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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **SUPERIOR COURT**
SUCV 2015-2053-D

[redacted] ESCORBOR
Plaintiff,

vs.

HELPING HANDS COMPANY, INC., THE SUBURBAN HOMEMAKING & MATERNITY AGENCY, INCORPORATED, [redacted] ROPER and [redacted] ROPER
Defendants.

MEMORANDUM AND ORDER ON CLASS CERTIFICATION

On July 8, 2015, the plaintiff, [redacted] Escorbor ("Escorbor"), filed this putative class action lawsuit under the Wage Act (Count I); the Massachusetts Minimum Wage Law (G.L. c. 151, §1) (Count II), Contract (Count III), Unjust Enrichment (Count IV) and violation of record-keeping requirements (Count V) against the defendants Helping Hands Company, Inc., The Suburban Homemaking & Maternity Agency, Incorporated ("Suburban"), [redacted] Roper and [redacted] Roper (collectively, "Helping Hands"). On May 22, 2017, the Plaintiff filed Plaintiff's Motion for Class Certification ("Motion"), which the defendants opposed. By motion filed on June 22, 2017, Helping Hands moved to strike expert materials included with Escorbor's reply memorandum. The issue having been fully briefed and argued on July 26, 2017, the Court **ALLOWS** the Motion to Certify a Class.

Notice Sent 09.13.17 FJB CBK LMPC RM NFO LMFO RBM MAG 3648 (MO)

BACKGROUND

For purposes of the Motion only, the Court finds the following preliminary facts for purpose of making a reasonable judgment on whether the proposed class meets the requirements of Mass. R. Civ. P. 23:

Helping Hands is a home health care agency, which employs hundreds of home health care aides. The aides provide patient care in towns in the Greater Boston area. They are compensated for their work in visiting patients, to provide those patients with home health care to include personal care, light housekeeping and assistance with activities of daily living. The process of placing an aide with a patient is a complicated one, with many variables including geography, culture, language, gender and availability of schedule. Each aide has a schedule unique to him or her, which varies month-to-month and often week-to-week or day-to-day. The duration of patient visits also varies considerably.

Helping Hands entered into a Travel Agreement with [redacted] Escorbor and numerous class members, providing for payment at an hourly rate of $10.00 and an hourly travel expense of $2.00. The Travel Agreement left blank any provision for "Hourly Travel Time." Its format was virtually identical for all who signed Travel Agreements without an entry for "hourly travel time" and read:

Employee Name: _____

1. Hourly Rate: $___[typically $10]___
2. Hourly Travel Time: $___[typically blank]_
3. Hourly Travel Expense: $___[typically $1 to $2]_
4. Total: $___[typically $11 to $12]_

I am entitled to be paid for my travel time and expense between clients. To get paid, I must submit reports of my travel time and travel expense. Instead of submitting travel time and expense reports, I would like to be paid the Hourly Travel Pay (4), which accounts for the travel time and travel expense I now spend on an hourly basis. If at any time I think that the Hourly Travel Pay does not correctly show the travel time and travel expense I spend each week, I can cancel this agreement at any time by giving Helping Hands written notice and then get paid by submitting reports of my travel time and travel expense.

_____ _____

Date Employee

Helping Hands did not withhold taxes from the Travel Pay. It did withhold taxes, at least in part, from something called "differential pay," which were sums paid to home health aides who reported to Helping Hands that the travel pay did not fully compensate her. In Ms. Escobor's case,

Helping Hands did not keep records showing how much travel time was spent by each of its employees who signed the Travel Agreement. The inference that, under the parties' agreement Helping Hands actually reimbursed travel expense and paid nothing for hourly travel time receives support from the allegations that (1) Helping Hands did not withhold or pay payroll-related taxes such as FICA, on the Hourly Travel Expense, (2) travel demands of the job within the work day often exceed $2.00, if one considers both travel time and travel expense and (3) the employer's failure to comply with its record-keeping obligations as to hours and travel expense. Using facts in the Second Amended Complaint, Escorbor's Memorandum plausibly calculates travel expense in a reasonable way, such as the IRS reimbursement rate, which exceeds 50 cents per mile. Using such a calculation, any travel exceeding 4 miles in one hour would completely consume the travel allowance. The Second Amended Complaint alleges enough facts to support an argument of a plausible failure to pay the minimum wage for intra-workday travel as required by 454 Code Mass. Regs. 27.04(4)(d). Garcia v. Right At Home, Inc., No. 2015-808-BLS2, 2 (Suffolk Sup. Ct. Jan. 19, 2016)(Sanders, J.).

The employer's failure to keep records as alleged in Count V

Named plaintiff [redacted] Escorbor ended her employment at Helping Hands in xxxxxxxxxxxxx.

DISCUSSION

I.

Class certification does not turn on the merits. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 361 (2008), quoting Weld, 434 Mass. at 84-85. See generally Aspinall v. Philip Morris Cos., 442 Mass. 381, 391-392 (2004), quoting Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 605 (1985). The plaintiff's burden is well established:

> On a motion for class certification pursuant to either rule 23 or G.L. c. 93A, § 9(2), "[t]he plaintiffs bear the burden of providing information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23 [and c.93A § 9(2)]; they do not bear the burden of producing evidence sufficient to prove that the requirements have been met" (emphasis added). Weld v. Glaxo Wellcome Inc., 434 Mass. 81, 87 (2001).

Kwaak v. Pfizer, Inc., 71 Mass. App. Ct. 293, 297 (2008).

Under this test, for the reasons stated below, the court finds the plaintiff's presentation persuasive. The Court finds that the class meets the requirements of rule 23, if defined to include all individuals who worked as home health care aides for Helping Hands between July 2012 and the date of judgment and signed a Travel Agreement that did not include an entry on line 2, "Hourly Travel Time."

While the Court finds that the plaintiffs' showing satisfies Rule 23, it also notes that the Legislature has spoken on the class action issue in the wage and tips law area. G. L. c. 149, § 150, provides in relevant part that:

> An employee claiming to be aggrieved by a violation of sections . . . 148 . . . [or] 152A, . . . may, 90 days after [exhausting remedies with the Attorney General], and within 3 years after the violation, institute and prosecute in his own name and on his own behalf, **or for himself and for others similarly situated**, a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action shall be awarded treble damages, as liquidated damages, for any

lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees. (emphasis added).[1]

G. L. c. 149, § 150 specifically authorizes suits on behalf of "others similarly situated" and differs in significant respects from Mass. R. Civ. P. 23. Machado v. System 4, 465 Mass. 508, 514-15, S.C. 466 Mass. 1104 (2013) ("the Wage Act provides for a substantive right to bring a class proceeding."). The Supreme Judicial Court has cautioned against "equating the similarity requirements of rule 23 (a) with the requirements of" a statutory provision "that the parties seeking certification are 'similarly situated.'" Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 370-371 fn. 66 (2008)(case under G. L. c. 149, § 149), quoting Aspinall v. Philip Morris Cos., 442 Mass. 381, 391-392 (2004), quoting Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 605 (1985). The court has greater discretion under rule 23 than under G. L. c. 149, § 150 to decide whether or not to certify a class. Salvas at id. Rule 23 is "a useful framework for an analysis" but does not override the Court's admonitions, the remedial purposes of the statutory provisions authorizing plaintiffs to sue on behalf of "others similarly situated" and the corresponding legislative intent to provide a deterrent to violations of those statutes. Bellerman v. Fitchburg Gas and Electric Light Company, 470 Mass. 43, 53 (2014) (c. 93A case).

II.

Because Rule 23 sets the stricter test, the Court analyzes matters under that Rule, which necessarily also meets the requirements of G. L. c. 148, § 150.

1. Numerosity. The statutory authorization to sue on behalf of "others similarly situated" arguably conflicts with a strict construction of the requirement in

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1 The 2008 amendment also made payment of treble damages mandatory, regardless of willfulness.

Rule 23(a)(1) that "the class is so numerous that joinder of all members is impracticable." Here, however, it appears that the number of employees affected by the defendants' policies easily establishes numerosity, under Rule 23, and, even more, under G. L. c. 148, § 150.

The Motion asserts, without contradiction that approximately 1,528 home health care aides worked for the defendants over the past six years. The Affidavit of [redacted] Roper In . . . Opposition to Plaintiff's Motion for Class Certification" ("Roper Aff."), ¶ 17 describes Helping Hands' compensation policy in terms that track the Travel Agreement, quoted above. During the discovery in this case, Helping Hands objected to production of agreements and established by affidavit the great level of effort required to identify and copy travel agreements for current (and terminated) employees. See Affidavit of [redacted] Rachunok, dated January 5, 2017, ¶ 4 ("voluminous agreements"). While Helping Hands did not provide a precise number of agreements, the Court draws the natural inference that hundreds of Helping Hands employees signed the basic Travel Agreements in essentially the same manner as Escorbor. See also Defendants' Opposition to Plaintiff's Motion to Compel Compliance with Court Order, filed January 11, 2017 at 9 ("There are hundreds of employees at issue, both current and former.") (emphasis added). Indeed, Helping Hands has challenged the technical adequacy of plaintiff's showing on numerosity, but has never denied that hundreds of its aides signed Travel Agreements that provided pay for "travel time" as opposed to "travel expenses."

While an exact number is not presently available, the Court therefore finds sufficient numerosity to certify the class described above. Cf. In re Relafen Antitrust

Litigation, 218 F.R.D. 337, 342 (D. Mass. 2003). Joinder of all these present and former employees would be impracticable, in that it would be highly unwise or imprudent. Sniffin v. Prudential Ins. Co. of America, 11 Mass. App. Ct. 714, 723-24 (1981). It also is wise to join together the relatively small claims held by individuals who, in many cases, may not have substantial resources in circumstances where opportunities for out-of-court settlement are limited. To fulfill the statutory purposes and avoid a possible conflict between the statute and Rule 23, the Court finds sufficient numerosity to certify the class.

2. Common Questions of Law and Fact.

The parties contest vigorously whether there are common issues of fact in this case, as opposed to highly individual inquiries based upon particular circumstances of each aide who worked for Helping Hands. To resolve this disagreement, the Court starts with the pleadings.

The Introduction to the Second Amended Class Action Complaint ("Complaint") states: "[t]he crux of this complaint is that the defendants failed to pay employees for travel time between client sites during the workday, failed to fully reimburse employees for all transportation expenses and failed to pay employees premium overtime wages as required by law." Count V also alleges failure to maintain proper payroll records. The Reply in Support of Plaintiff's Motion for Class Certification ("Reply"), p. 1, states that "Plaintiff's theory is that the reimbursements she and other aides received were travel expense reimbursements, not wages for their intraday travel time." While the defendants down play these theories, the Court cannot. See id., quoting Gales v. Winco Foods, No. C 09-5813 CRB, 2011 WL 3794887 at *9 (N.D.

Cal. Aug. 26, 2011) ("When evaluating a motion for class certification, a plaintiff's theory is the guide."), citing United Steel, Paper & Forestry v. Conoco Philips Co., 593 F.3d 802, 808 (9th Cir. 2010) (abuse of discretion to treat plaintiff's theory as "all but beside the point").

The defendants plainly had uniform policies, which the Complaint challenges. Those policies applied to all aides who signed the Travel Agreements. Under these policies, the complaint alleges, Helping Hands (1) did not keep track of actual hours worked and (2) entered agreements that, by their terms, paid for travel expenses but not travel time. The plaintiffs accurately claim that the following questions are common to all class members:

- Whether Helping Hands failed to keep track of "hours worked each day" by its aides and pay stubs that reflected "numbers of hours worked," in violation of 454 Code Mass. Regs. 27.07(2) and G.L. c. 149, § 148 and c. 151, §§ 15 and 19;

- Whether Helping Hands' Agreement, coupled with the lack of withholding on travel expenses, amounted to a policy to pay for travel expenses but not travel time; and

- Whether Helping Hands failed to pay class members for travel time.

The existence and legality of these questions about Helping Hands' policies present common questions of both fact and law, comparable to those underlying certifications that the Supreme Judicial Court has upheld. See Salvas, 452 Mass. at 366, 370 ("all members of the class were unarguably the beneficiaries of identical terms of employment"; evidence that "all of the class members . . . were subject to the identical terms and conditions" of employment).

One of the defendants' most prominent arguments –affecting both commonality and predominance (discussed below) -- is that proof of liability will require

individualized fact-finding. Opp. at 5-6, 8-9, 12-17. That is certainly not true of the alleged violation of the record keeping provisions, and the defendants do not even argue otherwise. Since the applicable statutes and regulations warrant injunctive relief, the entire class may benefit from a full recreation by Helping Hands of the information that it allegedly failed to keep, with payment of any sums due to each and every class member. See G.L. c. 149, § 148 and c. 151, §§ 15 and 19; 454 Code Mass. Regs. 27.07(2). If Helping Hands had kept the records required by statute, it would of course be in an entirely different position to make these arguments, but they do not assert compliance.

Moreover, if proven, the failure to pay for travel time – arguably shown by the Travel Agreements themselves – will be evident on the face of the documents, leaving only the question of remedy, which can be addressed through a claims payment procedure. The defendants' main response to that point is to call it "specious" and "a mere issue with the labeling of that payment." (Opp. at 13). The jury is not required to accept Helping Hands' characterization of its own language as "mere labelling." The plaintiff asks only for the simplest of interpretations -- to take Helping Hands at its word and compensated for travel expenses but not travel time.

The provisions of the Travel Agreement, coupled with failure to withhold taxes on travel payments would warrant a finding by a fact-finder of a class-wide violation. The employer's description of the purpose of a payment to the employee matters. See Dixon v. City of Malden, 464 Mass. 446, 452 and n. 8 (2013) ("We note that had the city paid the plaintiff payments **labeled** as vacation pay, and merely been late in those payments, the city would not have been foreclosed from offsetting those

payments from what was owed.") (emphasis added). Employers cannot mitigate wage act violations by making payments that, a factfinder could conclude, were for other purposes. Id., 464 Mass. at 451-452.[2]

3. Typicality. The plaintiffs' claims must be "typical of the claims . . . of the class." Mass. R. Civ. P. 23 (3). That requires "'a sufficient relationship between the injury to the named plaintiff and the conduct affecting the class,,' and [that] the claims of the named plaintiff and those of the class 'are based on the same legal theory.'" Weld, 434 Mass. at 87. Because the defendants acted pursuant to policies that affected all of their employees in the same way (except for damages or the number of violations), the complaint meets this criterion. The named plaintiff's claims are typical of all entertainers within the class definition.

4. Fair Protection of the Class's Interests. The plaintiff must show that she and her counsel "will fairly and adequately protect the interests of the class." Mass. R. Civ. P. 23(a)(4).

The proposed class counsel have demonstrated that they are well-qualified and experienced in litigation arising under the Wage Law and Overtime Law for the reasons expressed in the plaintiff's memorandum. During motion practice and in oral arguments, the Court has observed first-hand the adequacy and competence of class counsel.

On the Wage Law and Overtime Law claims, no real adversity exists between the named plaintiff and the class members; the plaintiff has sufficient personal incentive to

[2] The Court held (at id.): "The city's payment of salary and benefits after the plaintiff's termination, however, does not provide a substitute for payment for accrued vacation time. The city did not characterize the continued salary payments as payment for vacation accrual, and the city did not communicate in any way that the salary continuation was payment for accrued vacation time."

prosecute this case. See generally Smith and Zobel, Massachusetts Rules Practice, § 23.7, 6 Mass. Practice Series, p. 339-340 (2006). Her diligence in doing so to date, her attendance and testimony prove her adequacy as a class representative. In any event, the Court stands ready to intervene in the unlikely event that any future deficiency appears on this score. Id.

There is no appreciable threat that inadequate representation will harm absent parties, either now or in the future. Since, once again, the defendants challenge only the adequacy of the Motion's showing, without raising any specific objection grounded in fact, the Court will not deny certification on adequacy grounds and, instead, will stand ready to issue an order "at any stage of an action" under Rule 23 to "impose such terms as shall fairly and adequately protect the interests of the class . . .." Mass. R. Civ. P. 23(d). It may also "order entry of judgment in such form as to affect only the parties to the action and those adequately represented."

5. Predomination of Common Issues. Under the law set forth above, common issues predominate on the liability questions. The potential existence of individualized questions on damages does not defeat a "predominance" finding, as long as there is a "sufficient constellation of common issues." Salvas, 452 Mass. at 367-368. "[W]e recognize that in some instances even one common question of law or fact may be found to predominate over individual questions so as to warrant certification of a class action. Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 603 (1985)("although common questions need not be dispositive of the entire class action, . . . their resolution should at least provide a definite signal of the beginning of the end.").

Here, the nature of the claims overlap remarkably well, with individualized issues limited largely to calculation of damages. All class members based their claims upon the same pattern and practices. The controlling questions are factual, not legal, and concern whether the class members were compensated according to the Wage Law, Overtime Law and the Tips Law. The case concerns a uniform policy implemented by the defendant. The three bulleted issues described above, p. 8 all lend themselves to "common answers." See Fletcher v. Cape Cod Gas Co., 394 595, 603 (1985); Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551-52 (2011). Because the questions concern general practices and status of categories of its employees, which affect all class members, Helping Hands can simply answer "no" to each of those questions.

The fact that damages may raise individual issues is not an impediment. "Class certification may be appropriate where common issues of law and fact are shown to form the nucleus of a liability claim, even though the appropriateness of class action treatment in the damages phase is an open question." Salvas, 452 Mass. at 364. See also Weld, 434 Mass. at 91-93. That is the case here.

6. Superiority: Finally, I find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). This criterion requires consideration of the efficiency of the class-action device, the possible expense to the plaintiffs, and the likelihood of judicial economy being served. Berry v. Town of Danvers, 34 Mass. App. Ct. 507, 515 (1993); Sniffin v. Prudential Ins. Co. of Am., 11 Mass. App. Ct. 714, 724-25 (1981).

This case "presents a classic illustration of the policies of judicial efficiency and access to courts that underlie the [employee] class action suit: it aggregates numerous

small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court." Weld, 434 Mass. at 93. While only one individual has stepped forward, the amounts in controversy may be too small -- and the risks of antagonizing an employer may be too great -- to warrant the expenditure of individual time and money to recover what may be relatively small individual damages. Refusing class action status would allow those workers to go uncompensated and allow the defendants to benefit from what may turn out to be to be a windfall and unfair competitive advantage. No class member would be harmed by class certification, particularly where the statute of limitations may have run on bringing a separate action in some cases.

The general legislative policy also favors class actions in these types of cases. G. L. c. 149, § 150. That weighs heavily in the Court's superiority determination. This case "presents a classic illustration of the policies of judicial efficiency and access to courts that underlie the [employee] class action suit: it aggregates numerous small claims into one action, whose likely range of recovery would preclude any individual plaintiff from having his or her day in court." Weld, 434 Mass. at 93.

For all these reasons, I find that a class action is the superior means of adjudicating this case.

III. CLASS DEFINITION.

The defendants argue that the proposed class is not ascertainable, as it depends upon a finding of liability as to each person before determining whether he or she is a class member. Opp. at 11, citing, among other cases, Crosby v. Social Security Administration, 796 F.2d 576, 580 (1st Cir. 1986). At this stage in the proceedings, the

Court takes the defendants' point and alters the class definition to avoid the ascertainability problem.

Federal and Massachusetts law may well differ significantly on how to approach class certification. Because Massachusetts has no rule requiring an early certification decision, "it may not invariably be improper to delay defining the class with precision until the time of judgment." Cleary v. Comm'r of Pub. Welfare, 21 Mass. App. Ct. 140, 147 n. 14 (1985). See also Mass. Gen. Hosp. v. Rate Setting Comm'n, 371 Mass. 705, 713 (1977) (no error to enter judgment without ruling on class-certification).

Therefore, the Court certifies and defines the following class:

> All individuals who worked as home health care aides for Helping Hands between July 2012 and the date of judgment and signed a Travel Agreement that did not include an entry on line 2, "Hourly Travel Time."

This definition easily can, and therefore should, be "easily identified from [employer's] records." See Espinoza v. 953 Associates LLC, 280 F.R.D. 113, 127 n. 85 (S.D.N.Y. 2011).

CONCLUSION

The Motion is **ALLOWED** as follows:

1. The plaintiff class on the Wage Law and Overtime Law claims shall be all individuals who worked as home health care aides for Helping Hands or Suburban between July 2012 and the date of judgment and signed a Travel Agreement that did not include an entry on line 2, "Hourly Travel Time."

2. The named plaintiff, [redacted] Escorbor, shall be the class representative.

3. The plaintiffs' counsel, Raven Moeslinger and Nicholas F. Ortiz, Law Office of Nicholas F. Ortiz, P.C. shall be class counsel.

Dated: September 13, 2017

Douglas H. Wilkins
Associate Justice, Superior Court