workweek in excess of 40 hours and thereby violated § 207.

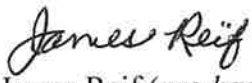
From the foregoing, it is apparent that each member of the putative collective shares with Beh and/or Balkum one or more similar issues of law or fact material to the disposition of their FLSA overtime compensation claims. Indeed, it is accurate to state that each member of the putative collective shares with Beh and with Balkum numerous identical issues of fact and numerous identical issues of law material to the disposition of their FLSA overtime compensation claims. Adherence to the Second Circuit's controlling decision in *Scott*, *supra*, compels the conclusion that each member of the collective is similarly situated to the Named Plaintiffs within the meaning of § 216(b) with respect to their FLSA overtime compensation claims.

CONCLUSION

For the foregoing reasons, the members of the putative collective are similarly situated to Beh and/or Balkum within the meaning of § 216(b) with respect to their FLSA overtime compensation claims and, therefore, Plaintiffs' motion for leave to maintain a collective action on behalf of all members of the putative collective should be granted.

Dated: August 7, 2024

Respectfully submitted,



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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 August 7, 2024 will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Nat Buchbinder
Nat Buchbinder