SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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NICO RUTELLA, WILLIAM IANNI, DAVID O'CONNELL, and JAMES MARKOVICH, individually and on behalf of other persons similarly situated who were employed by NATIONAL SECURITIES CORPORATION, NATIONAL HOLDINGS CORPORATION and/or any other entities affiliated with or controlled by NATIONAL SECURITIES CORPORATION and/or NATIONAL HOLDINGS CORPORATION,

Plaintiffs,

-against-

NATIONAL SECURITIES CORPORATION, NATIONAL HOLDINGS CORPORATION and/or any other entities affiliated with or controlled by NATIONAL SECURITIES CORPORATION and/or NATIONAL HOLDINGS CORPORATION,

Defendants.

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TRIAL/IAS PART: 5

NASSAU COUNTY

Index No: 601067-16
Motion Seq. Nos. 4 and 5
Submission Date: 5/6/22

Papers Read on these Motions:
Memorandum of Law in Support (Motion Seq. 4).....x
Affirmation in Support with Exhibits (Mot. Seq. 4).....x
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Reply Memorandum of Law (Mot. Seq. 5).....x

Presently pending before the Court are 1) the motion filed by Defendants National Securities Corporation ("NSC") and National Holdings Corporation ("NHC") (collectively, "Defendants"), for an Order, pursuant to CPLR § 3212, granting summary judgment dismissing the Plaintiffs' complaint in its entirety, and 2) the motion filed by Plaintiffs, Nico Rutella, William Ianni, David O'Connell and James Markovich (collectively, the "Named Plaintiffs"), individually and on behalf of other persons similarly situated who were employed by Defendants (the putative class collectively referred to as "Plaintiffs"), for an Order, pursuant to CPLR §§901 and 902, certifying this action as a class action. For the following reasons, Defendants' motion is denied as premature, and Plaintiffs' motion is granted.

The parties are reminded of the conference scheduled for July 19, 2022, at 9:30 a.m.

BACKGROUND

The parties' history is set forth in detail in the prior Decisions and Orders of this Court, including Decisions dated August 16, 2016, October 3, 2016, and December 18, 2019. Briefly, this action is brought pursuant to New York Labor Law Article 19 §§ 652, 663 and 12 NYCRR §§ 142-2.1 and 142-2.2 to recover unpaid minimum wages and overtime compensation allegedly owed to Named Plaintiffs and all similarly situated persons who are presently or were formerly employed by NSC, NHC and/or any other entities affiliated with or controlled by NSC and/or NHC. Plaintiffs claim that NSC and NHC are a single integrated enterprise under New York Labor Law that employed and/or jointly employed the Named Plaintiffs and those similarly situated.

NSC is a Broker-Dealer engaged in the financial business. It trades securities and brokerage products, and is a wholly owned subsidiary of NHC, a holding company. Defendants sell financial products through registered representatives, such as the Named Plaintiffs and other members of the putative class, whom NSC classifies as independent contractors, and who sell products for NSC pursuant to Registered Representative Agreements. Plaintiffs allege that Defendants share a common business purpose, ownership, corporate officers, offices, and maintain common control, oversight and direction over the work performed by Plaintiffs.

In bringing this suit, Plaintiffs claim that, beginning in approximately February 2010 and continuing through the present, Defendants wrongfully withheld wages from the Named Plaintiffs and other similarly situated individuals who worked for Defendants. Plaintiffs claim that during this time Defendants wrongfully classified the Named Plaintiffs and others similarly situated as independent contractors (rather than as employees), and consequently, exempted them from recovering minimum wages and overtime compensation.

Plaintiffs seek relief for themselves, and all similarly situated employees who performed work for Defendants in New York at four locations operated by or on behalf of Defendants: (1) Melville, NY; (2) Huntington, NY; (3) 80 Broad Street, New York, NY ("80 Broad Street"); and (4) 7 Hanover Square, New York, NY ("7 Hanover Square"). Specifically, Plaintiffs seek minimum wages and overtime compensation, which they claim they were deprived of, plus interest, attorneys' fees, and costs. Plaintiffs contend that while employed by and performing work for the benefit of the Defendants, they (a) worked well beyond forty hours each week; (b) did not have any managerial duties; (c) were not responsible for decisions regarding the hiring, firing, demotion or promotion of employees; (d) did not exercise independent judgment and discretion on matters of significance while employed by Defendants; and (e) were subject to control by Defendants over the means used to complete the tasks they performed for the Defendants.

The allegations made by each of the Named Plaintiffs are summarized as follows:

1. Nico Rutella

Rutella worked for Defendants from approximately August 2013 through February of 2016 at the Melville office. Rutella primarily made telephone calls to individuals to sell financial services and products. He typically worked approximately fifty-five hours each week. Specifically, Rutella would normally work Monday through Friday from 8:00 a.m. to 6:00 p.m. and on Saturday from 9:00 a.m. to 2:00 p.m. During his employment, Rutella was not paid an hourly wage. Instead, Rutella was paid on commission. Rutella received a monthly payment of $1,800.00 from Defendants, but this monthly payment was deducted from any commissions he earned. As a result, Rutella routinely worked more than forty hours each week, but did not receive overtime wages at time and one-half his regular rate of pay for all the hours over forty that he worked. Additionally, Rutella did not receive minimum wages for all hours worked.

2. William Ianni

William Ianni worked for Defendants from approximately October 2019 through October 2020 at the 80 Broad Street office. Ianni primarily made telephone calls to individuals to sell financial services and products. Ianni typically worked approximately fifty-five hours each week. Specifically, Ianni would normally work Monday through Friday from 9:00 a.m. to 8:00 p.m. During his employment, Ianni was not paid an hourly wage. Instead, Ianni was paid on commission. Ianni received a monthly payment of $1,000.00 from Defendants, but this monthly payment was deducted from any commissions he earned. As a result, Ianni routinely worked more than forty hours each week, but did not receive overtime wages at time and one-half his regular rate of pay for all the hours over forty that he worked. Additionally, Ianni did not receive minimum wages for all hours worked.

3. David O'Connell

David O'Connell worked for Defendants from approximately April 2012 through April 2014 at the 7 Hanover Square office. O'Connell primarily made telephone calls to individuals to sell financial services and products. O'Connell typically worked approximately fifty to sixty hours each week. Specifically, O'Connell would normally work Monday through Friday for shifts that were between ten and twelve hours per day. As a result, O'Connell routinely worked more than forty hours each week, but did not receive overtime wages at time and one-half his regular rate of pay for all the hours over forty that he worked. Additionally, O'Connell did not receive minimum wages for all hours worked.

4. James Markovich

James Markovich worked for Defendants from approximately April 2018 through March 2019 at the 7 Hanover Square office. Markovich primarily made telephone calls to individuals to sell financial services and products. Markovich typically worked approximately eighty hours each week. Specifically, Markovich would normally work Monday through Friday from 7:30 or 8:00 a.m. to 9:30 p.m., with additional occasional work on Saturdays. During his employment, Markovich was not paid an hourly wage. Instead, Markovich was paid on commission. Markovich received a monthly payment of $1,500.00 from Defendants, but this monthly payment was deducted from any commissions he earned. As a result, Markovich routinely worked more than forty hours each week, but did not receive overtime wages at time and one-

half his regular rate of pay for all the hours over forty that he worked. Additionally, Markovich did not receive minimum wages for all hours worked.

Plaintiffs submit that this action is properly maintainable as a class action pursuant to CPLR Article 9. Specifically, Plaintiffs allege that 1) this action is brought on behalf of the Named Plaintiffs and a putative class consisting of every other person who worked for Defendants selling or marketing financial products in any capacity within the State of New York at any time between February 2010 and the present, 2) the putative class is so numerous that joinder of all members is impracticable, inasmuch as the size of the putative class is believed to be in excess of fifty individuals, and the names of all potential members of the putative class are not known, 3) the questions of law and fact common to the putative class predominate over any questions affecting only individual members, 4) the claims of the Named Plaintiffs are typical of the claims of the putative class, 5) the Named Plaintiffs and their counsel will fairly and adequately protect the interests of the putative class, and, 6) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

RULING OF THE COURT

A. Defendants' Motion for Summary Judgment

Defendants' motion for summary judgment is denied as premature. The law is clear that "a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *Malester v. Rampil*, 118 A.D.3d 855, 856 (2d Dept. 2014). The disclosure in this action has thus far been limited to ascertaining only those facts which are necessary to support or oppose the plaintiff's application for class status. *Gewanter v. Quaker State Oil Ref. Corp.*, 87 A.D.2d 970 (4th Dept. 1982). Indeed, this Court issued two Preliminary Conference Orders entered January 10, 2020 and February 3, 2020. In each Order, this Court specifically noted that 1) discovery and inspection was limited to pre-class certification demands, 2) depositions were limited to pre-class certification, 3) a motion for class certification was to be filed on or before July 31, 2020, and 4) expert disclosure was to be addressed following the determination of the class certification motion.

The Court is mindful that an inquiry into whether an action should proceed as a class action necessitates a consideration of whether a claim has merit. Nevertheless, such an "inquiry is limited, and such threshold determination is not intended to be a substitute for summary

judgment or trial." *Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 481, 482 (1st Dept. 2009) (internal quotations and citation omitted). Rather, the inquiry on a motion for class action certification vis-à-vis the merits is limited to determining "whether on the surface there appears to be a cause of action for relief which is neither spurious nor sham." *Simon v. Cunard Line*, 75 A.D.2d 283, 288 (1st Dept. 1980); *Super Glue Corp. v Avis Rent-A-Car Sys*, 132 A.D.2d 604, 607 (2d Dept. 1987). It remains a "surface" inquiry – not a summary examination tantamount to the procedural equivalent of a trial. *Falk v. Goodman*, 7 N.Y.2d 87, 91 (1959).

Accordingly, given that discovery in this action has thus far been limited to class certification issues, and Plaintiffs have not had a full and fair opportunity to conduct discovery on the merits, Defendants' motion seeking to defeat the Plaintiffs' individual claims—and thereby, among other things, the Named Plaintiffs' claims to standing as class representatives—is denied as premature. *Gewanter*, 87 A.D.2d at 970; *Shanklin v. Wilhelmina Models, Inc.*, 2020 N.Y. Slip Op. 31337(U) (Sup. Ct. N.Y. Cty. 2020). That denial is without prejudice to Defendants making a further motion for summary judgment at the close of discovery.

B. Plaintiffs' Motion for Class Certification

The proponent of a motion for class certification bears the burden of establishing the requirements of CPLR Article 9. *See Cooper v. Sleepy's, LLC*, 120 A.D.3d 742, 743 (2d Dept. 2014). The law requires that "[a] class action certification must be founded upon an evidentiary basis," *Yonkers Contr. Co. v. Romano Enters. of N.Y.*, 304 A.D.2d 657, 658 (2d Dept. 2003), and not conclusory statements in pleadings or affidavits, *Rallis v City of New York*, 3 A.D.3d 525, 526 (2d Dept. 2004).

In deciding whether to certify a class, "a court must be mindful… that the class certification statute should be liberally construed" in favor of granting certification. *Kudinov*, 65 A.D.3d at 482; *Pruitt v. Rockefeller Ctr. Props.*, 167 A.D.2d 14 (1st Dept. 1991); *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 90-92 (2d Dept. 1980). *See also Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 69 (2d Dept. 2006); *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 191 (1st Dept. 1998). That is, once the requirements for class certification are met, any doubts must be resolved in favor of class certification. *Pruitt*, 167 A.D.2d at 21; *Friar*, 78 A.D.2d at 90-92. In the end, the determination to grant class action certification rests in the

sound discretion of the trial court. *See Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 52-53 (1999); *Tosner v. Town of Hempstead*, 12 A.D.3d 589, 590 (2d Dept. 2004).

To have an action certified as a class action, the plaintiff must demonstrate that the purported class 1) exists, *Pesantez v. Boyle Envtl. Servs.*, 251 A.D.2d 11 (1st Dept. 1998); *Gerwin & Ehrenclou v. 964 Third Ave. Assoc.*, 90 A.D.2d 712 (1st Dept. 1982), and 2) is capable of being identified, *Globe Surgical Supply v GEICO Ins. Co.*, 59 A.D.3d 129 (2d Dept. 2008). Moreover, the plaintiff must describe the composition of the class. *Simon v. Cunard Line*, 75 A.D.2d at 288; *Scott v. Prudential Ins. Co. of Am.*, 80 A.D.2d 746 (4th Dept. 1981).

1. CPLR § 901

CPLR § 901 sets forth five prerequisites to class certification, commonly referred to as (a) numerosity, (b) commonality, (c) typicality, (d) adequacy of representation and (e) superiority. *City of New York v. Maul*, 14 N.Y.3d 499, 508 (2010); *see also Rallis v City of New York*, 3 A.D.3d at 523; *Moreno v. Future Health Care Servs., Inc.*, 186 A.D.3d 594, 595 (2d Dept. 2020). Specifically, CPLR § 901(a) provides that one or more members of a class may sue as representative parties on behalf of a class if:

1. the class is so numerous that joinder of all members whether otherwise required or permitted is impracticable ("numerosity");

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members ("commonality" or "predominance");

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality");

4. the representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"); and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority").

CPLR § 901(a)(1) provides that a class action may be maintained if, *inter alia*, "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable." There is no mechanical test to determine numerosity. Nor is there a set number of prospective class members before a class is certified. *Friar*, 78 A.D.2d at 96; *see also*

Pesantez, 251 A.D.2d at 11-12. Rather, numerosity "depends upon the particular circumstances surrounding the proposed class." *Friar*, 78 A.D.2d at 96.

CPLR § 901(a)(2) provides that there must be "questions of law or fact common to the class which predominate over any questions affecting only individual members." Thus, the proposed class must assert a "common legal grievance" that predominates over or outweighs the issues that pertain to individual members of the class. *Geiger v. Amer. Tobacco Co.*, 181 Misc.2d 875, 883 (Sup. Ct. Queens Cty.1999), *quoting* 3 Weinstein-Korn-Miller, N.Y. Civil Practice § 901.11; *see also Pesantez*, 251 A.D.2d at 12. Like the other aspects of CPLR § 901, this is not a mechanical test, but rather depends on "whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Friar*, 78 A.D.2d at 97. In the end, this requires "predominance, not identity or unanimity, among class members." Moreover, even if questions peculiar to each individual may remain after resolution of the common questions," this will not defeat class certification. *Friar*, 78 A.D.2d at 97; *see also Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 6 (1st Dept. 1986).

CPLR § 901(a)(3) requires that the "claims and defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement is satisfied when the Named Plaintiffs' claims "derive from the same practice or conduct that gave rise to the remaining claims of the class members and is based upon the same legal theory." *Friar*, 78 A.D.2d at 98; *see Ackerman*, 252 A.D.2d at 181; *Pruitt v. Rockefeller Ctr. Props.*, 167 A.D.2d 14, 22 (1st Dept. 1991).

The essence of typicality is that the representative party must have an individual cause of action and that the representative's interest must be closely identified with that of the class members. Thus, to demonstrate typicality, "it is not necessary that the claims of the Named plaintiff be identical to those of the class." *Super Glue Corp.*, 132 A.D.2d at 604 (emphasis supplied). Nevertheless, the Named "Plaintiffs' claims must [also] not be antagonistic to or in conflict with the interest of the other class members." *Gilman v Merrill Lynch, Pierce, Fenner & Smith*, 93 Misc. 2d 941, 945 (Sup. Ct. N.Y. Cty. 1978).

CPLR § 901(a)(4) requires that the Named Plaintiff be in a position to adequately protect the interests of the members of the class in the litigation. "A class representative acts as principal to the other class members and owes them a fiduciary duty to vigorously protect their

interests." *City of Rochester v. Chiarella*, 65 N.Y.2d 92, 100 (1985). The class representative includes both "the duty to act affirmatively to secure the class members rights as well as to oppose the adverse interests asserted by others." *Id.* at 100.

Adequacy of representation also requires that "the [Named Plaintiffs] possess [the] required 'general awareness of the claims' at issue." *Stecko v RLI Ins. Co.*, 121 A.D.3d 542, 543 (1st Dept. 2014). The three essential factors to consider in determining adequacy of representation are (1) potential conflicts of interest between the representative and the class members, (2) personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and (3) the quality of the class counsel; i.e., in order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions. *See generally Ackerman*, 252 A.D.2d at 179.

CPLR § 901(a)(5) provides that a class may be certified only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The "very core of the class-action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc., v. Windsor*, 521 U.S. 591, 617 (1997).

2. CPLR § 902

CPLR § 902 requires a court deciding a motion for class certification to (1) determine whether the prerequisites of CPLR § 901 have been satisfied, and (2) consider at least the five specific practical matters listed in CPLR § 902. That is, Plaintiffs must show that certification is appropriate in consideration of: (1) "the interest of members of the class in individually controlling the prosecution or defense of separate actions," (2) "the impracticability or inefficiency of prosecuting or defending separate actions," (3) "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class," (4) "the desirability or undesirability of concentrating the litigation of the claim in the particular forum," and (5) "the difficulties likely to be encountered in the management of a class action." CPLR § 902; *Rallis*, 3 A.D.3d at 526.

3. Application of the Principles to the Instant Action

Plaintiffs' motion for class certification is granted. In support of their claim that certification of the putative class is appropriate in this action, the Plaintiffs advance seven

principal arguments: (1) class actions are the appropriate method of adjudicating wage claims arising from an employer's alleged practice of underpaying employees; (2) the class herein is so numerous that joinder of all members is impracticable; (3) questions of law and fact common to the class predominate over questions affecting only individual class members, and arise from a common wrong, specifically, Defendants' alleged misclassification of Plaintiffs as independent contractors, and their resultant failure to pay earned minimum wages and overtime; (4) the Named Plaintiffs' claims are typical of the claims of the putative class given that (i) the claims of the Named Plaintiffs' and all other members of the putative class arise from the same conduct and (ii) the claims are all based on the same legal theory; (5) the Named Plaintiffs will fairly and adequately protect the interests of the class because their interests are aligned with the interests of the putative class members – namely, the Named Plaintiffs stand to gain a pecuniary benefit through the successful prosecution of this action; (6) the class action method is particularly effective in wage and hour cases, such as the case at bar, where most of the individual differences among class members' claims are limited solely to damages, and, alternatively, requiring dozens of individual actions is an ineffective and inefficient method, which could lead to conflicting determinations and the imposition of different and, perhaps, incompatible standards upon Defendants; and, (7) the existence of hundreds of class members, in and of itself, is testament to both the impracticability and inefficiency of prosecuting or defending separate actions.

In opposition, Defendants offer six principal arguments: (1) there is no evidence that the Plaintiffs and/or the putative class members were anything but independent contractors; (2) Plaintiffs are unable to establish commonality or predominance as the determination of whether individuals are independent contractors or employees turns on a highly fact-specific balancing test; (3) Plaintiffs cannot show that their alleged experiences are typical of that of the putative class as they have no knowledge of the work practices, schedules or compensation of other registered representatives, with the exception of a handful of individuals that worked with Plaintiffs at their respective individual offices of supervisory jurisdiction ("OSJ"), under the same branch supervisors, and during the same period of time; (4) Plaintiffs are not adequate class representatives because they have provided contradictory testimony and evidence; (5) a class action is inferior to other methods available to resolve these claims including filing complaints

with the New York State Department of Labor; and, lastly, (6) Plaintiffs fail to satisfy the requirements for CPLR § 902 as (i) Nassau County is not the appropriate forum for all class members, many of whom never resided in or worked in Nassau County, and (ii) mini-trials will be required to assess each class member's claim and would impose substantial difficulties on the parties and the Court rendering the action unmanageable.

The Court's analysis begins with the Named Plaintiffs' identification of the putative class as:

> All individuals, other than managers, corporate officers, directors, clerical and office workers, who performed work for National between February 2010 and the present selling and marketing financial products pursuant to contracts entered into with National who worked at the National locations in Melville, NY; Huntington, NY; 80 Broad Street in New York, New York; and 7 Hanover Square in New York, New York; as "Registered Representatives" for any given calendar year in which they were paid by National less than $100,000.00.

The Named Plaintiffs sufficiently demonstrate that such a group of persons exists, and the purported class is not so overbroad as to defeat the identification requirements of CPLR Article 9. *See Pesantez*, 251 A.D.2d at 11-12. Further, this purported class easily satisfies the "numerosity" prong of CPLR § 901.

The Court now turns to the "commonality" prong of CPLR § 901 by initially noting that this case is a classic wage and hour suit. The Named Plaintiffs and, indeed, the putative class members, assert claims related to wages earned, but not paid, by the Defendants/employers based upon the employer's alleged practice of mischaracterizing employees as independent contractors. This is a "common legal grievance" satisfying commonality. Indeed, class action suits are particularly appropriate for adjudicating such claims. The fact that Plaintiffs may have different levels of damages does not in itself defeat class certification. *Id. See also Gold v. New York Life Ins. Co.*, 193 A.D.3d 454, 455 (1st Dept. 2021); *Stecko*, 121 A.D.3d at 542; *Kudinov*, 65 A.D.3d at 482.

The Court rejects Defendants' claim that commonality/predominance does not exist because the determination of whether individuals are independent contractors or employees turns on a highly fact-specific balancing test. Initially, the Court notes that in advancing this proposition, Defendants rely upon federal case law applying Federal Rule of Civil Procedure

23(b). New York State courts have consistently found this analysis inapplicable to CPLR § 901. Perhaps best said by the First Department in *Stecko*, "[w]e note that the motion court was not required to apply the 'rigorous analysis' standard utilized by the federal courts in addressing class certification motions under rule 23(b) of the Federal Rules of Civil Procedure, given this Court's recognition that CPLR 901(a) 'should be broadly construed' and that 'the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it.'" *Stecko*, 121 A.D.3d at 543; *Isufi v. Prometal Constr., Inc.*, 161 A.D.3d 623 (1st Dept. 2018). Applying that reasoning, numerous courts have certified classes asserting Labor Law violations through improper classification as "independent contractors," such as in the case at bar. *See generally Kolb v. Bankers Conseco Life Ins. Co.*, 2014 N.Y. Slip Op. 33984(U) (Sup. Ct. Nassau Cty. 2014).

Even assuming that Plaintiffs' claims require a "highly fact-specific balancing test" does not necessitate a finding that such actions are not suitable to class action status. This is particularly so in the instant matter where the Plaintiffs' claims 1) stem from written, standardized Registered Representative Agreements and practices of Defendants; 2) are based on the same theory (a misclassification as independent contractors); and 3) result in the same injury/damage claim (failure to page minimum wages and overtime compensation). That there might be a "different level of damage" for each plaintiff and class member is not fatal to commonality. *Gold*, 193 A.D.3d at 455.

The affidavits of the Named Plaintiffs provide a sufficient predicate for the Court to conclude that the claims of the Named Plaintiffs are typical of other members of the putative class. Specifically, 1) Rutella attests that he worked with no fewer than forty other individuals who were required to meet with supervisors, receive instructions on how to speak to potential customers; and were not paid overtime wages, 2) Ianni attests that he worked with no fewer than eight other workers performing similar work in a similar manner, who received instruction on how to speak to potential customers, and were not paid overtime wages, 3) Markovich attests that he worked with 203 other individuals who performed similar work, received instruction from supervisors on how to speak to potential customers, were required to meet with supervisors, and did not receive overtime pay, and 4) O'Connell attests that he worked with approximately fifteen other individuals doing the same work, who were required to meet with supervisors,

received instructions on how to speak to potential customers, and were not paid overtime. These affidavits describe a similar scenario that permeates the experiences of the other members of the putative class. Thus, in the end, this Court finds that there is sufficient commonality, predominance, and typicality in the assertion of the claims of the putative class.

Additionally, this Court finds that the Plaintiffs are "adequate" class representatives. Based upon the papers submitted, this Court is persuaded that the Named Plaintiffs are sufficiently apprised of the facts and issues of law herein. *Brandon v. Chefetz*, 106 A.D.2d 162 (1st Dept. 1985). The Named Plaintiffs have each submitted affidavits that demonstrate to this Court that they understand that their, and other class members', rights to wages and overtime compensation may have been violated by the Defendants' alleged practice of misclassification of employees as independent contractors. The Named Plaintiffs understand that this case is about whether they were required to be paid wages for all hours worked, including overtime payments. Their interests are aligned with those of the class, namely, "to receive the wages and benefits allegedly owed to them." In sum, the Named Plaintiffs' affidavits establish that they have a general understanding of the class claims and will be adequate representatives of the class. Defendants' claim that Plaintiffs were inconsistent in their deposition testimonies and therefore lack a "general awareness of the claims" asserted in this suit is best suited for trial.

As to the final CPLR § 901 factor, the Court concludes that a class action lawsuit is superior to other available methods for the fair and efficient adjudication of the controversy at hand. Indeed, as the First Department has stated, "a class action is the superior vehicle for resolving wage disputes since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court." *Lewis v. Hallen Constr. Co., Inc.*, 193 A.D.3d 511, 512 (1st Dept. 2021).

The Court rejects Defendants' argument that the superiority prong is not met because individualized mini trials will be required to calculate damages and administrative remedies. The law is clear that individualized inquiries as to damages will not defeat class certification. *See Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014). *See also Nawrocki v Proto Constr. & Dev. Corp.*, 82 A.D.3d 534, 535-536 (1st Dept. 2011). In sum, "while the

[damage] phase of the action may involve separate calculations for the individual class members, this does not militate against certification." *Gold*, 193 A.D.3d at 455.

CPLR § 902 further supports the Court exercising its discretion in favor of class certification. In the absence of any evidence that any other individual has instituted an action against Defendants seeking to recover any alleged underpayments, this Court finds that two of the five prongs of CPLR § 902 are satisfied, namely, "the interest of members of the class in individually controlling the prosecution. . . of separate actions," CPLR § 902(1), and "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class," CPLR § 902(3). In addition, the existence of nearly 600 class members satisfies "the impracticability and inefficiency of prosecuting or defending separate actions" prong of CPLR § 902(2). Finally, when compared to complications of managing multiple actions—potentially 600 claims—the Court is convinced that there will be fewer difficulties in managing a class action based upon the claims asserted. CPLR § 902(5); *Kurovskaya v Project O.H.R. (Office for Homecare Referral), Inc.*, 194 A.D.3d 612, 613 (1st Dept. 2021).

Notably, the parties spend a considerable amount of time arguing whether the Named Plaintiffs and putative class members were employees or independent contractors. Such extensive analysis is not required on the instant application for class certification. As noted above, "[w]hen evaluating a motion for class certification, the court's inquiry "vis-à-vis the merits is limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham." *Super Glue Corp.*, 132 A.D.2d at 607. Here, an examination of the Plaintiffs' claims demonstrates that the claims are suitable for class treatment because the fact determinations are not hopelessly individual. Moreover, the causes of action asserted in the Amended Complaint that (1) Defendants violated New York Labor Law Article 19 § 663 and 12 N.Y.C.R.R. § 142-2.1 (Minimum Wage), and (2) Defendants violated New York Labor Law Article 19 § 663 and 12 N.Y.C.R.R. § 142-2.2 (Overtime Compensation) are sufficiently viable to survive a motion for class certification.

CONCLUSION

Defendants' motion for summary judgment is denied and Plaintiffs' motion for class certification is granted.

The parties are reminded of the conference scheduled for July 19, 2022, at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
May 25 2022

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
May 27 2022
NASSAU COUNTY
COUNTY CLERK'S OFFICE