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

CHRISTINE MCLAUGHLIN, CRYSTAL VANDERVEEN, and JUSTIN LEMBKE, Individually and on behalf of all others similarly situated,
Plaintiffs,

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

v.

SELECT REHABILITATION LLC and SELECT REHABILITATION INC.,
Defendants.
_____.

PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION AND FOR COURT SUPERVISED ISSUANCE OF NOTICE TO THE PUTATIVE CLASS AND SUPPORTING MEMORANDUM OF LAW

Plaintiffs herein seek an Order from this Honorable Court: conditionally certifying this case to proceed collectively pursuant to FLSA section 216b; requiring Defendant SELECT REHABILITATION LLC (hereinafter Select or Defendants) to produce the required class list, and authorize Plaintiffs and their counsel to send notice of this action to all current or formerly employed Therapists and Program Managers (PM) aka Directors of Rehab (DOR) employed with Defendants and its predecessors within the preceding three (3) years to the present.

I. INTRODUCTION: FACTS AND BACKGROUND

Plaintiffs MCLAUGHLIN, VANDERVEEN and LEMBKE have brought this FLSA 216b collective action against Defendants, alleging willful violations of the FLSA and a scheme to avoid paying overtime wages to a group or "class" of All hourly-paid, non-exempt employees by permitting them to suffer to work off the clock, with their knowledge, encouragement and pressure, all hours over 40 in each and every work week in order to complete their job duties and requirements in violation of FLSA, 29 U.S.C. §207, ("FLSA"), (DE 16). Based upon the statements of the Plaintiffs in this case, Defendants have a long, pervasive history of willfully violating the FLSA and failing to pay Therapists and PM overtime wages. Plaintiffs and the class of similarly situated at issue were hourly non-exempt employees and worked in the following positions with similar job requirements and pursuant to nationally created job descriptions: Physical Therapist (PT), Physical Therapy Assistant (PTA), Occupational Therapists (OT), Certified Occupational Therapy Assistant (COTA), Speech Language Pathologist (SLP), Program Manager (PM) (a/k/a Director of Rehab (DOR)), including McLaughlin (PM-PT), Vanderveen (PM-SLP), and Lembke (PTA); all working from Select's managed health care and nursing homes, and as per its website, in 43 states, 2300 locations, 17,000 therapists (DE 16 at ¶ 65). See Exhibit 4

Defendants' Press Release.[1] The 3 named Plaintiffs are joined by 31 current and former PM and Therapists who worked at 34 separate locations located in **9 different states** including: Florida, Illinois, Indiana, Michigan, Missouri, New Jersey, North Carolina, Penn. and Wisconsin. In addition, a PM-SLP from Kansas, who has not joined, Paulette Claeys declares that the therapists in her facility who she supervised suffered to work overtime hours off the clock. Dec. Claeys, Ex 41.

Defendants utilize a single set of job descriptions, and likewise post jobs for these positions demonstrating the job requirements are the same regardless of the locations in the U.S. See Ex 5, Select job descriptions, and Ex 6, Composite of Select Job Postings. Likewise, all 19 Plaintiff PMs here, including McLaughlin, Vanderveen, like the 15 Plaintiff Therapists, all had respectively, the same standardized, routine job requirements as Therapists: providing therapy to patients in their respective specialties (Physical Therapy, Occupational Therapy or Speech and Language Therapy), and also paid on the same compensation plans of hourly paid, non-exempt employees. Similarly, the 19 Program Managers (aka Directors of Rehab), the great majority of whom were also required to treat patients upwards of ½ their weekly work hours within their respective specialties, also had the same

[1] Select is in a CA Class action for all hourly paid employees. *RATI GANDHALE et al v. SELECT REHAB LLC*, Ca. Superior Ct., Case No. 20CV002240, (Aug 2020).

routine and standardized job requirements as per the company singular Job Description (Exhibit 5), and as per the Declarations of the PM and allegations of Vanderveen and McLaughlin in the complaint.

The job duties of PM as McLaughlin and Vanderveen attest are standardized, routine and primarily involve scheduling, reporting, staffing, and generally making sure that Therapists were treating patients and completing their reporting and notes in timely manners. Vanderveen and McLaughlin are similarly situated to the Opt-In PM Plaintiffs who have joined and who they seek to represent, as corroborated by declarations by all Plaintiffs attached as Exhibits 7-40, and non-Plaintiff PM's Exhibits 41-43. Moreover, as Vanderveen, Lembke and McLaughlin at all times were also therapists, their factual statements about suffering from the same unlawful pay practices as the Opt in Plaintiff Therapists also demonstrates they are similarly situated, as a single group (class) or in class.

All Therapists and PM had the same job duties; providing therapy treatments to patients while PM had additional administrative duties such as staffing and scheduling the facilities. See Decls of McLaughlin ¶ 7; Collins ¶ 8; Jeter ¶ 8; Insalaco ¶ 8; Miller ¶ 8; Ramos ¶ 7; Newell ¶ 8; Comeau ¶ 9; Caouette ¶ 9; Murray ¶ 9; Vanderveen ¶ 7; Pitcher ¶ 6; Lyness ¶ 8; Cameron ¶ 9; Lembke ¶ 9; Ganczarz ¶ 5; Weaver ¶ 8; Macalis ¶ 5; Whalen ¶ 6; Pysher ¶ 9; Hofman ¶ 5; Nowicki ¶ 5; Gachalian ¶ 5; Magyar ¶ 5; Hernandez ¶ 5; L. Taylor ¶ 7; Heidinger ¶ 6; Lorenzetti ¶ 9; Voeun ¶ 5; Zahn ¶ 9; Otterbacher ¶ 9; Logan ¶ 5; Marro ¶ 8; C. Taylor ¶ 9. See also Exhibit 5 Select single job description and Exhibit 6 composite of job postings.

ALL PM and Therapists were treated as hourly, non-exempt employees. See Decls of McLaughlin ¶ 6; Collins ¶ 7; Jeter ¶ 7; Insalaco ¶ 7; Miller ¶ 7; Ramos ¶ 6; Newell ¶ 7; Comeau ¶ 8; Caouette ¶ 8; Murray ¶ 8; Vanderveen ¶ 6; Pitcher ¶ 9; Lyness ¶ 7; Cameron ¶ 8; Lembke ¶ 8; Ganczarz ¶ 8; Weaver ¶ 7; Macalis ¶ 8; Whalen ¶ 10; Pysher ¶ 8; Hofman ¶ 8; Nowicki ¶ 8; Gachalian ¶ 8; Magyar ¶ 8; Hernandez ¶ 8; L. Taylor ¶ 6; Heidinger ¶ 10; Lorenzetti ¶ 8; Voeun ¶ 8; Zahn ¶ 8; Otterbacher ¶ 8; Logan ¶ 8; Marro ¶ 7; C. Taylor ¶ 8.

Defendants had a De Facto policy subjecting and permitting PM and Therapists to suffer to work off the clock overtime hours. See Decls. of McLaughlin ¶¶ 10, 19; Collins ¶ 13; Jeter ¶ 13; Insalaco ¶ 11; Miller ¶ 12; Ramos ¶ 10; Newell ¶ 12; Comeau ¶ 12; Caouette ¶ 15; Murray ¶ 14; Vanderveen ¶ 10; Pitcher ¶ 16; Lyness ¶ 11; Cameron ¶ 12; Lembke ¶ 12; Ganczarz ¶ 12; Weaver ¶ 11; Macalis ¶ 15; Whalen ¶ 15; Pysher ¶ 12; Hofman ¶ 15; Nowicki ¶ 15; Gachalian ¶ 12; Magyar ¶ 16; Hernandez ¶ 14; L. Taylor ¶ 9; Heidinger ¶ 15; Lorenzetti ¶ 12; Voeun ¶ 14; Zahn ¶ 12; Otterbacher ¶ 12; Logan ¶ 14; Marro ¶ 11; C. Taylor ¶ 13.

All PM and Therapists were subject to a productivity requirement which was a percentage of their time spent treating patients. See Decls of McLaughlin ¶ 18; Collins ¶ 3; Jeter ¶ 3; Insalaco ¶ 3; Miller ¶ 3; Ramos ¶ 3; Newell ¶ 3; Comeau ¶ 3; Caouette ¶ 3; Murray ¶ 3; Vanderveen ¶¶ 3, 18; Pitcher ¶ 3; Lyness ¶ 3; Cameron ¶ 3; Lembke ¶ 3; Ganczarz ¶ 3; Weaver ¶ 3; Macalis ¶ 3; Whalen ¶ 3; Pysher ¶ 3; Hofman ¶ 3; Nowicki ¶ 3; Gachalian ¶ 3; Magyar ¶ 16; Hernandez ¶ 3; L. Taylor ¶ 3; Heidinger ¶ 3; Lorenzetti ¶ 3; Voeun ¶ 3; Zahn ¶ 3; Otterbacher ¶ 3; Logan ¶ 3; Marro ¶ 3; C. Taylor ¶ 3.

All PM and Therapists state they worked Overtime hours but were not paid for all of their overtime hours worked. See Decls of McLaughlin ¶ 17; Collins ¶ 22; Jeter ¶ 22; Insalaco ¶ 18; Miller ¶ 18; Ramos ¶ 17; Newell ¶ 24; Comeau ¶ 13; Caouette ¶ 26; Murray ¶ 25; Vanderveen ¶ 17; Pitcher ¶ 27; Lyness ¶ 12; Cameron ¶ 13; Lembke ¶ 13; Ganczarz ¶ 13; Weaver ¶ 21; Macalis ¶ 26; Whalen ¶ 12; Pysher ¶ 13; Hofman ¶ 26; Nowicki ¶ 26; Gachalian ¶ 12; Magyar ¶ 26; Hernandez ¶ 25; L. Taylor ¶ 10; Heidinger ¶ 12; Lorenzetti ¶ 13; Voeun ¶ 23; Zahn ¶ 13; Otterbacher ¶ 13; Logan ¶ 23; Marro ¶ 12; C. Taylor ¶ 14.

1. Named Plaintiffs and the opt in Plaintiffs who are PM and Therapists are similarly situated and the case should be certified as a single "class", as they were all subjected to a common, unlawful de facto policy which required work to be done off the clock, and which caused them all to suffer to work off the clock work hours over 40 throughout their employment and thereby makes the identical relief appropriate at this stage, and all were hourly paid, non-exempt employees. Alternatively the PM and Therapists should be certified in 2 classes.

2. Based on turnover, the size of the collective is estimated to be 20,000 persons, including 3000 PM. Each week that goes by over 3 years from the present, class members lose their right to recover their unpaid or stolen wages as the SOL runs, and for some, by the time they are provided notice of this action, their wages have either been wholly wiped out or detrimentally impacted, creating a financial windfall and reward for Defendants and its years of unlawful pay practices stealing the hard earned wages of its employees, in the name of millions of dollars in profits. Plaintiffs appeal to the Court to expeditiously grant this Motion so Select employees can protect their fleeting FLSA wage rights.

3. Plaintiffs have met the lenient showing necessary under the Notice Stage of the 11th Circuit to proceed collectively pursuant to Section 216(b) of the

FLSA and the Plaintiffs seek to deliver the proposed Notice and Consent to Join form to the following Class or Classes of Similarly Situated persons:

ONE CLASS OR COLLECTIVE GROUP CONSISTING OF:

All persons employed as a Program Manager (PM), Director of Rehab, Occupational Therapist (OTR), Physical Therapist (RPT), Certified Occupational Therapy Assistant (COTA), Physical Therapist Assistant (PTA), Speech Language Pathologist (SLP), or other persons performing similar hourly, non-exempt positions under various other job titles, and who are currently employed by, or were previously employed by Select Rehabilitation LLC in the U.S. within the three years preceding the filing of this lawsuit to the date of trial in this action.

ALTERNATIVELY, 2 Separate CLASSES OR COLLECTIVE GROUPS:
CLASS A: ALL PROGRAM MANAGERS/DIRECTORS OF REHAB

All persons employed as a Program Manager (PM), Director of Rehab, or other persons performing similar hourly, non-exempt management or supervisory positions under various other job titles, and who are currently employed by, or were previously employed by Select Rehabilitation LLC in the U.S. within the three years preceding the filing of this lawsuit to date of trial in this action.

CLASS B: ALL THERAPISTS:

All persons employed as an Occupational Therapist (OT), Physical Therapists (PT), Certified Occupational Therapy Assistant (COTA), Physical Therapist Assistant (PTA), Speech Language Pathologist (SLP) or other persons performing similar hourly, non-exempt positions under various other job titles, and who are currently employed by, or were previously employed by Select Rehabilitation LLC in the U.S. within the three years preceding the filing of this lawsuit to date of trial in this action.

MEMORANDUM OF LAW AND LEGAL ARGUMENT

II. Legal Standard For Conditional Cert. of Section 216(B) of the FLSA

A. Authority to Send Class Notice

The FLSA permits a plaintiff to bring a collective action on behalf of similarly situated persons subject to the requirement that each prospective plaintiff(s) file a written consent in the court where the action is brought. 29 U.S.C. §216(b); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001). Unlike a Rule 23 Class Action, the collective action includes only those plaintiffs who affirmatively opt into the action by filing their consent in writing in the court in which the action is brought. 29 U.S.C. §216(b); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 497 F.3d 1214, 1218–19 (11th Cir. 2007).

Courts have endorsed and encouraged the sending of notice early in the proceeding and prior to commencing in discovery as a means of facilitating the FLSA's broad remedial purpose and promoting efficient class management. *See Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335, 336 (2d Cir. 1978) (early notice "comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits"); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 952 (11th Cir. 2007). Collective actions are favored because they benefit the judicial system

by enabling the "efficient resolution in one proceeding of common issues of law and fact," and provide plaintiffs with the opportunity to "lower individual costs to vindicate rights by the pooling of resources." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Since the substantial benefits of FLSA collective actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action," the FLSA grants the Court authority to manage the process of joining such employees in the action, including the power to authorize notice and monitor preparation and distribution of the notice. *Hoffman-La Roche*, 493 U.S. at 169–70 ("The broad remedial goal of the statute should be enforced to the full extent of its terms."). This authority arises from the Court's broad discretionary power to manage the process of joining multiple parties in an orderly manner. *Id.* "Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffman-La Roche*, 493 U.S. at 172.

In the absence of a court-authorized notification all similarly situated persons would likely (i) not receive timely, complete, and accurate information as to the pendency of this action, (ii) lack meaningful access to the court and (iii) have no practical or efficient method of vindicating their rights. *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613 (S.D. Tex. 1979) (finding that notice was required through

notions of fundamental fairness). Courts are empowered and encouraged to issue notice early in the case to those similarly situated, and should do so here.

B. The Eleventh Circuit Uses A Two-Tiered Approach To Decide Whether To Create An Opt In Class And Facilitate Notice

To grant conditional collective action certification and issue notice to putative class members, the Court must satisfy itself that there are other employees who (1) are similarly situated with regard to their job requirements and pay provisions, and who (2) desire to opt into the case. *Dybach v. Fla. Dep't of Corr.*, 942 F.2d 1562, 1567–68 (11th Cir. 1991). Regarding the first requirement, Plaintiffs bear the burden of proving that they, and the class they seek to represent, are similarly situated. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996). "[D]etermining similarity, at this initial stage, [is] "not particularly stringent," *Hipp*, 252 F.3d at 1214, "fairly lenient," *id*. at 1218, "flexib[le]," Id. at 1219, "not heavy," *Grayson*, 79 F.3d at 1097, and "less stringent than that for joinder under Rule 20(a) or for separate trials under 42(b)," id. at 1096." *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1261 (11th Cir. 2008). Courts in the 11th Cir. utilize a two-tiered procedure that recognizes distinct burdens at different stages of the litigation process. *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1243 n.2, (11th Cir. 2003). The first tier – the one at issue in the

present Motion – is referred to as the "notice stage". *Id.* The primary question at this notice stage is whether Defendant's "employees are similarly situated with respect to their job requirements and with regard to their pay provisions" and whether these individuals desire to opt-in. *Rojas v. Garda CL Se., Inc.*, 297 F.R.D. 669, *3 (SDFL 2013); *Kie v. IVox Solutions, LLC*, 2016 US Dist LEXIS 12223 (S.D. Fla. 2016); *Palma v. Metropcs Wireless, Inc.*, 2013 US DIST LEXIS 175934 (MDFL 2003); *De Oca v. Gus Machado Ford of Kendall, LLC*, 2011 U.S. Dist. LEXIS 157506 (SDFL 2011); *Thomas v. Waste Pro USA, Inc.*, 360 F. Supp. 3d 1313, 1316 (MDFL 2019).

The Court applies a "fairly lenient standard" at the notice stage in determining whether the class should be conditionally certified. *Hipp*, 252 F.3d at 1218. The rationale for this is that "at the early stages of litigation, plaintiffs have not had time to conduct discovery and marshal their best evidence." *Id.* At the notice stage, the district court makes a decision – **usually based only on the pleadings and any affidavits which have solely been submitted by the Plaintiffs** – whether notice of the action should be given to potential class members. *Hipp,* 252 F.3d at 1218; *Simpkins v. Pulte Home Corp.*, 2008 U.S. Dist. LEXIS 64270 (MDFL Aug. 21, 2008). If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in"

and the action proceeds as a representative action through discovery. *Id.* The second determination is typically precipitated by a motion for "decertification" filed by the defendant usually after discovery is largely complete and the matter is ready for trial. *Id.* To satisfy the initial modest burden, "plaintiff[s] need only show that their positions are similar, not identical, to the positions held by the putative class members." *Hipp*, 252 F.3d at 1217; *Morgan*, 551 F.3d at 1273.

The primary purpose of the court making the determination on whether to certify the class/collective action is strictly to locate other similarly situated employees who may wish to bring their claims to the court's attention before this litigation is resolved. *Alexander v. Cydcor, Inc.*, 2012 U.S. Dist. LEXIS 187258, *5 (NDGA 4/5/2012). The Court need only consider the declarations provided by Plaintiffs at stage 1, not those "happy camper" class members **not opting in**. *Metzler v. Case No Med. Mgmt. Int'l, Inc.*, No. 8:19-cv-2289-T-33CPT, LEXIS 62176 (MDFL 3/4/2020); *Lytle, supra; Carmody v. Fla. Ctr. for Recovery, Inc.*, 2006 U.S. Dist. LEXIS 81640 (S.D. Fla. 2006) (granting conditional certification).

Any analysis of factual variances is contrary to the inquiry followed by most courts at this stage. *IBEA v. Rite Aid Corp.*, 2012 U.S. Dist. LEXIS 4682, *8 (S.D.N.Y. Jan. 6, 2012). In *Evans v. Lowe's Home Ctrs., Inc.*, the court stated, "to require conclusive findings of 'similar situations' before providing notice [under §

216(b)] to absent class members 'would condemn any large class claim…to a chicken and egg limbo in which the class could only notify all its members to gather after it had gathered together all its members…" 2004 LEXIS 15716 (MDPA 6/17/2004). This Court should grant "conditional certification" and facilitate notice to the rest of the class of their rights to opt in without delay.[2]

Moreover, Courts in the 11th Cir. have declared that the lenient standard for stage 1 certification merely requires an "either" "or" the Plaintiffs have the same job requirements or claim the same unlawful pay practices: ***"a plaintiff only needs to show that the proposed collective members either (1) had similar duties; or (2) "were all subject to the same policy, plan, or scheme that forms the basis of the alleged FLSA violation.""*** **A plaintiff does not have to establish both**." *Campo v. Granite Servs. Int'l*, No. 1:21-cv-223-AT, 2022 U.S. Dist. LEXIS 14585, (N.D. Ga. Jan. 24, 2022) (emphasis added); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001) ("similarly situated" determination "requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan"). Regardless, both facts are satisfied here.

C. <u>The Plaintiffs and Putative Class(es) are Similarly Situated</u>

[2] "[Wh]ether the requested class in this case actually includes similarly situated individuals (and thus serves judicial economy) is a question more appropriately addressed at the decertification stage, when more specific information will be available." *Reyes v. AT&T Mobility Servs. LLC*, 801 F. Supp. 2d 1350, 1360 (S.D. Fla. 2011).

When weighing the factors which courts may consider, it is absolutely clear that this action should be conditionally certified to proceed collectively either as a single class or 2 classes. First, all 19 PM Plaintiffs dually worked as hourly paid, non-exempt Therapists (SLP, COTA, OT, PT, PTA). See Decls. of Plaintiffs, Exhibits 7-40. They all had the same Job requirements. See Exhibit 5- Select Job Descriptions, (also Exhibit A to declarations). Furthermore, Select Rehab Job postings show descriptions for openings across the US are the same for each respective Therapy or PM position. See Exhibit 6 Job posting composite.

Second, all PM, Therapists and members of the putative class or classes were paid on an hourly basis. Lastly, the supporting Declarations (Exhibits 7-40) show a common pay practice or scheme applied by Defendants to all of its PM and Therapists to avoid paying overtime compensation. A company acts by its Managers, and if Managers know of a policy, the Defendants know of the policy. First, PM, who as managers are the company, admit that the company has a **de facto off the clock policy** applicable to themselves and for all Therapists, and this unlawful policy from the company as enforced down to the 17,000 hourly paid, non-exempt therapists, and as well as to the 3000 program managers. If 35 PM and therapists from 9 states and 34 locations report suffering to work off OT hours

off the clock, stage 1 is met and they are similarly situated, such that all Therapists and PM should be notified.

The preceding facts paint a clear picture for the Court that the named and the Opt-In Plaintiffs are "similarly situated" with regard to their job requirements, compensation plan (hourly pay), and that they were the victims of a common, unlawful pay practice and scheme to avoid paying overtime wages such that Plaintiffs should be permitted to proceed collectively and notify all others similarly situated of this action and their right to join this action and file a claim. See *Garnick et al v. Verizon Connect Fleet USA LLC*,. 8:20-cv-01474-MSS-TGW (DE 110) (M.D. Fla. Aug. 30, 2021)(granting conditional Cert), Exhibit 45.

D. Plaintiffs Have Sufficiently Shown That Other Employees Wish To Opt Into This Action

In addition to showing that they are similarly situated with the group of employees they wish to represent, Plaintiffs must establish a reasonable basis for the existence of other potential opt-in plaintiffs to justify certifying a conditional class. *Peña v. Handy Wash, Inc.*, 2014 U.S. Dist. LEXIS 88879 (SDFL. 2014); *Mackenzie v. Kindred Hosps. E.*, 276 F. Supp. 2d 1211, 1220 (MDFL 2003) ("[A] showing that others desire to opt-in must be made before notice is authorized."). This burden is not onerous. *Rojas,* 297 F.R.D. at *5. "[T]he existence of just one

other co-worker who desires to join is sufficient to raise the Plaintiff's contention beyond one of pure speculation … Courts in this District have conditionally certified classes with as few as two affidavits from potential plaintiffs." *Id.*; *Ackley v. City of Fort Lauderdale*, Case No.: 0-:07-cv-60960, at Doc. 45 (S.D. Fla. Jan. 24, 2008) (granting conditional cert with only **two (2)** opt-in plaintiffs); *Beck v. Desoto Health and Rehab*, Case No.: 2:06-CV-226-FTM-34DNF, at Docs. 23, 34 (MDFL 1/24/2004) (granting conditional certification with only **one (1)** opt-in plaintiff). The fact that 31 people have Opted into this Case from 30 different facilities in 9 different states stating they suffered to work off the clock evidences there are others interested in joining this suit.

Additionally, Plaintiffs present declarations stating that if given notice of this action, others will seek to join[3]. Such declarations have been found to be sufficient to demonstrate interest in the lawsuit and to conditionally certify a class. *Stuven v. Tex. De Braz. Tampa Corp.*, 2013 LEXIS 22240 (MDFL 02/19/2013). "Even a single affidavit or consent to join submitted by another individual stating that they are similarly situated and wish to join the suit is enough to bring the Plaintiff's contentions above pure speculation." *Robbins-Pagel v. WM F. Puckett, Inc.*, 2006

[3] See Decls of McLaughlin ¶ 21; Insalaco ¶ 20; Miller ¶ 22; Ramos ¶ 23; Newell ¶ 28; Comeau ¶ 28; Caouette ¶ 29; Murray ¶ 28; Vanderveen ¶ 20; Pitcher ¶ 31; Lyness ¶ 26; Cameron ¶ 28; Lembke ¶ 26; Ganczarz ¶ 29; Weaver ¶ 24; Macalis ¶ 28; Whalen ¶ 24; Pysher ¶ 27; Hofman ¶ 29; Nowicki ¶ 29; Gachalian ¶ 27; Magyar ¶ 28; Hernandez ¶ 29; L. Taylor ¶ 23; Heidinger ¶ 23; Lorenzetti ¶ 28; Voeun ¶ 26; Zahn ¶ 28; Otterbacher ¶ 28; Logan ¶ 26; Marro ¶ 27; C. Taylor ¶ 29.

U.S. Dist. LEXIS 85253, *6 (MDFL 11/22/2006). Likewise, in *Albert v. HGS Colibrium*, the Court conditionally certified a class based upon just two (2) supporting declarations. Case No. 1:16-cv-3072-WSD, 2017 U.S. Dist. LEXIS 67180 (NDGA 05/3/2017). See: *Sutherland v. Harbour Rest. Partners, LLC*, No. 16 Civ. 21400, 2016 U.S. Dist. LEXIS 132590, at *2-3, 6-7 (SDFL Sept. 23, 2020) (granting conditional certification for off-the-clock claims based upon declaration of named plaintiff and 4 opt-in plaintiffs regarding compensation and duties).

By providing 31 Opt-In Plaintiffs alleging the same common policies, pay practices and job requirements, Plaintiffs have demonstrated enough interest in this lawsuit to warrant conditional certification and for NOTICE to be delivered to those similarly situated.

In sum, Plaintiffs have submitted substantial evidence (beyond modest) in support here including declarations of McLaughlin, Vanderveen and Lembke and 31 opt-ins, along with 3 witness declarations of PM from other states, Ex 41-43; Job Description Ex 5, Job postings Composite Ex 6 showing a single, corporate mandated job requirements and duties for PM and Therapists, all of which demonstrate they are similarly situated. Defendants cannot dispute they had the same jobs, job titles and compensation plans for all respective PM and Therapists

working from their self reported 2300 locations in 43 states.[4] Most courts agree that if the plaintiffs and opt-in plaintiffs have the same compensation plans and same job requirements or job duties they meet the lenient standard or definition of similarly situated. *Thomas v. Waste Pro USA, Inc.*, 360 F. Supp. 3d 1313 (MDFL 2019); *Wade v. Furmanite Am., Inc.*, 2018 U.S. Dist. LEXIS 75624 (SDTX 2018); *Gregory v. Stewart's Shops Corp.*, 2016 U.S. Dist. LEXIS 89576 (NDNY. July 8, 2016); *Jewell v. Aaron's, Inc.*, 2012 U.S. Dist. LEXIS 92285 (NDGA June 28, 2012); *Torres-Roman v. Burger King*, 2015 U.S. Dist. LEXIS 188963 Dkt. 66 (SD FL 2016), *Lytle v. Lowe's Home Ctrs. Inc.*, 2014 U.S. Dist. LEXIS 3227 (MDFL Jan. 10, 2014), *Campo*, *supra*. Further, Plaintiffs have demonstrated in their supporting declarations that all PM and Therapists were subjected to Defendants' willful common policy and practice of not paying its PM and Therapists overtime compensation through a De Facto policy against working overtime hours on the clock necessary to complete their job duties, and conditional certification should be granted. *McClean v. On the Half Shell A/K/A Aqua Grill*, 2018 U.S. Dist. LEXIS 234604 (***Harvey E. Schlesinger***). All factual disputes, and "happy camper" competing declarations are rejected at this stage. *Ciani v. Talk of the Town Rests.,*

[4] Again, some PM newly hired as of 2021, or acquired from other entities may be salaried, but Plaintiffs do not seek to include them in this case or the class of similarly situated.

Inc., 8:14-cv-2197-T-33AEP, 2015 LEXIS 5580 (MDFL 2015); *Pendlebury v. Starbucks Coffee Co.*, 2005 LEXIS 574 (SDFL 2005); *Lytle, Supra.*

III. CLASS NOTICE

The opt-in provisions of the FLSA require a procedure for identifying and notifying potential class members. *Morden v. T-Mobile USA, Inc.*, 2006 WL 1727987, at *3 (WDWA June 22, 2006). "The first step is to identify those employees who may be similarly situated and who may therefore ultimately seek to opt in to the action." *Id.* An accurate employee list must be produced in FLSA collective actions because the lists are necessary to facilitate notice. *See Hoffman-La Roche*, 493 U.S. at 165. Courts in this Circuit compel defendants to produce the names, last known addresses, email addresses, and telephone numbers of putative class members in FLSA cases. *Lopez v. Valls Groups, Inc.*, 2008 U.S. Dist. LEXIS 124218 (SDFL 07/14/2008) (granting conditional certification and producing last known addresses, email addresses and last 4 digits of SS numbers); *Stuven v. Tex. De Braz. Tampa Corp.*, 2013 U.S. Dist. LEXIS 22240 (MDFL 2013); *Cooper v. E. Coast Assemblers, Inc.*, 2013 U.S. Dist. LEXIS 10435 (SDFL 2013) (approving notice by email and mail); *Abdul-Rasheed v. Kablelink Communs., LLC*, 2013 U.S. Dist. LEXIS 159632 (MDFL Nov. 7, 2013) (granting conditional cert and directing defendants to produce a list containing the names, last known

addresses, telephone numbers, and email addresses of putative class members). Plaintiffs request Select be ordered to Produce a list of all Therapists and hourly paid PM in Excel or .csv format containing (1) names, (2) U.S. address, (3) cell numbers, (4) personal email addresses, (5) dates of employment, and (6) last four ss numbers.[5] *Garnick, supra, Torres-Roman, Supra.*

A. <u>The Plaintiffs Proposed Notice Should Be Used</u>

The Notice, text message and Consent to Join form (<u>Exhibits 1-3</u>), are typical of notices approved many times in this Circuit. *See Parrilla v. Allcom*, Case No.: 6:08-cv-01967-GAP-GJK Dkt. 69; *Simpkins v. Pulte Home Corp.,* No. 6:08-cv-130-Orl-19DAB, 2008 LEXIS 64270 (MDFL Aug. 21, 2008). Included in the notice is standard language, a description of the action and a basic statement of the law against retaliation by an employer if a putative plaintiff joins the case. In addition, no statement regarding a potential plaintiff's liability for costs should be included in the notice. *Abdul-Rasheed v. KableLink Communs., LLC*, 2013 U.S. Dist. LEXIS 167159, at *15 (MDFL Nov. 25, 2013) (warning of costs in Notice "would undermine the FLSA's goal of encouraging full enforcement of statutory rights because warning would dissuade people from joining the lawsuit.")

[5] Partial Social Security Numbers will aid in correcting outdated contact info.

"[A]bsent ***reasonable*** objections by either the defendant or the Court, plaintiffs should be allowed to use the language of their choice in drafting the notice." *KING v. ITT Cont'l BAKING CO.*, No. 84 C 3410, 1986 U.S. Dist. LEXIS 29321, at *6 (N.D. Ill. Feb. 13, 1986). A court has discretionary authority over the notice-giving process for FLSA collective actions. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 174, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). Plaintiff's proposed Class Notice is accurate, neutral, and has been adopted and approved by other courts[6]. Accordingly, Plaintiffs' proposed Class Notice should be approved.

B. Notice Should Be Posted in each of Defendants' facility break rooms.

Select must post the notice and consent form in the break rooms of its 2300 facilities. Such requests are routinely granted and ensure increased likelihood that members of the putative class who must be notified that their rights may be affected by the action are so notified. *Didoni v. Columbus Rest., LLC,* 327 F.R.D. 475, 482 (S.D. Fla. 2018). See *Shoots v. iQor Holdings US Inc.,* 215 US DIST LEXIS 131617 *82 (posting notice in lunch/break rooms)*; Lora v. To-Rise, LLC,* No. 16-CV-3604 (RRM) (ST), 2017 U.S. Dist. LEXIS 112644, at *47 (E.D.N.Y. July 18, 2017)("Courts routinely order notice to be posted in employee common areas, even if potential class members have been notified by mail"); See *Collado v.*

[6] *Shawn Martin, individually and on behalf of all others similarly situated v. Partsbase Inc. d/b/a Govgistics*, Case 9:20-cv-80235-DMM, (May 14, 2020 SDFL), DE 52

J. & G. Transp., Inc., No. 14-80467-CIV-GOODMAN, 2014 U.S. Dist. LEXIS 152441, at *14 (SDFL 10/23/14) (ordering notice posted in a conspicuous location in each of the defendant's business offices).

C. Notice Should Be Delivered By Us Mail, Email And Text Message, Available On A Website Consents Allowed To be Signed Electronically

Plaintiffs seek approval to deliver notice by US mail, email, and by text. Courts grant such requests as this increases the likelihood members of the class will see the notice and not reject it as junk mail or spam which they may do if received in just one (1) form. *See Landry v. Swire Oilfield Servs.*, L.L.C., 252 F. Supp. 3d 1079, 1129, 2017 U.S. Dist. LEXIS 66497, *119-120, 2017 WL 1709695. Increasingly, courts permit issuance of the notice by TEXT message to cellular telephone numbers. *See Irvine v. Destination Wild Dunes Mgmt., Inc.,* 15-cv-980 (RMG), Dkt. No. 44-9 (D.S.C. July 23, 2015); *Dickensheets v. Arc Marine, LLC*, No. 3:19-CV-00322, 2020 U.S. Dist. LEXIS 32058, at *4-5 (S.D. Tex. Feb. 19, 2020) (notice via text message in addition to other traditional notice methods appropriate in modern society."). Opt-ins should be allowed to sign the consent to join form electronically as allowed in *Kraft v. Freight Handlers, Inc.*, No. 6:18-cv-1469-Orl-41GJK, 2019 U.S. Dist. LEXIS 128826, at *20 (MDFL May 21, 2019); see F.S.§668.004. Further, the MDFL permits e-signatures on documents.

Plaintiffs request authorization to post the Notice and Consent forms on a website, a link to which will be contained in the email and text message sent to class members. Courts in FLSA cases allow similar websites. *See Sellers v. Sage Software, Inc.,* No. 1:17-CV-03614-ELR, 2018 U.S. Dist. LEXIS 188420, at *15-16 (N.D. Ga. May 25, 2018). The SDFL authorized Notice via US mail, email, and text message and that a reminder notice could be sent out via the same communication methods 30 days into the 60 day notice period. See *Shawn Martin et al v. Partsbase Inc. d/b/a Govgistics*, Case 9:20-cv-80235-DMM, (SDFL May 14, 2020). The court authorized posting of the notice and consent form to a newly created website consent forms signing electronically. *Id*. Similarly, Plaintiffs request authorization to deliver notice to putative class members via mail, email, and text message, that the Court approve the Notice and Consent forms be posted on a newly created website, and that opt-ins be permitted to sign their consent forms electronically. Plaintiffs also propose posting this website and link on Social Media, such as LinkedIn and Facebook so it becomes visible. *See Aguiar v. M.J. Peter & Assocs*., No. 20-CIV-60198-RAR, 2020 U.S. Dist. LEXIS 253390, at *7 (S.D. Fla. Sep. 10, 2020) (authorizing notice and reminder via mail, email, text message and website), *Beltran v. Interexchange, Inc.*, Civil Action No.

14-cv-03074-CMA-CBS, 2017 U.S. Dist. LEXIS 205079, at *19 (D. Colo. June 9, 2017)(notice via Facebook authorized).

D. 60 DAY NOTICE PERIOD and REMINDER NOTICE

A 60 day notice period courts agree is reasonable and appropriate here. *Pittman v. Comfort Sys. USA (Se.), Inc.*, No. 8:12-CV-2142-T-30TGW, 2013 U.S. Dist. LEXIS 19434, (M.D. Fla. Feb. 13, 2013). A reminder notice of duplicate notice also is reasonable. *See Shawn Martin et al v. Partsbase Inc. d/b/a Govgistics*, Case 9:20-cv-80235-DMM, (S.D. Fla. May 14, 2020.) Plaintiffs request the right to send an identical reminder notice after 30 by US mail.

E. A 3 Year Sol Should Be Used For Determining Who Receive Notice

The overwhelming majority of courts use a 3 year SOL period when Plaintiffs allege a willful violation. *See Simpkins v. Pulte Home Corp.*, 2008 WL 3927275 at p. 9 (M.D. Fla. 2008), *Whitaker v. Kablelink Communications, LLC*, No. 8:13-cv-2093-T-30MAP, 2013 U.S. Dist. LEXIS 157675, 2013 WL 5919351, at *4 (M.D. Fla. Nov. 4, 2013); *Sellers v. Sage Software, Inc.*, No. 1:17-CV-03614-ELR, 2018 U.S. Dist. LEXIS 188420 (N.D. Ga. May 25, 2018). Plaintiffs have sufficiently alleged in the Amended Complaint willful FLSA violations to warrant a (3) year SOL for Notice. *See Longcrier v. HL-A Co., Inc.*, 595 F. Supp. 2d 1218, 1242 (S.D. Ala. 2008) (approving 3 year sol when plaintiff

alleged willfulness). Regardless, this Court should authorize notice to everyone employed within the 3 year period and Select can argue SOL later as Judge Merryday ordered in *Swarthout v. Freightcenter, Inc.*, 8:20-cv-2910-JSM, 2021 U.S. Dist. LEXIS 139135, at *8 (M.D. Fla. May 10, 2021).

CONCLUSION AND RELIEF REQUESTED

Plaintiffs have more than met the lenient burden to certify the action to conditionally proceed collectively under 11th Circuit precedent. The PM (aka DOR) job requirements as well as the Therapists' job requirement are identical for all 2300 locations in all states, and all PM and Therapists are all hourly paid, non-exempt employees who all report here suffering to work overtime hours with the knowledge of Select. Thus, there are others who would seek to join and should be notified expeditiously of this action and their right to join. Accordingly, Plaintiffs request this Court conditionally certify 1 class of PM and Therapists, or 2 classes, order Defendants to produce the class list within 14 days, and authorize Plaintiffs to send Notice in the manner and form requested above.

April 13, 2022

/s/Mitchell L. Feldman
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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Parties may access this filing through the Court's System.

/s/ Mitchell L. Feldman
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