COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court Department of the Trial Court.

MATTHEW SUTTON and AMIE ARESTANI, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
	)	Case No. 19-01763
v.	)	
JORDAN'S FURNITURE, INC.,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM IN SUPPORT THEREOF

Plaintiffs are sales employees who have worked for Defendant Jordan's Furniture, Inc. ("Jordan's"), one of New England's leading furniture retailers. They brought this case alleging that Jordan's has violated the overtime provision of the Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, § 1A, and the Massachusetts Wage Act, M.G.L. c. 149, § 148, by failing to pay its commission-based sales employees[1] "separate and additional compensation" equal to 1.5 times the Massachusetts minimum wage when they have worked more than 40 hours in a week or worked on Sundays. This claim presents "about the most perfect questions for class treatment," *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007), because there is no dispute as to the manner in which Jordan's paid its sales employees. Indeed, Jordan's admits that all of its sales employees at all its stores perform the same type of work under the same job titles and were paid in the same manner, pursuant to the same policies. The

[1] For purposes of this motion, Plaintiffs use the term "sales employee" to refer to Jordan's "sales consultant" and "sleep technicians."

only question going forward is whether those policies complied with the wage laws – and if not, the sales employees' damages for that violation.

As the Supreme Judicial Court held in *Sullivan v. Sleepy's LLC*, 482 Mass. 227 (2019), the Wage Act and the Minimum Fair Wage Law require "separate and additional overtime [and Sunday] compensation to be provided to a one hundred percent commission employee regardless of whether the employee receives a recoverable draw or commissions that equal or exceed one and one-half times the minimum wage for any hours worked beyond forty [or on Sundays]." 482 Mass. at 236, 239. The Court explained that this outcome was required by the plain language and legislative purpose of the statutes, the latter of which was threefold: to "reduce the number of hours of work, encourage the employment of more persons, and compensate employees for the burden of a long workweek." *Id.* at 236. Compensation policies which permit employers to reallocate commissions towards their overtime and Sunday pay obligations advance none of those purposes because they do not reduce employees' time spent at work; do not encourage employers to hire more people; and result in employees receiving the same compensation "regardless of whether [they] worked forty or fifty hours." *Id.* at 234, *quoting Mullally v. Waste Mgt. of Mass., Inc.*, 452 Mass. 526, 531-532 (2008).

Here, Jordan's paid its sales employees on a commission basis with a recoverable sales draw that is calculated on an hourly basis. Put another way, Jordan's paid its sales employees total compensation each week equal to a certain dollar amount per hour worked – the "sales draw" – which it deducted from the commissions the sales employees earned. Although this system facially accounted for the hours that the sales employees worked, it did not result in the sales employees receiving any "separate or additional compensation" for the hours that they worked over 40 or the hours that they worked on Sundays. Rather, all of their overtime and

Sunday premium compensation came from the same source: the sales employees' own sales earnings. In this manner, Jordan's pay practices run afoul of the Wage Act and the Minimum Wage Law, which mandate that employers separately pay additional sums to their employees to compensate them for overtime and Sunday work.

Since this case presents purely common questions as to the legality of Jordan's pay practices, and since the answers to those questions will similarly impact the rights of every sales employee who has worked for Jordan's during the relevant statutory period, Plaintiffs respectfully request that the Court certify the following class:

> All individuals whom Jordan's Furniture, Inc., has employed in the position of "sales consultant" or "sleep technician" during the time period between June 19, 2016, and August 1, 2019.[2]

As discussed herein, that proposed class satisfies all the requirements of Massachusetts Rule of Civil Procedure 23. It is too numerous for practicable joinder because it encompasses potentially hundreds of employees. It presents common issues of fact and law, all of which predominate over individual concerns. The named plaintiffs are typical of the putative class, and both they and their counsel will adequately represent the class members' interests. Finally, class litigation is the superior method of resolving this case. In sum, this case is aptly suited for class treatment.

[2] As defined, this class would include all sales consultants and sleep technicians who have worked for Jordan's at any of its stores both inside and outside Massachusetts. The Court is currently poised to decide, as part of Jordan's pending partial motion to dismiss, whether Massachusetts' wage laws apply to Jordan's employees who work in stores outside of Massachusetts. Depending on the Court's ruling on that issue, the scope of the class may be modified – e.g. limited to individuals who have worked for Jordan's in its Massachusetts stores only.

Background

Jordan's owns and operates a chain of eponymous furniture stores with locations in and around Massachusetts.[3] (Complaint at ¶ 10; Answer at ¶ 10). It employs salespeople to work at these stores as "sales consultants" and "sleep technicians," among them the two plaintiffs, Matthew Sutton and Amie Arestani.[4] (Jill Franklin[5] Deposition Transcript ["Franklin Tr."] at 19:12-20:4, 78:24-79:4, 90:18-20, attached as "Exhibit 1"; Complaint at ¶ 4; Answer at ¶ 4; Amie Arestani Deposition Transcript ["Arestani Tr."] at 42:9-43:1, 54:22-23, attached as "Exhibit 3"). The sales consultants and sleep technicians perform generally the same function, which is to sell products to customers. (Franklin Tr. [Ex. 1] at 19:19-20:4). The principal difference between the two is that the sales consultants sell furniture and related products in Jordan's store "showrooms," whereas the sleep technicians sell mattresses and related products in Jordan's "sleep labs." (*Id.*). During the time period relevant to this case, Jordan's has, in Massachusetts alone, employed at least 158 sales consultants and sleep technicians. (Gedeon Decl. [Ex. 2] at ¶ 4).

Jordan's compensates all its sales consultants and sleep technicians at all of its stores pursuant to the same "Sales Draw Plan" and "Sales Commission Plan." (Franklin Tr. [Ex. 1] at 53:18-54:22, 56:16-21, 58:13-17, 61:5-18, 63:9-19). Both plans are described in a set of

[3] Three of those stores are located in Massachusetts. Connecticut, New Hampshire, and Rhode Island each have only one Jordan's Furniture location. (Declaration of Kendall Gedeon ["Gedeon Decl."] at ¶ 6, attached as "Exhibit 2").

[4] Mr. Sutton worked as a sales consultant at the Jordan's store in Natick, Massachusetts. (Complaint at ¶ 14; Answer at ¶ 14). Ms. Arestani worked as a sales consultant at the Jordan's store in Nashua, New Hampshire, though she was trained partially in Massachusetts and on one occasion assisted a customer at Jordan's store in Reading, Massachusetts. (Arestani Tr. [Ex. 3] at 49:17-24, 54:22-23, 55:15-56:22).

[5] Ms. Franklin is Jordan's Vice President of Human Resources. (Franklin Tr. [Ex. 1] at 9:5-7). She has held that position for 17 years. (*Id.*). One of Ms. Franklin's responsibilities as Vice President of Human Resources is to oversee how Jordan's compensates its employees and ensure that "we are following proper protocol and compliance." (*Id.* [Ex. 1] at 28:4-12).

memoranda that are available on Jordan's internal employee computer network, [redacted] (*Id.* [Ex. 1] at 51:16-52:4; Sales Draw Plans, attached as "Exhibit 4"; Sales Commission Plans, attached as "Exhibit 5"). [redacted]

Jordan's Sales Draw Plan memoranda provide examples of how this system works. [redacted]

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[6] [redacted] For this reason, Plaintiffs' proposed class period ends on August 1, 2019.

[7] [redacted]

(Sales Draw Plans [Ex. 4] at pp. 2, 4). The Sales Draw Plan for the time period prior to March 12, 2018 provides an even simpler example. (*Id.* [Ex. 4] at p. 6). As the chart in that memo explains,

All newly hired sales employees are required to sign "Sales Compensation Program Agreements" confirming that they understand this compensation policy. (Franklin Tr. [Ex. 1] at 77:1-78:7; Sales Compensation Program Agreements, attached as "Exhibit 8"). These Agreements state that employees [redacted]

These statements comport with Jordan's actual practices. Describing the method used by Jordan's to compute the weekly compensation owed to a sample sales employee, Dawn Brown – Jordan's Payroll Manager for the past 15 years – testified:

[redacted]

[redacted]

(Brown Tr. [Ex. 7] at 50:10-51:7). Put another way, Ms. Brown testified that Jordan's calculated sales employee number 34175's weekly pay as follows:[8]

[redacted]

[8] [redacted]

[9] [redacted]

The effect of Jordan's pre-August 2019 compensation policy was to deny the sales consultants and sleep technicians separate or additional pay for hours worked over 40 per week and for hours worked on Sundays. How? Because Jordan's did not make any "separate" or "additional" payments to the sales consultants or sleep technicians for their premium work time (i.e. for overtime or Sundays). Instead, it merely advanced compensation to those employees in the form of an hourly "draw" that it calculated at a rate of 1.5 times the Massachusetts minimum wage, which it then "recovered" – that is, deducted – from their commissions. This resulted in the sales employees receiving the same total compensation irrespective of how many hours they worked each week, precisely what the Supreme Judicial Court has ruled employers cannot do. *See Sleepy's*, 482 Mass. at 234, *quoting Mullally*, 452 Mass. at 531-532.

The data used by Jordan's in its own draw recovery examples, taken from the March 2018 and January 2019 Sales Draw Plans, demonstrate how that is so.

Argument

1. The Court has broad discretion to certify the class, and wage cases such as this are particularly well suited to class certification.

Plaintiffs here are pursuing claims under the Massachusetts Wage Act, M.G.L. c. 149, § 148, and the overtime provisions of the Massachusetts Minimum Fair Wage Law, M.G.L. c. 151, § 1A. Both statutes expressly allow employees to bring claims on behalf of other "similarly situated" workers. *See* M.G.L. c. 149, § 150 (allowing employees to bring Wage Act claims "for others similarly situated"); M.G.L. c. 151, § 1B (same, for overtime violations). The Legislature enacted these provisions in order to give employees a "substantive right to bring a class proceeding," recognizing that class litigation has an important "deterrent effect and, unique in the employment context … allow[s] one or more courageous employees the ability to bring claims on behalf of other employees who are too intimidated by the threat of retaliation and termination to exercise their rights[.]" *Machado v. System4 LLC*, 465 Mass. 508, 514-515 (2013).

Plaintiffs seeking class certification in a wage case must satisfy the requirements of Massachusetts Rule of Civil Procedure 23. *See Gammella v. P.F. Chang's China Bistro, Inc.*, 482 Mass. 1, 11 (2019). Under Rule 23, class certification is appropriate where: (1) the class is so numerous that joinder of all members is impractical (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or 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). If these four prerequisites are met, then class certification may be granted if (1) questions of law or fact common to the members of the class predominate over any individual questions

(predominance), and (2) a class action is found superior to other available methods for the fair and efficient adjudication of the case (superiority). Mass. R. Civ. P. 23(b).

As the Supreme Judicial Court has repeatedly stated, Massachusetts' version of Rule 23 is flexible, and affords trial judges "broad discretion" to grant class certification. *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 361, 371 (2008) ("One of the great strengths of the rule 23 class action device is its plasticity."); *Weld v. Glaxo Wellcome Inc.*, 434 Mass. 81, 87 (2001) (noting that one of the ways "our rule 23" provides "judges and parties with greater flexibility" than its federal counterpart). Along with numerous other courts, the Supreme Judicial Court has also recognized that Rule 23 is particularly "well suited to class action litigation in the employment context, including under the Wage Act and the minimum fair wage law." *Gammella*, 482 Mass. at 11; *see also*, *e.g.*, *George v. National Water Main Cleaning Co.*, 286 F.R.D. 168, 180 (D. Mass. 2012) ("numerous courts have found that wage claims are especially suited to class litigation – perhaps 'the most perfect questions for class treatment' – despite differences in hours worked, wages paid, and wages due"), *quoting Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 359 (E.D.N.Y. 2011).

2. The class in this case satisfies the prerequisites of Rule 23(a).

a. The class is too numerous for practicable joinder.

Numerosity is satisfied where "joinder of all members is impracticable, unwise or imprudent" based on considerations of "efficiency, limitation or juridical resources and expense to the Plaintiffs." *Brophy v. School Committee of Worcester*, 6 Mass. App. Ct. 731, 735 (1978). This prerequisite is "easily met in most employment cases, as in most class actions generally." *Gamella*, 481 Mass. at 13, *quoting* W.B. Rubenstein, Newberg on Class Actions § 23:18 at 665 (5th ed. 2017). Courts have typically concluded classes comprised of more than 40 individuals

satisfy numerosity. *See, e.g., Garcia v. E.J. Amusements of New Hampshire, Inc.*, 98 F. Supp. 3d 277, 285 (D. Mass. 2015); *In re Relafen Antitrust Litigation*, 218 F.R.D. 337, 342 (D. Mass. 2003).

In Massachusetts alone, Jordan's has employed at least 158 sales consultants and sleep technicians during the relevant period. (Gedeon Decl. [Ex. 2] at ¶ 4). If the class were to include Jordan's stores outside Massachusetts, that number would certainly be larger. Either way, a class comprised of more than 100 individuals is certainly too large for practicable joinder. This is especially true given that all the putative class members are retail salespeople who are unlikely to possess the resources necessary to pursue individual legal action, or who still work for Jordan's, which would make them reluctant to bring suit on an individual basis. *See Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (joinder of 100 to 150 class members would be impracticable where class members still employed "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs"); *Pyke v. Cuomo*, 209 F.R.D. 33, 41 (N.D.N.Y. 2002) ("The fact that many of these potential class members purportedly are of limited financial means also contributes to a finding of impracticability."). Accordingly, Plaintiffs submit that numerosity is satisfied.

b. The class presents only common issues of law and fact.

Rule 23(a) requires that a putative class present common questions of law or fact. Commonality is a low threshold, requiring only that the class members' claims arise from "a common relationship to a definite wrong." *Spear v. H.V. Greene Co.*, 246 Mass. 259, 266 (1923). This test is "qualitative, not quantitative," meaning that "there need only be a single issue common to all members of the class." *Holzman v. General Motors Corp.*, 2007 WL 4098913, at *9 (Mass. Super. 2007), *quoting In re American Medical Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir.

1996); *Schrier v. Banknorth, N.A. Mass.*, 2004 WL 3152399, at *3 (Mass. Super. 2004) ("The requirement for commonality is met if there is only one issue common to the entire class"). Commonality is most readily satisfied in cases where employees of a single employer are all subject to a uniform policy or practice, the legality of which may be resolved in a single swoop.[10]

Commonality is satisfied here because the entire class coheres around a single common question of liability as to which there is a single common answer. The common question is this: did Jordan's sales consultants and sleep technicians receive "separate and additional compensation" for their overtime and Sunday hours? The answer to that question can only be "yes" or "no" – that is, Jordan's either paid its sales consultants and sleep technicians a separate amount of additional compensation when they worked overtime or on Sundays, or it did not. Moreover, the evidence upon which that answer depends is both common to every member of the class and largely undisputed. For example, Jordan's admits that its payroll systems are administered by the same small team of employees; that it has paid its sales consultants and sleep technicians at all its stores pursuant to the same set of policies; that it tracks their hours worked using a common timekeeping system; and that it calculates the sales consultants' and sleep technicians' compensation using a common computer program and a consistent formula. (*See*

[10] *See, e.g., Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1040 (2016) (commonality satisfied where class members all "worked in the same facility, did similar work, and were paid under the same policy"); *Ouadani v. Dynamex Operations East, LLC*, 405 F. Supp. 3d 149, 161 (D. Mass. 2019) (citing "several cases where courts in this district have found that a lawsuit challenging a company-wide practice or policy satisfied [commonality]"); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 309-10 (D. Mass. 2004) (commonality satisfied where class members "were all employed by the defendant" and whose claims arose "out of the same policies and wrongful conduct of the Defendant, and [were] based on the same legal theories"); *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 109 (E.D.N.Y. 2011) (commonality and predominance satisfied where the class "was aggrieved by the same policy of paying wages to technicians without regard to whether business expenses bring those wages below the established minimum wage"); *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513, 531 (Cal. 2012) ("Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment").

Franklin Tr. [Ex. 1] at 54:11-22, 63:9-18, 64:20-65:2; Brown Tr. [Ex. 7] at 8:10-9:20, 47:1-48:21, 50:3-51:7, 57:9-16). In such circumstances, there can be no argument that the proposed class presents common issues of law and fact. *See Rasmus v. The Bank of New York Mellon Corp.*, 2018 WL 8139253, at *4 (Mass. Super. Jan. 17, 2018) (commonality satisfied in case seeking to recover unpaid overtime, where all class members were "deemed by [defendant] to be [overtime] exempt and the same job description applied to all [class members]").

c. The named plaintiffs are typical of the class they seek to represent.

Rule 23(a) next requires that the representative plaintiffs' claims be "typical of the claims … of the class." Mass. R. Civ. P. 23(a)(3). "Typicality is established when there is '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. Plaintiffs who allege that the "defendant acted consistently toward [them and the] members of a putative class" meet that test. *Fletcher v. Cape Cod Gas. Co.,* 394 Mass. 595, 606 (1985). However, typicality does not require that the representative plaintiffs be identical to the class members in every respect. *See Margaret Hall Found., Inc. v. Atlantic Fin. Mgmt., Inc.*, 1987 WL 15884, at *2 (D. Mass. 1987) (the "typicality requirement may be satisfied even if there are factual distinctions between the claims of the named Plaintiffs and those of other class members"), *quoting De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

The named plaintiffs' claims are typical. Both worked as sales consultants for Jordan's during the statutory period; Mr. Sutton worked at the Jordan's Furniture store in Natick, Massachusetts, and Ms. Arestani worked primarily at the Jordan's Furniture store in Nashua, New Hampshire. (*See* Complaint at ¶ 14; Answer at ¶ 14; Arestani Tr. [Ex. 3] at 49:17-24,

54:22-23). Both were subject to the same sales draw and commission policies as the class members generally. (Sales Draw Plans [Ex. 4]; Sales Commission Plans [Ex. 5]). Both signed the same Sales Compensation Program Agreement that all of the proposed class members are obligated to sign. (Sales Compensation Agreements [Ex. 8]. And both are pursuing the same claims, based on the same legal theories, as the putative class members. They are, accordingly, typical of the class. *See Rasmus*, 2018 WL 8139253, at *5 (typicality satisfied where the "claim of [plaintiff] is based on [defendant] having acted consistently toward him and the class with respect to misclassification"); *Goldberg v. EF Education First, Inc.*, 2017 WL 4400028, at *9 (Mass. Super. June 29, 2017) (same, where "[plaintiff] operated as a [tour consultant] under the same corporate policies and with the same amount of discretion (whether exercised or not) as other [tour consultants]"); *Dvornikov v. Landry's Inc.*, 2017 WL 1217110, at *9 (D. Mass. Mar. 31, 2017) (same, where "the injuries of the proposed named Plaintiffs and putative plaintiffs arose from same course of conduct by the Defendants").

d. Plaintiffs and their counsel will adequately represent the class.

Finally, Rule 23(a) requires that the "representative parties will fairly and adequately protect the interests of the class." Mass. R. Civ. P. 23(a)(4). The "[t]wo basic guidelines for meeting the adequacy of representation standard of rule 23(a)(4) are: (1) the absence of potential conflict between the named plaintiffs and the class members and (2) that counsel chosen by the representative parties is qualified, experienced and able to vigorously conduct the proposed litigation." *Adair v. Sorenson*, 134 F.R.D. 13, 18 (D. Mass. 1991), *quoting Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985) (internal quotations omitted).

Plaintiffs here have no potential conflict of interest with the class they seek to represent. To the contrary, their interest in this case is the same interest as every other class member

because – they are, in short, seeking to recover monetary damages for unpaid overtime and Sunday work under the Massachusetts wage laws. Further, no class member will be harmed if they are successful, and no class member has an interest in preserving Jordan's pay practices, since Jordan's changed those practices effective August 2019. If plaintiffs are personally successful in pursuing their claims, their success will translate into success for the class as a whole. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-626 (1997) ("[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members"), *quoting East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); *Chebotnikov v. LimoLink, Inc.*, 2017 WL 2909808, at *2 (D. Mass. July 6, 2017) ("plaintiffs have adequately established that all class members have the same interest in receiving gratuities allegedly owed to them").

Plaintiffs' counsel is also more than adequate to represent the class. Hillary Schwab is a 1999 graduate of Columbia Law School, where she was an editor of the *Columbia Law Review*. She has spent nearly all of her legal career representing employees in wage matters at both the state and federal level. Her colleague Brant Casavant graduated from Northeastern University School of Law in 2008. Since then, he has exclusively represented workers in wage class actions and in individual cases. Attorney Schwab's and Attorney Casavant's substantial experience in this field has led several courts to conclude that they are adequate class counsel. *See*, *e.g.*, *Chebotnikov*, 2017 WL 2909808, at *2 (Attorney Schwab was adequate class counsel based on her "experience … in the areas of employment law and class action litigation"); *Dvornikov*, 2017 WL 1217110, at *11 (adequacy "easily met" because the undersigned counsel was "clearly qualified, experienced, and able to undertake this litigation"); *Goldberg*, 2017 WL 4400028, at *9 n.3 ("Plaintiff's counsel are well-versed in class litigation and are adequate to serve as class

counsel"); *Levi v. Gulliver's Tavern, Inc.*, 2018 WL 10149710, at *8-*9 (D.R.I. April 23, 2018) (adequacy satisfied; Attorney Casavant "has experience with numerous class action cases based on similar claims, and there is no conflict of interest apparent from the record"). Accordingly, Plaintiffs submit that they have met Rule 23's adequacy prerequisite.

3. The class satisfies all the requirements of Rule 23(b).

a. Common issues of law and fact predominate over individual concerns.

Rule 23(b) requires that the issues of law and fact common to the class members "predominate" over any questions affecting only individual class members. Mass. R. Civ. P. 23(b). This requirement is satisfied upon showing that a "sufficient constellation of common issues … bind[] class members together." *Salvas*, 452 Mass. at 366, *quoting Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000). Under this test, class certification is "appropriate where common issues of law and fact … form the nucleus of a liability claim, even though the appropriateness of class action treatment in the damages phase is an open question." *Id.* at 364. Though a finding on predominance is discretionary, the Supreme Judicial Court has cautioned that judicial "discretion … 'must be exercised in accord with the purposes sought to be achieved by class actions'," namely, vindicating the rights of persons who might lack the wherewithal to bring claims individually. *Id.* at 363, *quoting Sniffin v. Prudential Ins. Co.*, 11 Mass. App. Ct. 714, 723 (1981).

As with commonality, predominance is satisfied in this case because the proposed class is defined by a single question that may readily be answered in a common manner using common evidence and common legal analysis. For example, questions concerning Jordan's pay practices with regards to the sales consultants and sleep technicians may be addressed using testimony from its Vice-President of Human Resources and its Payroll Manager; from Jordan's own written

policy statements concerning the method in which it compensated its sales employees; and the sales employees' earnings, time records, and work schedules, all of which are accessible in Jordan's computer databases. Similarly, the principle legal question in this case – whether Jordan's provided its sales consultants and sleep technicians with separate and additional pay for overtime and Sunday work – applies equally to every proposed class member because every proposed class member was compensated pursuant to the same systems and policies. Predominance is therefore satisfied. *See Dvornikov*, 2017 WL 1217110, at *9 (predominance satisfied where "the bulk of the evidence that will be presented at trial will be common to all hostesses, including internal company documents, job descriptions, or other communications involving employer expectations for hostesses, and firsthand employee experiences"); *Garcia*, 98 F. Supp. 3d at 290 (predominance satisfied where liability for failure to pay wages turned on common issues such as "whether the class worked over 40 hours during any given week" and the "factual and legal significance of [defendant's] alleged prepayment of wages"); *Garcia v. JCPenny Corp., Inc.*, 2016 WL 878203, at *8 (N.D. Ill. Mar. 8, 2016) (same, where challenged pay policy was "applied universally to all [class members], and the policy did not change in any substantive way during the class period").

b. A class action is the superior means of resolving this dispute.

Finally, a class may be certified if it is "superior to other available methods for the fair and efficient adjudication of the controversy." Mass. R. Civ. P. 23(b). The superiority requirement serves several purposes. It ensures the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents to court at all." *Anchem Prods., Inc. v. Windsor*, 512 U.S. 591, 617 (1997). It helps achieve judicial economy by consolidating potential claims. *See Overka v. American Airlines, Inc.*, 265 F.R.D. 14, 24 (D.

Mass. 2010). And it ensures that class actions serve as a means to privately enforce a substantive remedial statute. *See* Newberg on Class Actions § 4:66 (5th ed.) (discussing how class actions are the "primary vehicle in modern jurisprudence for the effective enforcement" of various statutory schemes).

A class action is the superior means of adjudicating this case for at least three related reasons. First, this case challenges a common policy that has adversely affected every putative class member by depriving them of separate and additional compensation for their overtime and Sunday work. As a matter of judicial economy, addressing the legality of that policy on a class basis is superior to the two alternatives, which would be to either (1) limit recovery to the named plaintiffs and to those other individuals who may be courageous enough to pursue individual suits or (2) to burden the Court with a multiplicity of identical lawsuits. *See*, *e.g.*, *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968) (certifying class of 25 individuals; "I see no necessity for encumbering the judicial process with 25 lawsuits, if one will do").

Second, the reality of employment litigation is that, in the absence of class treatment, very few employees will take steps to enforce their wage rights. *See Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (the "*realistic* alternative to a class action is not [numerous] individual suits, but zero individual suits") (emphasis original). This is an important consideration, given that the Supreme Judicial Court has repeatedly emphasized the importance of class litigation as a means of enforcing statutory compliance and vindicating employees' rights. *See Gammella*, 482 Mass. at 11 ("We have … recognized that rule 23 is well suited to class action litigation in the employment context, including under the Wage Act and the minimum fair wage law"); *Machado*, 465 Mass. at 515 & n.12 ("class proceedings under the

Wage Act" advance "very legitimate policy rationales," including "the deterrent effect of class action lawsuits").

Lastly, courts have recognized fear of retaliation as one of the factors that make class actions superior. Indeed, in *Machado*, the Supreme Judicial Court held that the Legislature created a "substantive right" for employees to pursue class wage claims in order to "allow one or more courageous employees the ability to bring claims on behalf of other employees who are too intimidated by the threat of retaliation and termination to exercise their rights under the Wage Act." 465 Mass. at 514 n.12; *see also Overka v. Am. Airlines, Inc.,* 265 F.R.D. 14, 24 (D. Mass. 2010) ("class adjudication is superior in the employment context because fear of employer retaliation may have a chilling effect on employees bringing claims on an individual basis"); *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 308-09 (D. Mass. 2004) ("Many courts have suggested that the employer-employee relationship is of such a nature that an employee 'may feel inhibited to sue making joinder unlikely'"). Class litigation would enable employees who are too fearful of potential retaliation, or who might not otherwise have the resources to pursue legal action, to obtain recovery. For all these reasons, Plaintiffs submit a class proceeding in this matter is superior to the alternatives.

Conclusion

The putative class in this case satisfies every requirement of Rule 23. Accordingly, for the reasons set forth herein, Plaintiffs respectfully request that the Court certify the following class:

> All individuals whom Jordan's Furniture, Inc., has employed in the position of "sales consultant" or "sleep technician" during the time period between June 19, 2016, and August 1, 2019.

Respectfully submitted,

MATTHEW SUTTON and AMIE ARESTANI,
on behalf of themselves
and all others similarly situated,

_____

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Dated: March 2, 2020.

CERTIFICATE OF SERVICE

I certify that, on March 2, 2020, one copy of this motion was served by email and first-class mail on counsel for Defendant at the following addresses:

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