UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CHRISTINE MCLAUGHLIN et. al.
Plaintiffs,

Case No: 3:22-cv-00059-HES-MCR

v.
SELECT REHABILITATION LLC,
Defendant.
_______________________________________/

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW FOR CLASS CERTIFICATION OF ILLINOIS STATE LAW OVERTIME CLAIMS

Plaintiff, Scott Hardt, ("Plaintiff" or "Hardt"), pursuant to Fed. R. Civ. P. Rule 23 ("Rule 23") seeks an Order certifying the claims in Count III of the Third Amended Complaint [DE 307] as a Class Action for violations of the Illinois State overtime wage law 820 ILCS 105/4(a) (the "Illinois Minimum Wage Law" or the "IMWL") on behalf of the putative class of similarly situated therapists who worked for Select Rehabilitation LLC ("Select") in the state of Illinois.

I. BACKGROUND INFORMATION AND PRELIMINARY STATEMENT

On February 10, 2022 [DE 16], Plaintiffs filed an Amended Complaint seeking Rule 23 Class Action treatment of the Illinois state law claims. The operative complaint, the Third Amended Complaint (the "TAC") [DE 306] added Scott Hardt as a named Plaintiff and class representative for the class of Illinois Therapists on the

claim for overtime wages in Count III under Illinois Minimum Wage Law (IMWL)[1]. This Court has already ruled that a broader, national class of Therapists were similarly situated for FLSA conditional certification. [DE 163]. Subsequently, over 200 Illinois Therapists have joined the collective action and are also putative class members for the IMWL claims. Plaintiffs now seek an order certifying the Illinois Minimum Wage Law claims to proceed as a class action pursuant to Rule 23. The putative class Plaintiffs seek to represent is a much narrower class of Therapists from the FLSA 216(b) nationwide class the Court found similarly situated. Now, Plaintiffs seek class certification for only Therapists who worked for Defendant in Illinois, identified and disclosed by Select as totaling 3,868 Therapists class members.

A. Key Facts and Declarations of Illinois Therapists.

1) Therapists are Hourly Non-Exempt Employees

Plaintiff Hardt was employed by Select as an hourly paid, non-exempt Physical Therapy Assistant (PTA) (i.e. "Therapist"). Select classified all Therapist class members, including Hardt, as hourly, non-exempt employees [Ex. 31 - Illinois Therapists' Pay Stubs]. All therapists are hourly paid, non-exempt employees; Select does not dispute this nor has Select pled any exemption. Select's payroll for 1,179 Plaintiffs in the collective action also prove that all Therapists (including the 208

[1] "Therapists" (aka clinicians) include persons working for Defendant under various therapy job titles, including: Occupational Therapists (OTR), Certified Occupational Therapy Assistants (COTA), Physical Therapists (RPT or PT), Physical Therapist Assistants (PTA), and Speech Language Pathologists (SLP) (hereinafter collectively referred to as "Therapists")

plaintiffs from Illinois) were in fact hourly paid employees.[2] Select cannot and does not dispute that all Therapists in the national class (including Illinois) were hourly paid, nonexempt employees.

The primary job of the Select Therapists (aka Clinicians) is to provide therapy services to patients within their respective specialty (i.e. occupational, physical, speech) and document the treatment provided at skilled nursing facilities (SNFs), or assisted living facilities (ALFs) staffed by Select. Therapists complete this documentation using an electronic health record system ("EHR"). It is a cloud-based software program owned by Net Health Systems Inc. ('Casamba' and 'Optima Rehab').

Select uses a single, standard set of job descriptions for all Therapists nationwide, and thus all therapists in Illinois have the same respective job requirements. [Ex. 32 - Janssen Dep. 390:23-392:10]. *See* EX. 1-Decl. Gachalian (PT); EX. 2-Decl. Lorenzetti (OTR); EX. 3-Decl. Miller (OTA); EX. 4-Decl. Hardt (PTA); EX. 5-Decl. Phillips (PT); EX. 6-Decl. Ramsey (PTA); EX. 7-Decl. Daniels (COTA); EX. 8-Decl. Shah (PTA); EX. 9-Decl. Matic (COTA); EX. 10-Decl. Beck (OT); EX. 10-Decl. Beck (OT); EX. 12-Decl. Boyle (PTA); EX. 13-Decl. Hovorka (PTA); EX. 14-Decl. Rowls (COTA); EX. 15-Decl. Tlatenchi (PTA); EX. 16-Decl. Brown (COTA); EX. 17-Decl. Swift (PTA) and EX. 18-Decl. Ness (COTA).

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[2] *See* EX. 1-Decl. Gachalian (PT) ¶8; EX. 3-Decl. Miller (OTA) ¶6; EX. 19-Decl. Vanderveen (SLP) ¶6; EX. 20-Decl. Ramos (OT) ¶6; EX. 21-Decl. Whalen (COTA) ¶10; EX. 22-Decl. Magyar (COTA) ¶8; EX. 22-Decl. Magyar (COTA) ¶8 and EX. 24-Decl. Logan (COTA) ¶8.

2) Therapists were Subject to Productivity Requirements

Select employs over 30,000 clinicians (a.k.a. Therapists) working from 3,000 facilities nation-wide.[3] (Select produced a class list of about 30,000 therapists to Plaintiffs pursuant to the FLSA Conditional Certification order). In a scheme to avoid paying overtime wages and save hundreds of millions of dollars in labor costs, Select employed a performance productivity requirement for all Therapists. EX. 4-Decl. Hardt (PTA) ¶7[4] Ex. 36 - Select productivity reports.

Select's productivity requirement is/was based upon a percentage (%) of a Therapist's Medicare billable time divided by the time they spent working on-the-clock. These assigned and enforced productivity rates required Therapists to bill for upwards of 90% of their time. EX. 4-Decl. Hardt (PTA) ¶7. If Therapists fell below these daily, weekly and monthly productivity requirements, they were subject to disciplinary action, including termination. EX. 4-Decl. Hardt (PTA) ¶7.[5]

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[3] *See* https://www.selectrehab.com/about.htm last visited March 13, 2024. "Our privately held company employs over 21,000 clinicians across 3,000 sites in 46 states and Washington D.C."

[4] *See also* EX. 1-Decl. Gachalian (PT) ¶3; EX. 2-Decl. Lorenzetti (OTR) ¶3; EX. 3-Decl. Miller (OTA) ¶8; EX. 5-Decl. Phillips (PT) ¶7; EX. 6-Decl. Ramsey (PTA) ¶7; EX. 7-Decl. Daniels (COTA) ¶7; EX. 8-Decl. Shah (PTA) ¶7; EX. 9-Decl. Matic (COTA) ¶7; EX. 10-Decl. Beck (OT) ¶7; EX. 11-Decl. Chamberlain (COTA) ¶7; EX. 12-Decl. Boyle (PTA) ¶7; EX. 13-Decl. Hovorka (PTA) ¶7; EX. 14-Decl. Rowls (COTA) ¶7; EX. 15-Decl. Tlatenchi (PTA) ¶7; EX. 16-Decl. Brown (COTA) ¶7; EX. 17-Decl. Swift (PTA) ¶7 and EX. 18-Decl. Ness (COTA) ¶7.

[5] *See also* EX. 1-Decl. Gachalian (PT) ¶21; EX. 2-Decl. Lorenzetti (OTR) ¶20; EX. 3-Decl. Miller (OTA) ¶12; EX. 5-Decl. Phillips (PT) ¶7; EX. 6-Decl. Ramsey (PTA) ¶7; EX. 7-Decl. Daniels (COTA) ¶7; EX. 8-Decl. Shah (PTA) ¶7; EX. 9-Decl. Matic (COTA) ¶7; EX. 10-Decl. Beck (OT) ¶7; EX. 11-Decl. Chamberlain (COTA) ¶7; EX. 12-Decl. Boyle (PTA) ¶7; EX. 13-Decl. Hovorka (PTA) ¶12; EX. 14-Decl. Rowls (COTA) ¶7; EX. 15-Decl. Tlatenchi (PTA) ¶7; EX. 16-Decl. Brown (COTA) ¶7; EX. 17-Decl. Swift (PTA) ¶7 and EX. 18-Decl. Ness (COTA) ¶7

Select enforced these performance productivity "expectations" upon Therapists daily through pressure by the facility Program Managers, who were pressured by their superiors, Regional Managers and VP's. Therapists were both pressured and encouraged to work 'off-the-clock' in order to meet their assigned performance productivity and efficiency percentages or face disciplinary action and/or termination. Declarations filed in support of Plaintiffs' Motion for Collective Certification also demonstrate that Select's therapists from across the US were subjected to the same performance pressures and expectations and likewise suffered to work off the clock.

This same practice of enforcing productivity requirements on Therapists has been an industry problem for more than a decade. *See* Complaints from the following cases: Haggerty v. Reliant Rehabilitation LLC, Case No. 1:22-cv-11329-WGY (Dist Mass); Kendall V Reliant Rehab, 1:22-cv-02787-NLH-SAK (Dist NJ); Anderson v. Reliant Rehab, 1:22-cv-00599-HBK (ED CA); Hebert v. Select Rehabilitation, LLC, 4:21-cv-00524-JM (ED ARK). Hebert, was a Select physical therapist who claimed to have suffered to work off the clock because, "Plaintiff was required to spend 92% of his time on "billable work."" Ex. 38 at ¶ 28. The same claims are made here not just by Hardt and the Illinois Plaintiffs, but by the putative class members who attest they suffered to work off the clock to meet Select's productivity expectations.

As a corporation, who acts through its managers, Select has known that Therapists worked off-the-clock in order to meet their productivity performance

expectations. For instance, Illinois Program Manager Nancy Quinn confirms Therapists worked off the clock. EX. 29-Decl. Quinn (COTA) ¶15; as does Illinois Directors of Rehab (aka Program Manager) and Plaintiff Vanderveen , EX. 19-Decl. (SLP) ¶19. Select's Regional Managers required facility Program Managers to review each Therapists' productivity metrics daily, weekly and hourly. "As a PM I was instructed by my superiors, the Regional Manager, and the VP or Operations, on a daily basis and on a weekly basis, to enforce the therapists assigned productivity rates which ranged from 87 to 90%." EX. 29-Decl. Quinn ¶11. *See* EX. 25-Decl. Myers ¶7; EX. 23-Decl. Voeun ¶9; EX. 22-Decl. Magyar ¶9 and EX. 20-Decl. Ramos ¶7.

Through its managers, Select knew that Therapists worked off-the-clock to meet these productivity requirements.

> "My regional manager, and thus the company knew I did this out of office work and that I would come in early to access the systems and work off the clock, and could see my logins and heard me even report and complain of this." EX. 22-Decl. Magyar (COTA) ¶ 15

See also EX. 21-Decl. Whalen (COTA) ¶ 17; EX. 24-Decl. Logan (COTA) ¶24 and EX. 29-Decl. Quinn (COTA) ¶¶ 11,12.

But Select wilfully turned a 'blind eye' to the off the clock work and overtime hours incurred by Therapists who suffered to work off-the-clock.

> "I was expected by my superiors to turn a blind eye to therapists working off the clock to hit their productivity numbers, and I was aware that therapists worked off the clock to hit their assigned productivity numbers." EX. 29-Decl. Quinn ¶15.

See also EX. 1-Decl. Gachalian (PT) ¶23; EX. 2-Decl. Lorenzetti (OTR) ¶23 and EX. 19-Decl. Vanderveen (SLP) ¶14.

Defendant's failure to pay Therapists overtime wages for all hours worked in excess of 40 in each and every workweek is a violation of the IMWL. The IMWL mirrors the FLSA (29 U.S.C. §207(a)), but provides additional remedies beyond the FLSA, including treble damages and accrued interest for each pay period in which the overtime payments were delayed.[6] Like the FLSA, the IMWL makes it unlawful to not pay hourly, non-exempt employees such as Hardt and Therapists overtime premiums for all hours worked over 40 in each and every workweek. Barlett v. City of Chicago, No. 14 C 7225, 2019 WL 4823532, at *4 (N.D. Ill. Oct. 1, 2019), aff'd sub nom. Chagoya v. City of Chicago, 992 F.3d 607 (7th Cir. 2021); Pietrzycki v. Heights Tower Serv., Inc., 197 F. Supp. 3d 1007, 1017 (N.D. Ill. 2016).

Judge Schlesinger has already held that a nationwide class of Therapists (now over 900 therapists) were similarly situated and entitled to proceed collectively [DE 163] against Select for unpaid overtime violations under the FLSA. Thus, the narrower class of Illinois Therapists must also be similarly situated for the purpose of a Rule 23 Class Action under the IMWL for the exact same claims.

Pursuant to a common policy and plan, Select pressured Illinois Therapists to work off-the-clock to meet productivity performance expectations. The reasons why is not to be addressed at this stage, but rather Plaintiffs present ample proof that

[6] 820 ILCS 105/12(a) - "Sec. 12. (a) If any employee is paid by his employer less than the wage to which he is entitled under the provisions of this Act, the employee may recover in a civil action treble the amount of any such underpayments together with costs and such reasonable attorney's fees as may be allowed by the Court, and damages of 5% of the amount of any such underpayments for each month following the date of payment during which such underpayments remain unpaid."

Therapists were permitted to work off-the-clock in Illinois, as well as across the US. Select has willfully failed to pay overtime compensation to Hardt and similarly situated Illinois Therapists. Hardt and the putative class of Illinois Therapists were pressured and encouraged to work off-the-clock without being paid overtime premiums for overtime hours Select knew were being worked.

3) The facts demonstrate Illinois Therapists are similarly situated:

Plaintiff presents this Court with declarations from Illinois Therapists and putative class members which demonstrate their claims are identical to Hardt's and identical to those of Therapists across Illinois.

Illinois Therapists All Had Similar Job Duties and Requirements: "The job duties and requirements of a Physical Therapist are routine and standardized. Generally, Select Rehab published job descriptions contained in Exhibit A, attached, are a fair and accurate description of my duties and responsibilities as a Physical Therapist during my time of employment." EX. 1-Decl. Gachalian ¶5;

> EX. 2-Decl. Lorenzetti ¶9; EX. 3-Decl. Miller ¶3; EX. 4-Decl. Hardt ¶5; EX. 5-Decl. Phillips ¶5; EX. 6-Decl. Ramsey ¶5; EX. 7-Decl. Daniels ¶5; EX. 8-Decl. Shah ¶5; EX. 9-Decl. Matic ¶5; EX. 10-Decl. Beck ¶5; EX. 11-Decl. Chamberlain ¶5; EX. 12-Decl. Boyle ¶5; EX. 13-Decl. Hovorka ¶5; EX. 14-Decl. Rowls ¶5; EX. 15-Decl. Tlatenchi ¶5; EX. 16-Decl. Brown ¶5; EX. 17-Decl. Swift ¶5 and EX. 18-Decl. Ness ¶5

Illinois Therapists were All Assigned Productivity Performance Metrics: "As a Physical Therapist (RPT), I was responsible for productivity of 90%, meaning that for my 40 hours of work, I was required to treat patients 90% of the weekly time." EX. 1-Decl. Gachalian (PT) ¶3;

> EX. 2-Decl. Lorenzetti (OTR) ¶3; EX. 3-Decl. Miller (OTA) ¶8; EX. 5-Decl. Phillips (PT) ¶7; EX. 6-Decl. Ramsey (PTA) ¶7; EX. 7-Decl. Daniels (COTA) ¶7; EX. 8-Decl. Shah (PTA) ¶7; EX. 9-Decl. Matic (COTA) ¶7; EX. 10-Decl. Beck (OT) ¶7; EX. 11-Decl. Chamberlain (COTA) ¶7; EX. 12-Decl. Boyle (PTA) ¶7; EX. 13-Decl. Hovorka (PTA) ¶7; EX. 14-Decl. Rowls (COTA) ¶7;

EX. 15-Decl. Tlatenchi (PTA) ¶7; EX. 16-Decl. Brown (COTA) ¶7; EX. 17-Decl. Swift (PTA) ¶7 and EX. 18-Decl. Ness (COTA) ¶7.

Illinois Therapists were Subject to Discipline/Termination for Not Meeting Performance Metrics: "I was assigned a productivity rate by Select Rehab which meant that each day and week the % of my work hours which were billable to Medicare were expected to meet this assigned rate or I would be subject to coaching and disciplinary action, including termination. My last rate assigned was 95%."EX. 15-Decl. Tlatenchi (PTA) ¶7;

EX. 1-Decl. Gachalian (PT) ¶21; EX. 2-Decl. Lorenzetti (OTR) ¶20; EX. 3-Decl. Miller (OTA) ¶12; EX. 4-Decl. Hardt (PTA) ¶7; EX. 5-Decl. Phillips (PT) ¶7; EX. 6-Decl. Ramsey (PTA) ¶7; EX. 7-Decl. Daniels (COTA) ¶7; EX. 8-Decl. Shah (PTA) ¶7; EX. 9-Decl. Matic (COTA) ¶7; EX. 10-Decl. Beck (OT) ¶7; EX. 11-Decl. Chamberlain (COTA) ¶7; EX. 12-Decl. Boyle (PTA) ¶7; EX. 13-Decl. Hovorka (PTA) ¶12; EX. 14-Decl. Rowls (COTA) ¶7; EX. 16-Decl. Brown (COTA) ¶7; EX. 17-Decl. Swift (PTA) ¶7 and EX. 18-Decl. Ness (COTA) ¶7

Illinois Therapists were Pressured to Work Off-the-Clock: "As a result of this productivity expectation or requirement I found it necessary to routinely work off the clock because the company, through my superiors did not want me to report overtime hours and discouraged the same even though they were aware of the necessity for the overtime hours. I was pressured by Select Rehabilitation to meet this productivity requirement or expectation on both a daily and weekly basis and also discouraged from accurately reporting all of my actual work hours." EX. 16-Decl. Brown (COTA) ¶¶9, 10;

EX. 1-Decl. Gachalian (PT) ¶25; EX. 2-Decl. Lorenzetti (OTR) ¶¶17, 22, 25; EX. 3-Decl. Miller (OTA) ¶¶8, 9, 11; EX. 4-Decl. Hardt (PTA) ¶¶8, 9; EX. 5-Decl. Phillips (PT) ¶¶8, 9; EX. 6-Decl. Ramsey (PTA) ¶¶8, 9; EX. 7-Decl. Daniels (COTA) ¶¶8, 9; EX. 8-Decl. Shah (PTA) ¶¶9, 10; EX. 9-Decl. Matic (COTA) ¶¶8, 9; EX. 10-Decl. Beck (OT) ¶¶8, 9; EX. 11-Decl. Chamberlain (COTA) ¶¶8, 9; EX. 12-Decl. Boyle (PTA) ¶¶8, 9; EX. 13-Decl. Hovorka (PTA) ¶¶10-13; EX. 14-Decl. Rowls (COTA) ¶¶8, 9; EX. 15-Decl. Tlatenchi (PTA) ¶¶8-10; EX. 17-Decl. Swift (PTA) ¶¶8, 9 and EX. 18-Decl. Ness (COTA) ¶¶8, 9

Select Knew that Illinois Therapists Worked Off The Clock. "Early in my employment, I put some overtime down on my timesheet and my regional director

had my program manager tell me not to do it again and told me not to report even a minute of overtime." EX. 1-Decl. Gachalian (PT) ¶22

> EX. 1-Decl. Gachalian (PT) ¶22; EX. 21-Decl. Whalen (COTA) ¶ 17; EX. 22-Decl. Magyar (COTA) ¶15; EX. 24-Decl. Logan (COTA) ¶24 and EX. 29-Decl. Quinn (COTA) ¶¶11,12.

Not only did Select know about these off-the-clock hours, but Select used multiple levels of managerial scrutiny to pressure Therapists to hit the productivity expectations and encourage Therapists to work off-the-clock. EX. 30-Email from Regional Manager, Jim Swartz, to Illinois Program Managers (emails are by facility names) dated as far back as December 8, 2020, telling Crystal Vanderveen, (the Director of Rehab at Prairie Manor Nursing Home, Illinois) stating as follows:

> "Please speak with your staff regarding productivity standards for your therapy programs. Please advise your therapy assistants the expectation is 92 percent or higher and your evaluators must be at 85 percent or higher. " "If you have any questions regarding the expectations please reach out to me to discuss."

By the company's own words, Select is enforcing Therapists' daily and weekly job performance requirements: the words "expectation" and "must" are unmistakable and determinative. Therapists must meet their assigned performance productivity rates or they would suffer consequences for not performing up to company 'expectations' or standards. This email corroborates the declarations of the Illinois Plaintiffs and the putative class members.

4) Select assigned all therapists a productivity rate (%) and pressured them to meet this expectation resulting in Therapists suffering to work off the clock.

The simple formula is explained as follows. Each Therapist was assigned a productivity rate such as 90%. This productivity rate must be met on a daily and weekly basis - meaning that each Therapist must record and bill Medicare for 90% of his/her clocked work hours. Thus in an eight-hour work day, Therapists had to bill medicare for 7.2 hours of therapy services performed (even if that Therapist had to attend a facility meeting, or encountered a patient-induced delay). If the therapist actually worked 10 hours for the day but only had 7.2 hours of Medicare billable time, the productivity rate is only 72% and the Therapist is failing performance expectations. Failing performance expectations subjects the Therapist to warnings and disciplinary actions.[7]

Thus, when a Therapist reaches the most hours he or she could work on the clock to meet this productivity expectation, they are forced to clock out and finish their work. To accomplish the productivity requirement, Therapists purposefully clocked out for meal breaks and continued working to meet productivity quotas. Therapists worked while clocked out during meal breaks to increase the productivity rate. Similarly, therapists routinely clocked out at the end of the day but continued to complete their therapy documentation, (i.e the medical records) 'off-the-clock' to increase their productivity rate.

[7] *See also* EX. 1-Decl. Gachalian (PT) ¶21; EX. 2-Decl. Lorenzetti (OTR) ¶20; EX. 3-Decl. Miller (OTA) ¶12; EX. 5-Decl. Phillips (PT) ¶7; EX. 6-Decl. Ramsey (PTA) ¶7; EX. 7-Decl. Daniels (COTA) ¶7; EX. 8-Decl. Shah (PTA) ¶7; EX. 9-Decl. Matic (COTA) ¶7; EX. 10-Decl. Beck (OT) ¶7; EX. 11-Decl. Chamberlain (COTA) ¶7; EX. 12-Decl. Boyle (PTA) ¶7; EX. 13-Decl. Hovorka (PTA) ¶12; EX. 14-Decl. Rowls (COTA) ¶7; EX. 15-Decl. Tlatenchi (PTA) ¶7; EX. 16-Decl. Brown (COTA) ¶7; EX. 17-Decl. Swift (PTA) ¶7 and EX. 18-Decl. Ness (COTA) ¶7

If Therapists logged all their actual work hours, including overtime hours, this would cause their assigned productivity rates to fall below the productivity requirements and subject Therapists to discipline, up to and including termination. See EX. 1-Decl. Gachalian (PT) ¶21; EX. 2-Decl. Lorenzetti (OTR) ¶20; EX. 3-Decl. Miller (OTA) ¶12; EX. 5-Decl. Phillips (PT) ¶7; EX. 6-Decl. Ramsey (PTA) ¶7; EX. 7-Decl. Daniels (COTA) ¶7; EX. 8-Decl. Shah (PTA) ¶7; EX. 9-Decl. Matic (COTA) ¶7; EX. 10-Decl. Beck (OT) ¶7; EX. 11-Decl. Chamberlain (COTA) ¶7; EX. 12-Decl. Boyle (PTA) ¶7; EX. 13-Decl. Hovorka (PTA) ¶12; EX. 14-Decl. Rowls (COTA) ¶7; EX. 15-Decl. Tlatenchi (PTA) ¶7; EX. 16-Decl. Brown (COTA) ¶7; EX. 17-Decl. Swift (PTA) ¶7 and EX. 18-Decl. Ness (COTA) ¶7.

II. MEMORANDUM OF LAW

A. The Substantive Claims at Issue Under the FLSA and the IMWL are Identical: Unpaid Overtime Wages for Off-the-Clock Work.

Plaintiffs obtained an Order of conditional FLSA collective certification for two nationwide classes: Therapists and Program Managers (aka Directors of Rehab) [DE 163]. Plaintiff Hardt now seeks class certification to proceed to recover unpaid overtime wages for a narrower group - all Illinois Therapists under FRCP 23(a) and (b)(3) for violations of the Illinois Minimum Wage Law.

Hybrid class action suits under Rule 23 (for state law wage claims) and 29 U.S.C. § 216(b) (for overtime) may proceed without conflict. Bennett v. Hayes Robertson Group, Inc., 880 F. Supp. 2d 1270, 1276 (S.D. Fla. 2012) *See generally*

Advisory Committee's Notes to Federal Rule 23(b)(3) ("The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended."). *See also, e.g.,* Prickett v. DeKalb County, 349 F.3d 1294, 1297 (11th Cir. 2003) (distinguishing opt-in procedure under FLSA and Rule 23); Scantland v. Jeffry Knight, Inc., No. 8:09-CV-1985-T-17TBM, 2010 U.S. Dist. LEXIS 103151, 2010 WL 4117683, at *4 (M.D. Fla. Sept. 29, 2010) (recognizing "hybrid class actions") (*citing* Lindsay v. Government Employees Insurance Co., 448 F.3d 416, 371 U.S. App. D.C. 120 (D.C. Cir. 2006)); Ervin v. OS Restaurant Services, Inc., 632 F.3d 971, 977 (7th Cir. 2011).

In the present case, both the essential facts and legal questions forming the foundation of Plaintiffs' claims under the IMWL and the FLSA are identical – whether Select failed to pay overtime premiums to Therapists who worked overtime hours off-the-clock in any work week. Both claims will rely upon the same witnesses and documentary proof. The only difference between the two claims are the remedies available and the administration of the class(es).

B. The Rule 23(b)3 Standard for Class Action Certification and the Proposed Putative Class of IIllinois Therapists

Plaintiffs seek class certification under Rule 23 with respect to Count III of the TAC [DE 307]. Plaintiffs ask the Court to declare the following class certified:

All persons who worked as "Therapists" (aka clinicians) including the positions of Occupational Therapist (OTR), Physical Therapist (RPT or PT), Certified Occupational Therapy Assistant (COTA), Physical Therapist Assistant (PTA), Speech Language Pathologist (SLP) for Select Rehabilitation LLC in the state of

Illinois during the period of 3 years from the filing of the Second Amended Complaint on February 16, 2022 to the present day.[8]

While Plaintiffs bear the burden of showing that the requirements of Rule 23 have been met, "[f]or the purposes of class certification...the Court accepts the plaintiffs' substantive allegations as true." In Re Carbon Dioxide Antitrust Litigation, 149 F.R.D. 229, 232 (M.D. Fla. 1993). "The Court resolves any doubt in favor of class certification." Id. "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (US 1974); *see* Butler-Jones v. Sterling Casino Lines, L.P., No. 6:08-CV-01186, 2008 U.S. Dist. LEXIS 102256, *4 (MDFL Dec. 18, 2008).

"Rule 23 establishes the legal roadmap courts must follow when determining whether class certification is appropriate. Pursuant to Rule 23(a), a class may be certified only if (1) the class is so numerous that joinder of all members would be impracticable; (2) there are questions of fact and law common to the class; (3) the claims or defenses of the representatives are typical of the claims and defenses of the unnamed members; and (4) the named representatives will be able to represent the interests of the class adequately and fairly." Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1187-88 (11th Cir. 2003).

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[8] The same class definition previously certified for FLSA conditional certification [DE 163].

"A class action may be maintained if Rule 23(a) is satisfied and if…the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FRCP 23(b). (The Rule 23 Prerequisites). Additionally, plaintiffs attempting to certify a class must also fulfill at least one requirement under Rule 23(b)." Khan v. H&R Block E. Enters., No. 11-20335-Civ, 2011 U.S. Dist. LEXIS 83404, at *24 (S.D. Fla. July 29, 2011); *See e.g.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997).

"While a district court's class certification analysis "may entail some overlap with the merits of the plaintiffs underlying claim, Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." Amgen, 568 U.S. at 466. Rather, "[m]erits questions may be considered to the extent - but only to the extent - that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.,* quoted in Brown v. Electrolux Home Prods., 817 F.3d at 1234; *see also* Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1187, 1188 n. 15 (11th Cir. 2003) ("Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied."). (J. Schlesinger) In re Disposable Contact

Lens Antitrust, 329 F.R.D. 336, 423 (M.D. Fla. 2018)(granting rule 23 class certification).

C. PLAINTIFFS SATISFY ALL THE RULE 23 PREREQUISITES

1) The Class Of Illinois Therapists Is Clearly Defined, Ascertainable, and Already Approved as a National Class

"In addition to these express requirements of Rule 23, there is an implicit but firm requirement that Lead Plaintiff must satisfy. Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012) (internal quotation omitted). Nevertheless, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage," and thus merits questions may be considered "only to the extent" they pertain to the Rule 23 analysis. Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)." City of Sunrise Gen. Emples. Ret. Plan v. FleetCor Techs., Inc., No. 1:17-CV-02207-LMM, 2019 U.S. Dist. LEXIS 122231, *5-6 (NDGA July 17, 2019).

"Although not explicit in Rule 23(a) or (b), courts have universally recognized that the first essential ingredient to class treatment is the ascertainability of the class." Grimes v. Rave Motion Pictures Birmingham, L.L.C., 264 F.R.D. 659, 663 (N.D. Ala. 2010). The Eleventh Circuit requires a class definition to "contain[] objective criteria

that allow for class members to be identified in an administratively feasible way." Karhu v. Vital Pharms., Inc., 621 F. App'x 945, 946 (11th Cir. 2015).

It is undisputed that both factors are met here. This Court already approved a much broader, nationwide (42 States) Therapist class in the Order granting FLSA collective action certification. [DE 163]. Now, Hardt seeks to certify a much narrower class of Therapists under Rule 23 - just the class of Therapists who worked for Select in the State of Illinois. From the Class List produced by Select, Plaintiffs have identified 3,868 Therapists who worked at over 310 Select facilities/locations in Illinois. *See* Ex. 34 - ILL CLASS LIST, produced by Select pursuant to the Court's Order [DE 184] produced on May 8, 2023. Thus, the Court must conclude the putative class is easily defined, ascertainable and meets the numerosity prerequisite.

The 11th Circuit has explained that Rule 23 demands the Class' members be ascertainable, that is, defined by "objective criteria that allow for class members to be identified in an administratively feasible way. Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x. 782, 787 (11th Cir. 2014). Identifying class members is administratively feasible when it is a "manageable process that does not require much, if any, individual inquiry." Id. at 946.

"'An identifiable class exists if its members can be ascertained by reference to objective criteria. The analysis of the objective criteria also should be administratively feasible. Administrative feasibility means that identifying class

members is a manageable process that does not require much, if any, individual inquiry."' Palm Beach Golf Ctr., 311 F.R.D. at 693[9]

Here, all class members meet the objective elements: a) they all worked for Defendant in Illinois as a Therapist; b) they all had an assigned performance productivity rate set by Select; c) all were classified as hourly paid, non-exempt employees; d) all worked in facilities staffed by Select Rehab from February 12, 2019 to the present day; and e) they all performed therapy on patients assigned by Select and documented the therapy notes. The class is objectively ascertained.

2) The Numerosity of the Class Makes Joinder Impractical.

Rule 23(a)(1) requires "a class [be] so numerous that joinder of all members is impracticable." The numerosity requirement does not require that joinder be impossible, but rather that joinder be difficult or inconvenient. Leszczynski v. Allianz Ins., 176 F.R.D. 659, 669 (S.D. Fla. 1997). Parties seeking class certification do not need to know the "precise number of class members," but they "must make reasonable estimates with support as to the size of the proposed class." Agan v. Katzman & Korr, P.A., 222 F.R.D. 692, 696 (S.D. Fla. 2004). A general rule as to the numerosity is that "less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." Manno v. Healthcare Revenue

[9] *Quoting* Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x 782, 787-88 (11th Cir. 2014)). Griffith v. Landry'S, Inc., 8:14-cv-3213-T-35JSS, 2017 U.S. Dist. LEXIS 230260,*19 (M.D. Fla. Jan. 30, 2017).

Recovery Grp., LLC, 289 F.R.D. 674, 684 (S.D. Fla. 2013) *citing* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986).

In the instant matter, the numerosity requirement has easily been met. From the Class list of Therapists produced by Defendant as ordered by this Court in the conditional Certification Order, [DE 110], Plaintiffs have identified at least 3,868 Therapists who lived in (and presumptively worked) in Illinois. Ex. 34 - ILL CLASS LIST. Plaintiffs expect to discover more Therapists who worked in Illinois after the class list was produced and persons who lived in neighboring states but worked in Illinois. Joining over 3,800 putative class numbers is beyond impractical - it is not manageable or workable.

In evaluating the numerosity requirement, the actual number of the class is not the sole factor to consider. "Although there is no specific number of class members necessary to evidence the impracticability of joinder, the Court should consider the geographic dispersion of the class members, judicial economy and the ease of identifying the members of the class and their addresses." Leszczynski, 176 F.R.D. 659, 669 (S.D. Fla. 1997); Fuller v. Becker & Poliakoff, P.A., 197 F.R.D. 697, 700 (M.D. Fla. 2000) (Joinder of 200 class members is impractical, where class members live in several different areas).

In the present case, these 3,800+ Illinios Therapists worked at over 310 different facilities staffed by Select [Ex. 35 - Illinois Facility List][10]. Considering the size of the Illinois class, the transferable nature of performing therapy services, it is guaranteed that a significant number of Therapists have moved outside of Illinois.

In a near identical class action case involving overtime wage claims under Illinois law for Therapists and Nurses labeled as ***"clinicians"***, the Court held in granting Rule 23 Class Certification for the Clinicians:

> Although there is no "threshold or magic number at which joinder is impracticable, a class of more than 40 members is generally believed to be sufficiently numerous for Rule 23 purposes." *Ringswald v. Cnty. of DuPage*, 196 F.R.D. 509, 512 (N.D. Ill. 2000) (collecting cases). Bare speculation as to the number of members in a class generally does not suffice, *Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir. 1976), but a precise number is not required [*9] as long as "a conclusion is apparent from good-faith estimates." *Barragan v. Evanger's Dog & Cat Food Co., Inc.*, 259 F.R.D. 330, 333 (N.D. Ill. 2009). That a proposed class may ultimately turn out to include individuals not actually harmed by a defendant's conduct does not defeat certification. *See Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (noting that "a class will often include persons who have not been injured by the defendant's conduct....Such a possibility or indeed inevitability does not preclude certification."). Lukas v. Advocate Health Care Network & Subsidiaries, No. 1:14-cv-2740, 2015 U.S. Dist. LEXIS 109851, at *8-9 (N.D. Ill. Aug. 19, 2015).

Plaintiffs' proposed class in this case is not as broad as the class of Clinicians in Lukas, as this proposed class does not include Nurses.

3) The Commonality Prerequisite in Rule 23(a)(2) is Satisfied Here.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." In Wal-Mart Stores, Inc. v. Dukes, the U.S. Supreme Court held that the

[10] See SELECT054491- Check Detail 20200701-20230815 and SELECT048988-Check detail 20200701-20230815

commonality requirement is met when the plaintiffs have raised a common contention and the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. 338, 350 (2011). The Court went on to hold that, "[w]e quite agree that for purposes of Rule 23(a)(2), even a single common question will do…" Id. at 359 (internal quotations omitted).

The Rule is disjunctive, thus a showing of a common question of either fact or law satisfies Rule 23(a)(2). Georgia State Conference of Branches of NAACP v. State of Ga., 99 F.R.D. 16, 25 (S.D. Ga. 1983). "[O]ne significant common question of law or fact will satisfy this requirement. Id. Commonality "focuses on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1346 (11th Cir. 2001). "A court will normally find commonality where a question of law refers to standardized conduct by defendants towards members of the proposed class." In re Amerifirst Sec. Litig., 139 F.R.D. 423, 428 (S.D. Fla. 1991). However, it is not necessary that all members of the class have identical claims, as there is "no requirement here that issues subject to generalized proof predominate over those subject to individualized proofs." Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. Fla. 2001).

"Commonality requires at least one issue common to all members of the class, but does not require that all factual and legal questions be common. *In re Terazosin,*

220 F.R.D. at 685; *Fuller,* 197 F.R.D. at 700. The commonality element is generally satisfied when a plaintiff alleges that "defendants have engaged in a standardized course of conduct that affects all class members." *In re Terazosin,* 220 F.R.D. at 687." Agan v. Katzman & Korr, P.A., 222 F.R.D. 692, 697 (S.D. Fla. 2004).

Commonality exists here as to both questions of fact pursuant to Rule 23(a)(2), namely: a) whether the hourly paid putative Class Members suffered to work overtime hours without pay; b) whether Defendant pressured Plaintiff's to work off the clock due to Defendant's implementation of a productivity expectation or discouraged or squelched accurate reporting; c) whether Defendant failed to properly take actions to prevent Therapists from working off the clock after it was made aware of Therapists working off the clock and d) whether Defendant knew of should have known that Therapists in Illinois were working off the clock. There also exists a single question of law here of whether Defendant's actions constitute a violation of the Illinois Minimum Wage Law requirements by not paying plaintiffs for all hours they worked over 40 each week that it knew or should have known of. *See* Gibbs, 2018 WL 4761589, at 4 *citing* Williams v. Mohawk Indus., Inc., *568* F.3d 1350, 1355 (11th Cir. 2009) ("...commonality is satisfied because there is 'at least one issue whose resolution will affect all or a significant number of the putative class members'").

An alleged policy or practice of treating an entire class unlawfully satisfies the commonality requirement of Rule 23(a)(2). Cox, 784 F.2d at 1557-58; *see also* Palm Beach Golf Ctr., 311 F.R.D. at 695; Griffith v. Landry'S, Inc., No. 8:14-cv-3213-T-35JSS, 2017 U.S. Dist. LEXIS 230260, at *22 (M.D. Fla. Jan. 30, 2017). Here, Plaintiffs contend that pursuant to a scheme to avoid its overtime pay obligations, Select permitted Illinois Therapists to suffer to work off-the-clock in order to meet assigned productivity expectations. Plaintiffs also allege that Defendant knew or should have known this off-the-clock work was going on. Plaintiffs allege Select had actual and constructive knowledge of the unpaid off-the-clock work, but turned a blind eye to it, such that Select is liable for their unpaid overtime hours.

Anticipating that Select will make identical arguments it made in opposition to Plaintiffs' Motion for Conditional Certification about factual variances or different damages for each person, the Supreme Court has flatly rejected such arguments in deciding on Class certification under Rule 23. "Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well-nigh universal." Comcast Corp. v. Behrend, 569 U.S. 27, 42, 133 S. Ct. 1426, 1437 (2013).

The Court should also reject any red herring factual arguments as previously argued by Select that productivity was a "goal" or that it was not enforced. This is simply untrue and this is not the time to resolve questions of fact. It is sufficient here that evidence in the form of management directed emails and Declarations from the

superiors of the Therapists (the DOR/PMs) along with class member declarations demonstrate that Therapists, as a class, were expected to perform and meet their productivity (%) "expectation" that permeates the Therapists' work. The records belie arguments from Select that the Therapist's assigned productivity rate was just some goal the company didn't care about. Ex. 33 - Productivity Emails. Productivity was monitored and enforced, daily. *See* Declarations of Illinios Program Managers/ Directors of Rehab: Exhibits 19-29. [11]

In the present case, Plaintiff Hardt's claims (and the 208 Illinois Therapists/Plaintiffs who joined the collective action) are identical to the claims of the class and involve identical questions of law and fact. Hardt, like the putative class he seeks to represent, claims that as an hourly paid Therapist, Select failed to pay him overtime wages in violation of Illinois Law. Select permitted him and other Therapists to work off-the-clock to meet Select's productivity requirements. Hardt advances the following core questions of law and fact common to the Illinois Therapist class:

a) **Did Select violate the IMWL by permitting Therapists to work off-the-clock and failing to pay overtime for the off-the-clock work?**

b) **When did Select have actual or constructive knowledge of Therapists working off-the-clock…AND**

[11] EX. 19-Decl. Vanderveen, EX. 20-Decl. Ramos, EX. 21-Decl. Whalen ,EX. 22-Decl. Magyar, EX. 23-Decl. Voeun, EX. 24-Decl. Logan, EX. 25-Decl. Myers, EX. 26-Decl. Williams, EX. 27-Decl. Analitis, EX. 28-Decl. Harris, EX. 29-Decl. Quinn

c) With this knowledge of off-the-clock work by Therapists, did Select fail to take required actions to stop and prevent Therapists from continuing to work off-the-clock such that it is liable for all the overtime hours?

First, in the case of Hebert v. Select Rehabilitation filed June 2021, a therapist alleged that he and others suffered to work off the clock unpaid overtime hours. Although Mr. Hebert worked in Arkansas, he made the same claims as Hardt here - suffering to work off the clock. Moreover, pending in the District of Illinois is an identical claim filed by an Illinois putative class member, Linda Hovorka, in the case Hovorka v. Select Rehabilitation LLC, 1:23−cv−05192. EX. 37 - Hovorka Complaint. **Hovorka, a therapist claims to have suffered for years working off the clock overtime hours in efforts to hit productivity and avoid being fired.** Moreover, five Illinois Plaintiff therapists in this case also stated the same claims in declarations filed in support of Plaintiff's Motion for Conditional Certification. [De 59] stating that they suffered to work off the clock before 2021 and after. *See* Declarations of: Ramos [DE 59-19], Whalen [DE 59-25], Gachalian [59-28], Magyar [DE 59-30] and Lorenzetti [59-25].

Furthermore, Plaintiffs present 26 Declarations from Illinios Therapists who all claim that they suffered to work off the clock because of the productivity performance expectations enforced upon them: Analitis ¶7 ; Beck ¶7, Brown ¶7 , Boyle ¶ 7, Chamberlain ¶ 7, Daniels ¶7, Gachalian ¶3-4, 12,15-17, 21-25, Hardt ¶7, Harris ¶7, Hovorka ¶ 7, Lorenzetti ¶ 12-26, Magyar ¶22-24, Matic ¶7, Ness ¶ 7, Phillips ¶7, Ramsey ¶ 7, Ramos ¶ 18, Rowls ¶ 7, Shah ¶ 7, Swift ¶ 7, Tlatenchi ¶ 7,

Whalen ¶ 3, Williams ¶ 8, Vanderveen ¶ 18. Moreover, Illinois Program Managers (aka DOR), part of "management" and thus their knowledge is imputed to Defendant. Vanderveen and Quinn further state that they know Therapists worked off the clock during their terms of employment. Dec of Vanderveen [59-25] ¶18-19; Quinn ¶ 15.

Illinois Program Managers (management of Select), whose job it was to schedule Therapists to treat patients and enforce productivity as commanded by Select, confirm that Select knows that Therapists worked off the clock: *See* EX. 19-Decl. Vanderveen (SLP) ¶18-19; EX. 24-Decl. Logan (COTA) ¶18; EX. 23-Decl. Voeun (SLP) ¶18-24; EX. 22-Decl. Magyar (COTA) ¶22-24; EX. 22-Decl. Magyar (COTA) ¶18-19.

Because the putative class members are all hourly, non-exempt employees, the policies and practices at issue are questions of law and fact which do not require individualized analysis of what each of the putative class members thought or believed. There is no dispute that all therapists in this putative class were hourly paid, non-exempt employees. The factual issues that affect the entire putative class equally are objectively proven/disproven and thus satisfy the commonality requirement. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1558 (11th Cir. 1986).

The accessible and available time records will establish when Therapists logged into the EHR programs and electronically signed therapy notes. These records will dispositively either prove or disprove the Therapists' claims of working

off-the-clock work without overtime premiums for the entire putative class. Accordingly, the common factual and legal questions at issue satisfy the commonality requirement of a class action.

4) Hardt's Claims are Typical of the Illinois Therapist Putative Class.

Rule 23(a)(3) requires "the claims or defenses of the parties are typical of the claims or defenses of the class." The claims of the parties need to be similar enough to those of the class so that they will adequately represent them. Powers v. Stuart-James Co., 707 F.Supp. 499, 503 (M.D. Fla. 1989). The typicality requirement requires a class representative to "possess the same interest and suffer the same injury as the class members," albeit there may be substantial factual differences. Murray, 244 F.3d 807, 811. The distinction between commonality and typicality is "commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." Piazza, 273 F.3d 1341, 1346. "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3). Cooper v. Southern Co., 390 F.3d 695, 713 (11th Cir. 2004); Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). The typicality requirement measures whether "a sufficient nexus exists between the claims of the named representatives and those of the class at large." Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000)". Moreno-Espinosa v. J & J Ag Prods., 247

F.R.D. 686, 689 (S.D. Fla. 2007). *See* Complaints of Hovorka and Hebert. Exhibits 37, 38: identical claims yet years apart: 2021-2023.

Here, Hardt in the Complaint (DE 307) claims he suffered to work off-the-clock overtime hours. The reasons "why" he and other Therapists such as Hebert, Hovorka, and all the other 900+ Therapist Plaintiffs who already opted in to the collective action worked off the clock are not controlling on the Court's decision here. What controls is that their claims are the same: they all suffered to work overtime hours off the clock to complete job duties. While Hardt and many Illinois putative Therapist class members say the reasons why they did so was because of the productivity performance expectations assigned to them, the inquiry here is not about why, but whether the claims are typical, which they are: they all suffered to work overtime hours off the clock and without pay.

Third, the typicality requirements that exist under Rule 23(a)(3), require that Plaintiffs and the putative class members equally allege injuries that are based on identical claims or 'created by the same employment practices'. *See* Gibbs, 2018 WL 4761589, at *4 ("...typicality is shown because Plaintiff possesses 'the same interest and suffer[s] the same injury as the [Class M]embers'"). Typicality is established where the "claims or defenses of the representative parties are typical of the claims or defenses of the class..." FRCP 23(a)(3). Generally, "the commonality and typicality requirements" tend to merge. Dukes, 564 U.S. at 349.

"The typicality requirement is satisfied if "the claims or defenses of the class and class representative arise from the same event or pattern or practice and are based on the same theory." Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337." Agan v. Katzman & Korr, P.A., 222 F.R.D. 692, 698 (S.D. Fla. 2004). "The primary concern is whether the "named representatives' claims have the same essential characteristics as the claims of the class at large." CV Reit, 144 F.R.D. at 697; Pottinger, 720 F. Supp. at 959." Brown v. SCI Funeral Servs. of Fla., Inc., 212 F.R.D. 602, 605 (S.D. Fla. 2003).

> To satisfy the typicality requirement of a class representative, the class representative must have the same interest and suffer the same injury as the class members. Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1322 (11th Cir. 2008) (citing Cooper v. Southern Co., 390 F.3d 695, 713 (11th Cir. 2004)). The main focus of the typicality requirement is that the named plaintiffs will advance the interests of the class members by advancing their own interests. Agan v. Katzman & Korr, P.A., 222 F.R.D. 692, 698 (S.D. Fla. 2004). "'Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large.'" Cooper v. Southern Company, 390 F.3d 695, 713 (11th Cir. 2004) (citing Prado—Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000)). The typicality requirement, much like the commonality requirement, does not require that the claims of the proposed class representative and the proposed class be identical. Prado-Steiman, 221 F.3d at 1279. The requirement may be met "even if some factual differences exist between the claims of the named representatives and the claims of the class at large." Id. All that is required is that "the claims or defenses of the class and class representative arise from the same event or pattern or practice [*24] and are based on the same theory." Agan, 222 F.R.D. at 698 (citing Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984)). Generally, "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." Prado-Steiman, 221 F.3d at 1279.
>
> Griffith v. Landry'S, Inc., No. 8:14-cv-3213-T-35JSS, 2017 U.S. Dist. LEXIS 230260, at *23-24 (M.D. Fla. Jan. 30, 2017).

Here, the claims of Hardt and all the Illinois Plaintiffs are demonstratively the same as those of the Illinois Class Members. Plaintiff Vanderveen also worked for Select from approximately June 2017 to the present as both a Program Manager (PM) and a Speech Language Pathologist (SLP) (therapist), working at a facility in Homewood, Illinois. Plaintiff Hardt worked for Defendant as a Physical Therapy Assistant (PTA) from 2014 to September 2023 and worked at multiple facilities in Illinois. Most if not all PMs are also treating Therapists who also are assigned and must meet a therapy productivity expectation (50% which causes the PM to suffer to work off-the-clock). While the PMs have additional responsibilities beyond serving as a treating Therapist, the PMs are also hourly paid, non-exempt employees who have typical and identical claims of suffering to work off-the-clock overtime hours without being paid a premium for any hours in excess of 40 hours. (*see* FLSA).

All of Hardt's and the Illinois class members' claims arise from the same common facts of assigned productivity rates with daily and weekly pressure by superior and management to meet these performance expectations under warnings of consequences of discipline including termination. Thus, they suffered to work off-the-clock, and Select squelched the accurate reporting of work hours by Therapists not just in Illinois, but across the US in a scheme to avoid overtime pay and increase its profits to the tune of hundreds of millions of dollars.

Plaintiff Hardt is properly suited as a class representative of Therapists who worked for Select in Illinois. He alleges he suffered and worked off the clock to meet productivity requirements. The claims of Hardt and Illinois class members are all based on the same set of facts: a) they were all hourly paid, non-exempt employees who worked as therapists for Defendant; b) they all worked for Defendant in Illinois at Skilled Nursing Facilities ("SNF"), or Assisted Living Facilities ("ALFs"); c) and all Therapists were pressured to work off-the-clock hours due to Select's policy of an enforced productivity requirement that applied to all Therapists working in Illinois.

Plaintiff Hardt and all the putative class members all have identical claims against Select for permitting them to suffer to work off-the-clock overtime hours without pay. Defendant's defenses are identical for all Class members: a) no one worked off-the-clock and b) Select had policies against working off-the-clock which Plaintiffs violated; and c) Select did not have actual or constructive knowledge.

Thus, the claims of the class representative are typical of those of the class of present and former employees Plaintiffs seek to represent.

Additionally, the following three Illinois putative class members who are not opt-in Plaintiffs in the collective action likewise declare that they suffered to work off-the-clock because of Defendant's productivity expectations and enforcement of the same. They also declare that they were pressured to work off-the-clock to meet these productivity expectations under threats of disciplinary action. See EX. 13-Decl.

Hovorka (PTA) ¶14; EX. 15-Decl. Tlatenchi (PTA) ¶11 and EX. 16-Decl. Brown (COTA) ¶11. Plaintiffs in this action declare they suffered to work off-the-clock under pressure to hit the productivity expectations under threats of disciplinary action. Thus, the commonality factor is squarely satisfied and demonstrated here.

5) The Class of Illinois Therapists Interests will be Adequately Protected

"Rule 23(a)(4) requires that 'the representative parties will fairly and adequately protect the interests of the class.' The requirement of adequate representation addresses two issues: "(1) whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation and…(2) whether plaintiffs have interests antagonistic to those of the rest of the class." *See* Cheney, 213 F.R.D. at 495 (quoting Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987)." Ibrahim v. Acosta, 326 F.R.D. 696, 701 (S.D. Fla. 2018).

"The adequacy evaluation encompasses two inquiries: (1) whether any substantial conflicts of interest exist between the representative and the class; and (2) whether the representative will adequately prosecute the action. Sosna v. Iowa, 419 U.S. 393, 403, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)." Griffith v. Landry'S, Inc., No. 8:14-cv-3213-T-35JSS, 2017 U.S. Dist. LEXIS 230260 *28 (MDFL Jan. 30, 2017). Further, no conflicts exist. Hardt is committed to prosecuting these claims. He worked for Select for six years and his unpaid overtime wage claims are identical to those of the Illinois Therapists class.

6) Common Questions of Law and Fact Predominate Such that Class Action is the Superior Method of Adjusticating the Claims

"When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123-124 (3d ed. 2005) (footnotes omitted)." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453-54, 136 S. Ct. 1036, 1045 (2016). The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." Id.

a) A Class Action is the superior means to litigate these wage claims.

"The second prong of Rule 23(b)(3) requires a court to determine whether `a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1183 (11th Cir. 2010) (quoting Fed. R. Civ. P. 23(b)(3)). Courts in this district look to the four non-exclusive matters listed in Rule 23(b)(3) which are: (a) The class members' interests in individually controlling the prosecution or defense of separate actions; (b) The extent and nature of any litigation concerning the controversy already begun by or against class members; (c) The desirability or undesirability of concentrating the litigation of the claims in the

particular forum; (d) The likely difficulties in the managing a class action. Rosario-Guerrro v. Orange Blossom Harvesting, Inc., 265 F.R.D. 619, 624 (M.D. Fla. 2010). "When determining if a class action is superior, 'we are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more management problems than any of the alternatives,'" such as separate lawsuits by class members. Hinson v. BellSouth Telecommunications, Inc., 275 F.R.D. 638, 648 (M.D. Fla. 2011)(citation omitted). Here, each of these factors favor certification." Lopez v. Hayes Robertson Grp., Inc., Case No. 13-10004-CIV, 2013 U.S. Dist. LEXIS 189629 *20 (SDFL Sep. 23, 2013).

For the following reasons, a class action here is superior to 3,800+ individual lawsuits. First, Plaintiff's common theory of liability can be efficiently adjudicated on a classwide basis: the question of law and liability is applicable to all putative plaintiffs. If Defendant permitted Therapists to suffer to work off the clock, or did nothing to stop it, it is liable under Illinois law and the FLSA. Second, individualized determinations do not predominate over the common theory of liability. Third, the case is already involving the same claims for Therapists across the US under the FLSA such that litigating the claims of Illinois class members here is efficient, promotes judicial economy and prevents the likelihood of differing results. Any issue of individualized damages analysis does not predominate over determining class-wide liability when the records are not accurately maintained and damages in the

class/collective wage actions across the US in cases are based upon representative testimony. *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

7) Class Counsel is Experienced in Rule 23 and FLSA Nationwide Class Actions

"The adequate representation requirement involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation." Griffin v. Carlin, 755 F.2d 1516, 1533 (11th Cir. 1985). "As to the adequacy of counsel for the class representative, "[a]bsent specific proof to the contrary, the adequacy of class counsel is presumed." In re Seitel, Inc. Securities, 245 F.R.D. 263, 271 (S.D. Tex. 2007)." Sanchez-Knutson v. Ford Motor Co., 310 F.R.D. 529, 540 (S.D. Fla. 2015).

Plaintiffs' attorneys are highly experienced in wage and hour litigation and have successfully prosecuted hundreds of collective and class action cases. In fact, Lead Counsel Feldman just settled a nearly identical, national FLSA collective action case on behalf of Therapists in the matter of Haggerty et. al. v. Reliant Pro Rehab LLC., Case 1:22-cv-11329-WGY (D. Mass. 2023), [DE 121], December 14, 2023. For a more complete list of Counsels' wage and hour experience, *see* Ex. 39 - Feldman Decl; Ex. 40 - Williams Decl.

a. No Conflict Exists Between the Class Representative and the Class

"A fundamental conflict precluding class certification exists 'where some party members claim to have been harmed by the same conduct that benefitted other

members of the class,' where 'class members have opposing interests[,] or where the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class members." *Equifax*, 999 F.3d at 1275 (cleaned up)." Dasher v. RBC Bank (USA) (In re 1:09-md-02036-JLK, Checking Account Overdraft Litig.), No. 20-13367, 2022 U.S. App. LEXIS 4277, at *9 (11th Cir. Feb. 16, 2022).

There is no conflict of interest here. Plaintiff Hardt suffered the same injury of unpaid overtime hours as the Putative Class Members. Hardt and the class suffered unpaid overtime because of Select's unlawful policies and pay practices: enforcing a productivity rate and discouraging Therapists from reporting all work hours. These policies encouraged and pressured Hardt and the class members to work off-the-clock. Accordingly, Plaintiffs have satisfied the adequacy requirement.

III. COURTS IN SIMILAR CLASS ACTION WAGE CASES HAVE GRANTED RULE 23 CLASS CERTIFICATION

A. Near Identical Illinois Overtime Wage Class Actions Cases Involving Therapists Certified Under Rule 23 - Lukas And Dennis

The Northern District of Illinois certified an identical Illinois state overtime wage Class Action for an even broader class of clinicians (Therapists plus nurses) in the case of Dennis v. Greatland Home Health Servs., 591 F. Supp. 3d 320 (N.D. Ill. 2022). The Court certified the class consisting of: "All individuals employed by Greatland Home Health Services, Inc. as home health Registered Nurses, Physical Therapists, Occupational Therapists, and Speech Therapists." Id. at 325. Although the

class in Dennis included Nurses, Plaintiffs here only seek to certify a class of Therapists. In Dennis, the plaintiff asserted there were just over 40 members, whereas here, Plaintiffs can identify approximately 3,800+ Illinois therapists as class members and from the class list produced by Select itself. These include 15 class members whose declarations have identified themselves as class members and who represent that Select staffed a range of 5 to 40 Therapists at any given time at their facilities. or different facilities. *See* Decl. of Beck ¶ 4.

The Dennis court explained in granting class certification that plaintiffs in class actions are not required to prove all putative class members have in fact suffered the same harm.[12] As the court further analyzed, if the claimed overtime pay practice at issue is claimed to be unlawful, then the only question is quantity of damages, and thus commonality is satisfied. Id. at 328. Any argument that Select may make against Class certification because Plaintiff's cannot prove all class members have in fact worked off the clock is not considered in the Court's determination of whether to grant Rule 23 Class certification. Naturally, just about every Rule 23 case and every

[12] "Plaintiffs need not prove that every member of the proposed [**7] class has been harmed before the class can be certified…A class will often include persons who have not been injured by the defendant's conduct, but this possibility, or indeed inevitability, does not preclude class certification." Bell, 800 F.3d at 380 (citing Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009)). Requiring the plaintiff to identify which class members have been injured before certification would be "putting the cart before the horse" and would "vitiate the economies of class action procedure; in effect the trial would precede the certification." *Kohen*, 571 F.3d at 677. "If very few members of the class were harmed, that is 'an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate' [the defendant]." Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 758 (7th Cir. 2014) (*citing* Butler v. Sears, Roebuck & Co., 727 F.3d 796, 799 (7th Cir. 2013)). Dennis v. Greatland Home Health Servs., 591 F. Supp. 3d 320, 326 (N.D. Ill. 2022).

FLSA collective action has individualized damages. But the same rehashed defense arguments that individualized damages analysis should defeat class certification is routinely and squarely rejected by courts, including the Court in Dennis, *Supra*.

Select will likely make all the same arguments as rejected by the court in Dennis, and the rationale for granting class certification should equally apply here. In granting class certification for a class of therapists (clinicians) the court held that 1.) "individualized damages determinations do not defeat predominance for class certification purposes." Dennis *citing* Lukas, 2015 U.S. Dist. LEXIS 109851, 2015 WL 50060192); 2) "When 'one or more central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages" Dennis *citing* Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016); 3) "Under both the FLSA and the IMWL, employers are required to keep accurate records of non-exempt employees' work hours. Dennis *citing* Lukas; and 4) "Because common issues predominate here, liability is most efficiently adjudicated at once, and a class-action format is superior to individual trials for each class member" Dennis, 591 F. Supp. 3d 320.

Similarly, in the case of Lukas v. Advocate Health Care Network & Subsidiaries, No. 1:14-cv-2740, 2015 U.S. Dist. LEXIS 109851 (N.D. Ill. Aug. 19, 2015), the Court granted Class certification of the identical proposed putative Illinois

class of "Clinicians" (a.k.a. "Therapists" as used herein) and denied the defendant's decertification motion of the FLSA collective action. The plaintiff defined clinicians in the motion for Rule 23 class certification as: "registered nurses, occupational therapists, and physical therapists (and many held other job titles) who provide health care services to patients in their homes (collectively "Clinicians"). Id. at 2-3.

For the same reasons the Court granted Rule 23 class certification, the Court denied Defendant's competing motion to decertify the collective action holding:

> Accordingly, the common issue of whether Clinicians were wrongfully classified as exempt predominates over individualized damages determinations. Although the damages questions for members of the class may vary, the liability determination is best adjudicated once, in the class form. A class action is therefore superior to individual trials for each class member, in which the uniform legal issue of the hybrid pay scheme's compliance with the FLSA and IMWL would be wastefully relitigated. The requirements of Rule 23(b)(3) are met, and class certification is proper. Plaintiffs' motion for class certification is therefore granted. Because Plaintiffs' proposed class meets the Rule 23 standards for class certification, it necessarily meets the much lower bar for FLSA collective action certification. Therefore, Advocate's motion to decertify the collective action is denied." Lukas, at 22.

Thus, following the rationale and holdings in Lukas and Dennis, the Court should grant Rule 23 Class certification for the Illinois Class of Therapists. In a similar hybrid FLSA collective action and IMWL class action, the Illinois District Court granted Rule 23 class certification involving claims for off-the-clock unpaid overtime wages. Smith v. Family Video Movie Club, Inc., 311 F.R.D. 469, 473 (N.D. Ill. 2015). The putative class was split into two classes: a) the Commission Class and b) the Bank Deposit Class.

The Court first examined the four requirements of Rule 23 which are applicable here: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Id. at 473.

Here, Plaintiff Hardt and the class have common questions of law and fact: whether all Plaintiffs, as non-exempt hourly paid employees, suffered to work off-the-clock and were not paid premiums for all overtime hours worked. The commonality is a claim for suffering to work overtime hours off the clock without overtime pay. Plaintiff Hardt and the supporting declarations from Illinois Class members demonstrate the overtime was caused by Select's productivity performance requirement ("expectation") which necessitated them to work off-the-clock to hit this performance standard under pressure from Select.

B. Courts grant Rule 23 Class certification in similar Wage and Hour Cases under Illinois and Florida State wage laws and Hybrid Cases.

Further supporting class certification here, a Hybrid class action under the FMWA and the FLSA, the Court granted Rule 23 class action for a class of all hourly paid, tipped servers and bartenders working at five restaurants in Key West. Lopez v. Hayes Robertson Grp., Inc., No. 13-10004-CIV, 2013 U.S. Dist. LEXIS 189629 (S.D.

Fla. Sep. 23, 2013). The Court granted both Rule 23 Class certification and Collective Action Certification. Id. at *25-26 (S.D. Fla. Sep. 23, 2013).

In Griffith v. Landry'S, Inc., No. 8:14-cv-3213-T-35JSS, 2017 U.S. Dist. LEXIS 230260 (M.D. Fla. Jan. 30, 2017), the court certified two classes of servers for Florida Minimum Wage Act violations. The Griffith court found that the class of 2,000, all would recover damages under Florida's Minimum Wage law. Here, all 3,800+ would recover wages under Illinois Minimum Wage Law (IMWL). Just as in Griffith, many class members' wage claims would be small, as many employees within the class possibly have just a few weeks at issue under the three year SOL. For some, this is likely $2,000 or less in potential damages. As the Court stated in Griffith, "the fact that many class members still currently work for Defendant, militates in favor of finding that a class action is superior because those employees may be further discouraged from bringing individual actions due to a fear of reprisal." Griffith v. Landry'S, Inc., No. 8:14-cv-3213-T-35JSS, 2017 U.S. Dist. LEXIS 230260, at 33 (M.D. Fla. Jan. 30, 2017) (citing to Overka et al. v. American Airlines, Inc., 265 F.R.D. 14, 24 (D. Mass. 2010) (noting that "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").[13]

[13] *See also* Perez v. Safety-Kleen Systems, Inc., 253 F.R.D. 508, 520 (N.D. Cal. 2008); and Guzman v. VLM, Inc., No. 07-cv-1126, 2008 U.S. Dist. LEXIS 15821, at *8 (E.D.N.Y. 2008)

CONCLUSION

Plaintiffs present declarations from Illinois class members attesting to working off the clock in an effort to meet productivity expectations (requirements), in addition to declarations from Program Managers who attest to knowledge of the same and Select's practice of both pressuring Therapists to meet productivity expectations and daily enforcement of the same. Therapists do not want to lose their job, so they suffer to work off the clock. The Court can apply common sense and agree that hourly employees do not voluntarily forfeit up to 5 or more hours of pay at time and ½ each week if they could report and claim this time for just completing the mandatory job duties and responsibilities assigned to them. This practice and scheme has permeated the work culture at Select across the U.S, including Illinois for years. Plaintiffs have amply demonstrated that the requirements of Rule 23 have been met. The merits of the claims and Select's arguments in opposition are best left for another day.

WHEREFORE, Plaintiffs Request this Honorable Court Certify the class of Illinois Therapists to proceed under Count III, and a) designate named Plaintiff Scott Hardt, as Class Representative and b) appoint the undersigned counsel and their firms as class counsel. In the alternative, Plaintiffs request the right to conduct discovery on the Illinois Therapist class and submit a revised or renewed motion within 120 days.[14]

Dated this 11th day of June 2024.

[14] Following ruling on Plaintiffs' currently pending motions, including but not limited to Plaintiffs' Motion to Compel Rule 30(b)(6) deposition and motion to compel Illinois Class discovery.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the Court's CM/ECF electronic filing system. The CM/ECF system will forward a Notice to all interested parties.

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