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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV00130-E

[redacted] EVERETT[1]

vs.

MCGOVERN AUTO GROUP CORP SERVICES, INC. & another[2]

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

The plaintiff, [redacted] Everett ("Everett" or "Plaintiff"), moves the court to certify a class of current and former employees of the defendants, McGovern Auto Group Corp Services, Inc. ("McGovern") and [redacted] McGovern (collectively, "Defendants"). Everett and the proposed members of the class are past and present sales employees of McGovern who allegedly worked more than 40 hours per week and/or on Sundays but were not paid premium pay in violation of the overtime pay (G. L. c. 151, § 1A) and Sunday pay (G. L. c. 136, § 6(50)) statutes. The claim for unpaid overtime and Sunday wages parallels that discussed in the Supreme Judicial Court's (SJC) recent case of Sullivan v. Sleepy's LLC, 482 Mass. 227 (2019) ("Sleepy's"), as applied to "recoverable draw" sales commission pay plans.

The plaintiff seeks to certify a class of "individuals employed by McGovern that performed car sales duties who were paid on a 100% draw and commission basis and worked more than 40 hours in at least one workweek and/or on at least one Sunday at any time between January 11, 2016 and October 2019, and who did not sign an arbitration agreement with

Notice sent 12/2/22 (SJDC)

[1] On behalf of himself and all others similarly situated
[2] [redacted] McGovern

McGovern." The plaintiff also seeks an order appointing Everett as class representative and the Law Office of Nicholas Ortiz, P.C., as class counsel.

After hearing and upon careful consideration of the parties' submissions, plaintiff's motion for class certification is **ALLOWED**.

## PROCEDURAL HISTORY

Plaintiff's original complaint was filed on January 14, 2019, with a different named plaintiff: [redacted] DeLaCruz. The complaint alleged that DeLaCruz did not receive commissions and overtime pay owed to him and that he had been denied promotion when he complained about the unpaid wages. The complaint included an allegation that a putative class of car sellers had, like DeLaCruz, not received overtime pay owed to them.

On March 24, 2020, DeLaCruz settled his individual claims with the Defendants.[3]

On February 18, 2021, plaintiff's counsel moved to file an Amended Complaint naming Everett as the plaintiff. The motion was allowed, without opposition, in March 2021. In May 2022, plaintiff moved to further amend the Complaint to add a claim for unpaid Sunday wages on the same legal theory advanced for unpaid overtime wages in the original complaint. That motion was allowed, without opposition, and the Second Amended Complaint was docketed on June 9, 2022.

## BACKGROUND

In its motion for class certification, plaintiff seeks to certify a class of "individuals employed by McGovern that performed car sales duties who were paid on a 100% draw and commission basis and worked more than 40 hours in at least one workweek and/or on at least

[3] Plaintiff's counsel asserts that the settlement with DeLaCruz was accomplished via ex parte communications between DeLaCruz and the defendant McGovern. Determination of these allegations of improper communication with a represented party are concerning, but not germane to the issue of class certification presently before the court.

one Sunday at any time between January 11, 2016 and October 2019, and who did not sign an arbitration agreement with McGovern."

On May 8, 2019, the SJC issued its decision in Sleepy's, in which it answered referred questions and held that "recoverable draw pay arrangements," where employers retroactively allocated draws and commissions as hourly wages and overtime pay, did not comply with the overtime statute. Sleepy's, 482 Mass. at 233-234. The Sleepy's decision caused significant upheaval among employers who had employees who worked solely on commission, as the Department of Labor Standards (DLS) had issued opinion letters in 2003 and 2009 that endorsed "recoverable draw pay arrangements" for commission-based employees. The SJC stated that the DLS opinion letters "may have misled employers" but ultimately held that "separate and additional overtime is owed" to employees who work more than 40 hours a week or on Sundays. Id. at 233.

To prove his claims at trial, Everett will need to show that he, and all other identified salespeople, were compensated under a "recoverable draw" pay system; that he worked overtime or on Sundays; and that the Defendants did not make "separate and additional" overtime payments to him as required under the overtime and Sunday pay statutes.

McGovern operates nine car dealerships across Massachusetts. McGovern employed Everett as a salesperson from September to November 2016. Salespersons at McGovern are compensated on a one hundred percent "recoverable draw" and commission basis. A "recoverable draw" is an advance that the employee must pay back one he or she has earned sufficient commission. Under the "recoverable draw" pay plan, McGovern would pay employees who did not make any sales in a given pay period minimum wage for the first 40 hours of work and 1.5 times the minimum wage for any additional hours. This "draw" would

then be recovered from future commissions earned by the employee. Under this "recoverable draw" pay system, the employees always received compensation that equaled or exceeded the minimum wage times the number of hours they worked up to forty hours, plus one and one-half times the number of hours they worked over forty hours or on a Sunday, in a given pay period. However, the plaintiff has produced Payroll Records for himself and class members that reflect overtime and Sunday hours worked without corresponding separate premium wage payments. See Pl. Exhs. 4 (Plaintiff's Payroll Records) and 5 (Class Member Payroll Records).

In response to plaintiff's discovery request that McGovern identify all salespeople who worked more than 40 hours in at least one workweek between January 2016 and the present, McGovern produced the Class Member Payroll records. McGovern also produced all arbitration agreements in its possession signed by its salespeople. McGovern had a practice of having new hires sign arbitration agreements but had failed to secure such agreements from all salespeople. Of the salespeople identified as having worked at least one workweek between January 2016 and the present, plaintiff has identified 48 salespeople for whom McGovern did not produce a signed arbitration agreement. Plaintiff proposes that a group of 47 of those employees forms the putative class.

The Defendants assert that while some class members time records, including Everett's, reflect time worked in excess of 40 hours per week, "there are no time records suggesting they ever worked more than 40 hours in a week." Defendants state that the time records of some class members do not accurately reflect time actually worked because they do not fully account for breaks and mealtimes. Defendants conclude that the putative class must be smaller than the 47 employees identified by the Plaintiff.

The plaintiff is represented by attorneys from the Law Office of Nicholas Ortiz, P.C. located in Boston, Massachusetts. The court finds plaintiff's counsel are experienced in wage and hour and class litigation and are prepared to devote sufficient resources to representing the Class if appointed class counsel.

## DISCUSSION

### I. Standard for Class Certification

"A judge has broad discretion to certify or decertify a class." Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 361 (2008). Rule 23 of the Massachusetts Rules of Civil Procedure sets out the six requirements a plaintiff must satisfy to maintain a class action. The plaintiff must establish that (1) the class is so numerous that joinder of all members is impracticable ["numerosity"], (2) there are questions of law and fact common to the class ["commonality"], (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class ["typicality"], and (4) the representative parties will fairly and adequately protect the interests of the class ["adequacy"]. Mass. R. Civ. P. 23(a). Additionally, the plaintiff must demonstrate "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members ["predominance"], and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy ["superiority"]." Mass R. Civ. P. 23(b).

The Wage Act specifically authorizes aggrieved employees to commence class proceedings on behalf of others "similarly situated", and the general legislative policy favors class actions in Wage Act cases. See G. L. c. 149, § 50; Escorbar v. Helping Hands Company, Inc., 2017 WL 4872657, ay *6 (Mass. Super., Sept. 13, 2017) (Wilkins, J.).

At the pre-trial class certification stage of the proceeding, the party seeking class certification must "provide information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23; they do not bear the burden of producing evidence sufficient to prove that the requirements have been met." Weld v. Glaxo Wellcome, Inc., 434 Mass. 81, 87 (2001). As discussed more fully below, the plaintiff has satisfied this burden here.

**a. Numerosity**

A plaintiff satisfies the numerosity requirement of Mass. R. Civ. P. 23(a)(1) if they can demonstrate that joinder of all of the putative class members would be impracticable, "mean[ing] impractical, unwise or imprudent rather than impossible or incapable of being performed." Brophy v. School Comm. of Worcester, 6 Mass. App. Ct. 731, 736 (1978). In determining whether the plaintiffs have satisfied this requirement, the court may consider "efficiency, limitation of judicial resources [,] and expense to the plaintiff..." Id. "Numbers alone...do not control." James W. Smith and Hiller B. Zobel, Rules Practice § 23.4, at 337 (2d ed. 2006 & Suppl. 2010).

Here, the plaintiffs assert that the putative class consists of 47 members who are either current or former employees of McGovern that worked overtime, or on Sundays, and were subject to McGovern's "recoverable draw" pay policy. Defendants assert that the actual number of class members is less than 47 based on the inadequacy of the time records it produced.

As it is the employer's duty to maintain accurate time records, see Vitale v. Reit Management & Research, LLC, 88 Mass. App. Ct. 99, 109 (2015), an employer should not be able to defeat class certification based on its own inadequate record keeping, see Garcia v. E.J. Amusements of New Hampshire, Inc., 98 F. Supp. 3d 277, 286 (D. Mass. 2015). Courts have

adopted a burden shifting analysis where employer time records are challenged: where the employee plaintiff presents some evidence that he has performed work for which he was not properly compensated, the Court may draw a reasonable inference in the plaintiff's favor. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 580, 687-688 (1946). Once the Plaintiff satisfies that burden, the employer may then come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the plaintiff's evidence. Id.

Here, the plaintiff has produced time records reflecting hours worked in excess of 40 hours per week and payroll reflecting a lack of separate premium wage payments for those hours. The Defendants evidence consists only of their assertions that the time records presented are not sufficiently accurate, and they do not present any evidence of the precise amount of work performed that sufficiently calls the inference from the plaintiffs Payroll Records into doubt. See id. At this stage, the court believes that the plaintiff has produced sufficient evidence that the class of affected employees in fact worked overtime hours and that the number of affected employees likely is closer to plaintiff's estimated class size of 47. See Weld, 434 Mass. at 87.

Even if it is difficult to arrive at a precise number of putative class members, from the information provided, this court concludes that the number will likely exceed forty class members. The court finds that plaintiffs have satisfied the numerosity requirement as joinder of cases within the range identified would be "impractical, unwise or imprudent..." See Brophy, 6 Mass. App. Ct. at 735.

**b. Commonality**

Mass. R. Civ. P. 23(a)(2) requires that there be questions of law or fact common to the class. The commonality requirement is satisfied when all class members "'have a common

interest in the subject matter of the suit and a right and interest to ask for the same relief against the defendants.'" Salvas, 452 Mass. at 363-364, quoting Spear v. H.V. Greene Co., 246 Mass. 259, 266 (1923). "It is not essential that the interest of each member of the class be identical in all aspects with that of the plaintiffs." Id. (citation omitted); see Smith, supra, § 23.5, at 337 ("...*total* commonality is unnecessary."). Commonality "is easily met... [w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons and gives rise to a cause of action [because] one or more of the elements of that cause of action will be common to all of the persons affected." Conte & Newberg, Newberg on Class Actions, § 3.10, at 272-274 (4th ed. 2002) ("Newburg").

Defendants argue, again, that the time records produced do not accurately reflect the hours worked and that, because an individual review of hours worked by each employee is needed, the class lacks commonality. Defendants rely heavily on the reasoning contained in the case of Ardem v. M11 Motors, LLC, 2020 WL 8766384 (Mass. Super., December 9, 2020) (Sanders, J.), where class certification for a group of car dealership sales employees was defeated. However, in Ardem, the court found that "there [were] no detailed records or other written reports showing how many hours a week that Ardem worked" and that the defendants had produced "sufficient evidence to . . . rebut[] the inference that can be drawn in [Ardem's] favor." Id. at *7-8. For that reason, the court found that there was a question of fact whether the proposed class representative had worked any overtime hours at all. Id. at *9.

That is not the case here. Everett has produced time records reflecting that he worked overtime hours. Defendants' argument that its own time records are not accurate is not sufficient at this stage to defeat the reasonable inference that the court can draw from the plaintiff's evidence. See Anderson, supra. Further, all members of the proposed class are, or were, sales

employees of McGovern that worked overtime or Sunday hours for whom the "recoverable draw" pay policy at issue applied equally. As such, any cause of action arising from the illegality of that policy is available to any employee paid under the "recoverable draw" scheme.

The injury that plaintiff alleges is one that is common to all members of the proposed class: non-payment of overtime and Sunday wages under the Wage Act. The individual levels of damage (e.g., how much each employee is owed) is not a basis for defeating class certification. See Salvas, 452 Mass. at 367-368. All employees who worked overtime or on Sundays were treated similarly under McGovern's "recoverable draw" policy, and it is the legality of that policy that is the plaintiff's theory of its case. This court finds that plaintiff has met his burden to show common questions of law and fact are present.

As the Supreme Court has stated about the standard for commonality, a plaintiff has to demonstrate that the class claims "depend upon a common contention" and that determining the truth or falsity of that contention "will resolve an issue that is central to the validity of *each one of the claims* in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011) (emphasis added).

This court concludes that the plaintiffs have presented common questions of fact and law, namely the legality of McGovern's "recoverable draw" pay policy as applied to employees who were not paid separately for overtime or Sunday hours worked, that meets Rule 23's commonality requirement.

**c. Typicality**

Typicality is established when there is a sufficient relationship between the injury to the named plaintiff and the conduct affecting the class, and the claims of the named plaintiff and those of the class are based on the same legal theory. Weld, 434 Mass. at 87. An alignment of

claims ensures that the named plaintiff will advance the interests of the class by pursuing his or her own self-interest. Id. "A plaintiff representative nominally satisfies the typicality requirement with 'an allegation that the defendant acted consistently toward [the representative and the] members of a putative class.'" Id., quoting Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 616 (1985).

This court sees no divergence between the claims of the plaintiff and the claims of the proposed class. The plaintiff and class members are, or were, employees of McGovern who worked overtime or Sundays without receiving the required premium pay. Regardless of the individual amounts of premium pay withheld from each employee, the alleged deprivation of premium pay was due to the "recoverable draw" policy applicable to all McGovern's sales employees. This court finds that plaintiff's claims are typical of those of the proposed class that seek to challenge the "recoverable draw" pay policy and the resulting non-payment of overtime and Sunday premium pay. See Weld, supra.

**d. Adequacy**

The adequacy requirement has two parts. "The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985). "A class representative has the responsibility to protect the interests of all class members." Spence v. Reeder, 382 Mass. 398, 409 (1981). Counsel for a class "has a continuing obligation to [represent appropriately] each class member." Id. Here, there is no evidence to suggest either the plaintiff, or his counsel, will not adequately protect the interests of the class as a whole.

The plaintiff has demonstrated that his interests will not conflict with the interests of the putative class members as they seek the same relief for all class members. See Spence, 382 Mass. at 409. Plaintiff seeks a determination the McGovern's "recoverable draw" policy violated the overtime and Sunday pay statutes. Plaintiff's claims and legal theories are the same as those that would be asserted by other potential class members allegedly harmed by McGovern's "recoverable draw" pay policy.

Defendants argue that Everett's claims do not meet the requirements of typicality and adequacy because his claims are time-barred. Three factors weigh against Defendants' argument. First, Defendants did not oppose the amendments to the complaint adding Everett as the named plaintiff and adding the Sunday pay claims. Second, because Everett's claims arise out of the same non-payment of overtime wages as the original class complaint, they satisfy the relation back requirement of mass. R. Civ. P. 15(c). Lastly, the statute of limitations may be tolled as to putative class members during the pendency of a class action. See Kingara v. Secure Home Health Care Incorporated, 489 Mass. 393, 398, n.2 (2022). The defendants' statute of limitations argument concerning Everett's claims is without merit and does not defeat his adequacy or typicality as a class representative.

The plaintiff has also established that their counsel, Law Office of Nicholas Ortiz, P.C., is adequate to represent him and the putative class in this litigation. Counsel is experienced in both wage and hour and class litigation and has adequate resources to represent the class. Defendants do not challenge plaintiff's counsel's qualifications to represent the proposed class, and the central legal issue in this matter is proper application of the overtime and Sunday pay statutes to the employer's "recoverable draw" pay policy to a proposed class of under 50 individuals. This case does not much differ from a typical employment law matter. This court is satisfied that

Plaintiff's counsel can vigorously represent the plaintiff and proposed class in the proceedings related to this action. See Spence, 382 Mass. at 409.

**e. Predominance**

"The predominance test expressly directs the court to make a comparison between the common and individual questions involved," in order to reach a determination as to whether the common questions presented outweigh any individual questions. Salvas v. Wal-Mart Stores, Inc., 452 Mass. 337, 363 (2008). "[T]he presence of individual questions does not, *per se*, contraindicate class action treatment." Smith, supra, §23.8, at 341. Rather, "the question is whether the individual questions so inundate the common issues that a class action is no longer desideratum–or even useful" Id. "The predominance requirement seeks to ensure, in part, that the economies of class action will be realized in the particular litigation." Id. at 362. Where plaintiffs' alleged injuries are the result of a "single course of conduct" engaged in by defendants against a large group of individuals, the determination of an actionable violation arising from that conduct "will turn largely on common questions of law and fact..." See Weld, 434 Mass. at 92 (citations omitted).

Here, the plaintiff's claim and alleged injury (i.e., deprivation of premium pay for qualifying work hours) are the same as those experienced by other members of the proposed class. The legal theory under the Wage Act upon which those claims rest is also the same. One common question predominates over all other potential individual questions – whether McGovern's "recoverable draw" policy adequately compensated employees for overtime and Sunday hours. These common questions outweigh any questions regarding the amount of any individual employee's deprived wages. The "single course of conduct" complained of will "turn largely on common questions of fact and law" about how McGovern implemented is overtime

pay policy and whether those actions violated applicable statutes. See Weld, 434 Mass. at 92. This court concludes that plaintiffs have met Rule 23(b)'s predominance requirement.

**f. Superiority**

Once the other prerequisites for class certification have been met, the plaintiff must still demonstrate that a class action is superior to other methods for efficiently adjudicating the controversy. Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 601 (1985). This determination overlaps with some of the analyses under the previous requirements. In analyzing the superiority requirement, the court may consider the following:

"(1) The size of the class; (2) the number...of claims which the class members hold...; whether the relief sought is solely injunctive, or instead includes money damages...; (4) whether the class is party-plaintiff or defendant...; (5) the desirability of a uniform determination of common legal and factual issues...; (6) the expense to the parties and to the Commonwealth of maintaining separate actions; and (7) the administrative difficulty of subsequently determining and distributing damages to absentee class members, as opposed to the problems presented by administering multitudinous individual lawsuits." Smith, supra, § 23.8, at 342.

"[W]hen common issues predominate, 'judicial economy and consistency of result dictate class treatment.'" Weld, 434 Mass. 93 (citation omitted).

In this case, analysis of the above factors demonstrates that a class action is the superior method for efficiently adjudicating the controversy. The size of the possible class (over 40) makes joinder impracticable. The parties involved will benefit from one uniform determination of the facts concerning McGovern's "recoverable draw" policy applicable to the plaintiff class. Maintaining separate causes of action for each class member would be unnecessarily costly. This court is mindful that the Defendants will bear the cost of defending this litigation, making a

single adjudication beneficial to it, despite its opposition to the present Motion. Finally, as the class is readily identifiable from employment records, there is no special administrative difficulty identifying class members and ensuring proper application of any judgment received in favor of the class.

This court concludes that the plaintiffs have met the superiority requirement of Rule 23(b).

**II. Conclusion.**

The plaintiffs have provided this court with sufficient information to enable it "to form a reasonable judgment that the class meets the requirements of rule 23..." Salvas, 452 Mass. at 363, quoting Weld, 434 Mass. at 87. Accordingly, this court certifies a class of "individuals employed by McGovern that performed car sales duties who were paid on a 100% draw and commission basis and worked more than 40 hours in at least one workweek and/or on at least one Sunday at any time between January 11, 2016 and October 2019, and who did not sign an arbitration agreement with McGovern." The court also appoints Everett as the class representative and his attorneys as class counsel.

**ORDER**

This court finds that the plaintiffs have met the class certification requirements established by Mass. R. Civ. P. 23. For this reason, it is hereby **ORDERED** that Plaintiff's Motion for Class Certification is **ALLOWED**.

/s/John P. Pappas
Justice of the Superior Court

DATED: November 28, 2022