COMMONWEALTH OF MASSACHUSETTS

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

MATTHEW SUTTON, *et al.*, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
	)	Case No. 19-01763
v.	)	
JORDAN'S FURNITURE, INC.,	)	
Defendant.	)	

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Jordan's does not contest the relevance, admissibility, or authenticity of any of the evidence Sutton has submitted in support of his motion for partial summary judgment. Instead, Jordan's asserts that Sutton's motion should be denied because he has, ostensibly, not provided "evidence of an ***actual*** violation."[1] (Opp. 3) (emphasis original). That assertion is frankly disingenuous. As the Supreme Judicial Court held in *Dixon v. Malden*, 464 Mass. 446 (2013), and then confirmed in *Sullivan v. Sleepy's LLC*, 482 Mass. 227 (2019), "employers may not retroactively reallocate and credit payments made to fulfill one set of wage obligations against separate and independent obligations." *Sleepy's*, 482 Mass. at 233. Thus, retail employers who owe premium wages to their employees for overtime or Sundays cannot retroactively credit those employees' commission payments "against [their] overtime obligations" because those payments

[1] Jordan's opposition otherwise relies exclusively on arguments it made in its own motion for summary judgment, which it served on Sutton's counsel on April 20, 2021. Sutton addresses those arguments in his opposition to that motion, which he served on Jordan's counsel on May 14, 2021.

were "made for a different purpose," namely, to incentivize the employees to make sales. *Id.* at 236. Instead, such "employees are entitled to separate and additional payments of one and one-half times the minimum wage for every hour the employees worked over forty hours or on Sunday." *Id.* at 228.

And yet, according to all the evidence in this case – ***including Jordan's own statements concerning the workings and application of its sales employee pay plan*** – that is ***exactly what Jordan's did***. That is, rather than paying separate and additional compensation for overtime or Sundays, Jordan's [redacted]. This is categorically not a hypothetical: the undisputed evidence amply demonstrates beyond any reasonable disagreement that this is how Jordan's pay system worked because ***Jordan's admits that is how it worked.***

For example, Sutton has produced copies of Jordan's written pay plans and employee compensation agreements, all of which state [redacted]. (JA, Ex. 2-5, 8-10).[2] These documents are not open to interpretation; indeed, Jordan's even went so far as to define the [redacted]. (JA, Ex. 8 at p. 2) (emphasis added). Likewise, Sutton has produced sworn testimony from Jordan's Vice-President of Human Resources, Jill Franklin, and the company's payroll manager of 15 years, Dawn Brown, in which they ***unambiguously admitted*** that Jordan's paid the sales employees [redacted]

[2] References to the parties' Joint Appendix of Exhibits are denoted as "JA, Ex. [number]."

[redacted]. (*See* Fact Stmt. ¶¶ 6, 15-16, 31-35). Their explanation of Jordan's payment plan was corroborated by Sutton himself, who testified that he understood his compensation as a sales employee would consist of an hourly draw that was recoverable against any commissions he earned. (*See id.*, ¶ 6).

Sutton is not obligated, under Rule 56, to identify every instance in which Jordan's reallocated and credited commission payments toward its employees' overtime or Sunday hours in the form of a recoverable draw to establish Jordan's liability. Why? Because Jordan's concedes that is what it did in its written pay plans, employee compensation agreements, and its managers' own testimony. By contrast, Jordan's has produced no evidence that even suggests that its sales employee pay plan did not work, in practice, exactly as described in its policy documents and according to its managers' own testimony. Jordan's, however, fatally ignores its own admissions, focusing instead on attacking a chart Sutton provided on page 16 of his motion, wherein he demonstrated how Jordan's draw recovery system worked. Of course, it is ironic that Jordan's would challenge the reliability or admissibility of that chart when the Supreme Judicial Court used the ***same analysis*** in *Mullally v. Waste Management of Mass., Inc.*, 452 Mass. 526, 530 n.10 (2008), to illustrate how the defendant's pay plan in that case violated the overtime statute – and then relied upon that analysis ***again*** in arriving at its decision in *Sleepy's*. *See Sleepy's*, 482 Mass. at 234. Be that as it may, Jordan's neglects to mention that Sutton derived the information used in his hypothetical chart from ***Jordan's own pay plan documents***. (*See* JA, Ex. 4 at p. 2; Ex. 5 at p. 2). Such demonstrative evidence is plainly admissible for its limited intended purpose, which is merely to illustrate how Jordan's pay plan (1) worked in practice and (2) resulted in employees working overtime but still receiving the same amount of compensation, contrary to the Court's holding in *Sleepy's*. *See Commonwealth v. Chipman*, 418 Mass. 262, 270

(1994) (videotaped demonstrating of an event admissible provided it "sufficiently resembles the actual event so as to be fair and information."), *quoting Terrio v. McDonough*, 16 Mass. App. Ct. 163, 173 (1983) (internal quotations omitted).

Perhaps recognizing that the Court is entitled to consider the demonstrative chart cited by Sutton, Jordan's falls back to an alternative position, arguing that Sutton's analysis does not "withstand scrutiny" for two reasons: first, because the chart shows that a Jordan's sales employee would receive more "total hourly pay" (in the form of a recoverable draw) for a 50-hour week than a 40-hour week; and second, because Sutton "fails to account for the fact that an employee working a 50-hour week will have more opportunities to make sales … and, therefore, earn a higher commission." (Opp. 4). Neither argument has merit. The central teaching of *Sleepy's* was not that employees must receive greater pay in the form of a draw or in commissions when they work more hours. *Sleepy's* holding was, instead, that employers cannot "***retroactively allocate draws and commissions as hourly wages***" for overtime or Sundays because doing so undermines the Legislature's policy goals. 482 Mass. at 233 (emphasis added). Thus, irrespective of whether a sales employee received a greater hourly draw from one week to the next, or earned more commissions by dint of having worked longer hours, Jordan's was required to ***separately*** pay that employee premium wages ***in addition to*** the employee's draws and commissions. *See id.* ("We … agree with the employees that such retroactive allocation and crediting is impermissible and that separate and additional overtime is owed."). It did not do so, and no reasonable factfinder could look at this record and conclude otherwise.

Accordingly, for the reasons set forth herein and in his motion, Plaintiff respectfully requests that the Court enter judgment as a matter of law as to Jordan's liability under Rule 56.

Respectfully submitted,
MATTHEW SUTTON, *et al.*,
on behalf of himself
and all others similarly situated,

By their attorneys,

/s/ Brant Casavant

Hillary Schwab, BBO #666029
Brant Casavant, BBO #672614
FAIR WORK P.C.
192 South Street, Suite 450
Boston, MA 02111
Tel. (617) 607-3261
Fax. (617) 488-2261
hillary@fairworklaw.com
brant@fairworklaw.com

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CERTIFICATE OF SERVICE

I certify that, on May 24, 2021, one copy of this motion was served by email on counsel for the defendant at the following addresses:

Julie B. Brennan, Esq.
Brian H. Lamkin, Esq.
Manchel & Brennan, P.C.
100 River Ridge Drive, Suite 308
Norwood, MA 02062
jbrennan@manchelbrennan.com
blamkin@manchelbrennan.com

Ariel D. Cudkowicz, Esq.
Seyfarth Shaw LLP
Seaport East
Two Seaport Lane, Suite 300
Boston, MA 02210
acudkowicz@seyfarth.com

/s/ Brant Casavant
Brant Casavant