To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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GENDRI CASTILLO, individually and on behalf of all others similarly situated,

Plaintiff,

-against-

FIRST CARE OF NEW YORK, INC.,

Defendant

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Index No. 51140/2013
Motion Seq. # 2
Motion Date: 12/19/14

DECISION & ORDER

Scheinkman, J:

By Decision and Order entered October 6, 2014 (the "October 2014 Decision"), this Court gave Plaintiff Gendri Castillo ("Plaintiff" or "Castillo") the opportunity to further supplement the papers submitted on his motion pursuant to CPLR 902 to certify this action as class action. The Court held the motion in abeyance pending Castillo's further submissions and the response thereto of Defendant First Care of New York, Inc. ("Defendant" or "First Care").

Pursuant to a schedule "so ordered" by the Court on October 23, 2014, Castillo tendered his supplemental submission on November 13, 2014 and First Care interposed its response on December 18, 2014. Having given consideration to these further supplemental papers, as well as having considered the parties' original submissions and supplements[1], the Court now turns to the determination of the motion. The October 2014 Decision is incorporated into this Decision and Order by reference and familiarity therewith is assumed.

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[1]As set forth in the October 2014 Decision (at 9-10), counsel submitted supplemental letter briefs to address issues identified by the Court during the oral argument.

THE FURTHER SUPPLEMENTAL PAPERS

In the October 2014 Decision, the Court ruled that Plaintiff had not established that he had met the numerosity requirement for class actions and/or that the Spread of Hours claim was not a sham (*id.* at 12-17). Among other things, with the Court noting that Plaintiff had shown *prima facie* that there were 28 sample class members from 2008-2009 who had not been properly paid overtime, the Court expressed its concern that Plaintiff was seeking to tack 17 other employees from the 2010 time period who were not properly paid pursuant to the Spread of Hours regulation to the 28 "25 cent overtime" employees in order to reach 45 employees and, barely, satisfy the numerosity requirement (*id.* at 13). The Court also commented that Plaintiff's counsel had complained that they had not been given a full opportunity to analyze the voluminous documents that Defendant had provided and that Plaintiff's counsel had not explained how they went about gathering the samples, *i.e.*, were the samples selected at random or were they cherry-picked (*id.* at 14). Also, the Court ruled that it could not ascertain whether Plaintiff's claim for a violation of the Spread of Hours Regulation was a sham and whether a sufficient number of putative class members were not paid in accordance with that regulation (*id.* at 16).

A. Plaintiff's Further Submission

Plaintiff's further submission takes the form of an affirmation of Judith L. Spanier, Esq., a member of the firm representing Plaintiff ("Spanier Aff.").[2] Ms. Spanier states that Plaintiff's counsel received nearly 33,000 documents from Defendant and explains that, because of difficulties with the format in which the documents were produced, the process of reviewing the documents has been time-consuming and that is why Plaintiff has been relying upon samples of particular employees' pay and schedule information rather than providing a summary of the information of all employees (*id.* at ¶ 7). A detailed explanation of the difficulties involved is provided (*id.* at ¶¶ 8-10, 13).

According to Ms. Spanier, while Plaintiff has not completed a full computation for all employees, based upon counsel's review of the records, she believes that there are some 451 employees who are owed overtime pay and over 1,000 employees who are owed Spread of Hours pay (*id.* at ¶14). While these numbers would clearly be sufficient to satisfy the numerosity requirement and alleviate the Court's concern about tacking the two claims together, counsel's statement is entirely conclusory. Counsel does not explain the basis for her assertion that there are hundreds of employees with overtime claims and over one thousand with Spread of Hours claims. Counsel proceeds, instead, to again to provide samples.

1. Overtime Claims

Counsel submits the same records tendered in the moving and reply papers, though she points out that the Court's reference to 28 employees was incorrect since the

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[2]On December 19, 2014, counsel for Plaintiff submitted a letter to inform this Court of the decision of the Court of Appeals in *Borden v 400 East 55th Street Assoc., L.P.* (24 NY3d 382 [2014]).

Court had not included Plaintiff Castillo in the count, though his records were submitted (*id.* at ¶¶ 18, 56 and n2). Ms. Spanier explains that the records of the 28 employees (excluding Plaintiff) were randomly chosen, though she concedes that Plaintiff did seek and include examples of work weeks with high numbers of hours so that the same records could be used to support both overtime and Spread of Hours violations (*id.* at ¶¶19, 21). In addition, Plaintiff provides 16 other samples, bringing the total number of workers with overtime claims to 46 (*id.* at ¶¶ 22, 23 and Ex. A, B.). While Ms. Spanier does not claim to have been the one who did the analysis of the records for the 16 additional employees, she does submit what appears to be the payroll records from which the summary as to these 16 workers was extracted (*id.*, Ex. B). This being said, Ms. Spanier concedes that it appears that the overtime claims for the period after January 2009 appear to be "very small" (*id.* at ¶ 20).

2. *Spread of Hours Claims*

With respect to this aspect of the case, Ms. Spanier submits both the records previously submitted as well as additional records (*id.* at ¶¶ 24-29, Exs. C, D, E, G). Taken together, these records cover 45 workers (including Plaintiff). Some, but not all, of these 45 workers are included within the 46 employees listed for the overtime claims. Many of the 45 Spread of Hours employees are claimed to have overtime violations, though in a number of instances the claimed violation is *de minimus*. For example, with respect to Iris Amaro and the check date of January 13, 2012, it is claimed that $29 is owed for Spread of Hours and $0.04 for overtime.

Ms. Spanier provides an analysis of Plaintiff's own Spread of Hours claims and asserts that, for the week of June 2, 2007, he should have received $808.17 in pay, rather than $641, the difference including additional overtime pay and Spread of Hours pay. She asserts that, even if Plaintiff had been paid the correct amount of overtime for hours over 40, he would still have a claim that his payment should have been $772.15, rather than the $641 that he received (*id.* at ¶¶ 38-40).

B. Defendant's Further Submission

Defendant's further submission takes the form of a letter dated December 18, 2014 from Vincent M. Avery, Esq. He comes close to conceding that Plaintiff has succeeded in establishing ("arguably satisfied") the requirements of numerosity and impracticability of joinder. But Mr. Avery disputes that Plaintiff has shown commonality/predominance, typicality, or superiority.

Mr. Avery points out that the summaries and analyses submitted by Ms. Spanier are not authenticated. But he does not contest the substance or accuracy of those summaries and analysis. He argues that there is no commonality or typicality between those employees who were allegedly underpaid overtime prior to 2008 and those entitled to a Spread of Hours premium. He asserts that Plaintiff has not shown that "a class action is a superior vehicle for litigating [these] claims in a single action that will undoubtedly consume judicial resources, notwithstanding the existence of an administrative forum." Relying upon *Jara v Strong Steel Door, Inc.* (2008 NY Slip Op 51969[U], 20 Misc 3d 1135[A], 2008 WL 3823769 [Sup Ct, Kings County 2008]), counsel urges that a class action should not be "a vehicle for clogging up the judicial system and utilizing the court's limited resources litigating a number of different wage

and hour claims in a single action, in the absence of any real commonality amongst the claims and where there is an administrative forum available to any employee who believes he/she has not been [properly] compensated."

LEGAL ANALYSIS

As this Court has previously expressed, the inquiry into the merits on a motion for class action certification is limited to a determination as to whether, on the surface, there appears to be a cause of action which is not a sham (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]; *Super Glue Corp. v Avis Rent A Car Sys. Inc.*, 132 AD2d 604 [2d Dept 1987]; *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]).

While it is true that the latest submission from Plaintiff's counsel is not precisely authenticated, it would only further delay the disposition of this matter to require further elaboration. The Court does not wish to determine the matter on the basis of a technicality, especially where defense counsel has not questioned the appropriateness of the methodology employed by Plaintiff's counsel and has not questioned the accuracy of the computations and analysis either. Additionally, it appears that the information was analyzed and reviewed by counsel and that the results of counsel's work have been attested to in the submission of Ms. Spanier, which is submitted under oath and subject to the sanctions that may be imposed for a submission which lacks a good faith basis (*see* 22 NYCRR Part 130). Because this is not a motion for summary judgment or a trial, and because counsel have articulated clearly that they have prepared these summaries based on their attempts to analyze voluminous documents, the Court will accept the submissions as providing an appropriate factual foundation.

The Court is now satisfied the claims presented regarding underpayment of overtime and failure to abide by the Spread of Hours regulations are not shams. While it does appear that the bulk of the issue concerning underpayment of overtime occurred prior to 2009, and that some of the overtime underpayments alleged are *de minimus*, it also appears that underpayments for 2007 and 2008 may be substantial.

THE GOVERNING LEGAL STANDARDS

The Court now addresses the relevant criteria to be considered in determining whether to grant class certification. While these criteria have been identified in the October 2014 Decision, it is appropriate to briefly restate them in order to create an appropriate context for analysis:

> CPLR Article 9, which sets forth the criteria to be considered in granting class action certification, is to be liberally construed (*see Jacobs v Macy's East, Inc.*, 17 AD3d 318, 319 [2d Dept 2004]; *Kidd v Delta Funding Corp.*, 289 AD2d 203 [2d Dept 2001]; *Liechtung v Tower Air, Inc.*, 269 AD2d 363 [2d Dept 2000]; *Friar, supra*, 78 AD2d at 91). As a practical matter, a class action may be the only method available for determining a consumer dispute where the damages sustained by any particular consumer are insufficient to

> justify the expenses of litigation and the number of individuals involved is too large, and the possibility of effective communication between them too remote, to make practicable more traditional means of litigation (*see, e.g., Weinberg v Hertz Corp.*, 116 AD2d 1, 5 [1st Dept 1986], *affd* 69 NY2d 979 [1987]). Since the class action procedure serves a salutary purpose of permitting numerous consumers to band together to address a common wrong, and since a class can always be decertified or revised, the interests of justice require that, where the case is doubtful, the benefit of any doubt should be given to allowing the class action (*Brandon*, 106 AD2d at 168; *Friar v Vanguard Holding Corp., supra*).
>
> In order to obtain class certification, Plaintiffs must satisfy each of the five statutory requirements of CPLR §901 - numerosity, predominance, typicality, adequacy, and superiority. Plaintiffs must also show that certification is appropriate under the five factors set forth in CPLR §902 – interest of class members in controlling the litigation, inefficiency of separate actions, extent of prior litigation of the controversy, desirability of concentrating the litigation in this forum, and difficulties in managing the class action (*see Canavan v Chase Manhattan Bank, N.A.*, 234 AD2d 493, 494 [2d Dept 1996]). Plaintiffs bear the burden of establishing that the class exists and that the prerequisites are met (*id.* at 494, *citing Brady v State of New York,* 172 AD2d 17, 24-25 [3d Dept 1991], *affd* 80 NY2d 596 [1992], *cert denied* 509 US 905 [1993]; 2 Weinstein-Korn-Miller, NY Civ Prac ¶ 901.08 [2d ed]; *see also Kudinov v Kel-Tech Constr., Inc.*, 65 AD3d 481, 481 [1st Dept 2009]; *Globe Surgical Supply v Geico Ins. Co.*, 59 AD3d 129 [2d Dept 2008]). "Whether a lawsuit qualifies as a class action matter is a determination made upon a review of the statutory criteria as applied to the facts presented" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]). Certification cannot be predicated on general, conclusory allegations, but must be supported by a factual record (*see Rallis v City of New York,* 3 AD3d 525, 526 [2d Dept 2004]; *Yonkers Contr. Co. v Romano Enter. of New York, Inc.*, 304 AD2d 657, 658 [2d Dept 2003]) (October 2014 Decision at 10).

Any error should be resolved in favor of allowing the class action (*Wilder v May Dept. Stores Co.*, 23 AD3d 646, 649 [2d Dept 2005]).

A. *Numerosity*

As stated in the October 2014 Decision (at 12), while there is no mechanical test for determining whether numerosity has been met, it remains that numerosity is generally regarded as being present whether the proposed class contains around 30 members.

The Court concludes that Plaintiff has now provided a sufficient basis for holding

that the class would include at least 45 members and, likely more. Plaintiff's assessment as to the number of class members is based upon a sampling of the documents. While Plaintiff's counsel has not identified the percentage of the whole that has been reviewed and analyzed, it remains that the samples provided indicate that there are, at a minimum, 46 class members with viable overtime pay violations and 45 workers with viable Spread of Hours claims. These numbers make both groups sufficient, on their own, to comprise a class (*see Dabrowski v Abax Inc.*, 84 AD3d 633 [1st Dept 2011] [50 to 100 laborers sufficient to form class complaining of underpayment of wages, overtime and benefits, though the class members had varying job titles, pay rates, and were employed on different projects for which defendant had different contracts]). Thus, the Court's concerns about the prospect of tacking two groups together to reach numerosity have been resolved. As noted previously, defense counsel all but concedes that the numerosity requirement has been met. And the number of workers in the class is likely to increase as the remaining records are analyzed. While it is true that the value (and number) of overtime claims is less in the years after 2009, that does not take away from the fact that there are a sufficient number of overtime claims overall.

Put another way, it would appear that the costs of maintaining separate actions would be prohibitive for the potential class members, obtaining counsel individually may prove difficult because of the relatively small damages, and any potential class members who still work for Defendant might not bring individual suits for fear of retaliation (*Lee v ABC Carpet & Home*, 236 FRD 193, 203 [SD NY 2006]). Accordingly, the Court finds numerosity has been satisfied because joinder is both impractical and undesirable.

B. Commonality

CPLR 901(a)(2) requires that there be questions of law or fact common to the class which predominate over any questions affecting only individual class members. This standard requires "predominance, not identity or unanimity, among class members" (*Friar v Vanguard Holding Corp.,* 78 AD2d 83, 98 [2d Dept 1980] [acknowledging that the differences in the manner in which the defendant obtained money from potential class members does not mean that individual questions predominate over common questions]; *see also Branch v Crabtree,* 197 AD2d 557 [2d Dept 1993] [predominance of questions of fact or law over questions affecting only individual members is the test, not a nice inspection of the claims of each individual member]; *Freeman v Great Lakes Energy Partners, LLC*, 12 AD3d 1170, 1170 [4th Dept 2004] [common questions of law and fact means similar, though not identical, claims]; *Cherry v Resource Am., Inc.*, 15 AD3d 1013, 1013 [4th Dept 2005] [upholding class certification and finding common questions of law and fact predominated concerning defendants' common use of a methodology to manipulate calculation of royalties]). "The statute clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class" (*Weinberg v Hertz Corp.,* 116 AD2d 1, 6 [1st Dept 1986], *affd* 69 NY2d 979 [1987]).

In the context of wage and hour cases, the New York courts have recognized that commonality may be shown simply by a claim that the employer had a regular practice of not paying the prescribed wages and benefits (*see, e.g., Dabrowski, supra*; *Lamarca v Great Atl. & Pac. Tea Co.*, 55 AD3d 487 [1st Dept 2008]). In this context, the ultimate issue is a common one – did the defendant pay its employees the statutorily required wages, including overtime and Spread of Hours pay – and predominates over any individual issues

(*Andryeyeva v New York Health Care, Inc.*, 45 Misc 3d 820 [Sup Ct, Kings County 2014]). That one group of employees may not been paid the full amount of overtime and another group may not have been paid Spread of Hours wages does not defeat commonality since the complaint rests on "a unified policy of underpayment," though that policy may have been implemented in different ways (*Williams v Air Serve Corp.*, 2012 NY Slip Op 31134(U), 2013 WL 2369843 [Sup Ct, NY County 2013], *affd* 121 AD3d 441 [2014]; *accord Weinstein v Jenny Craig Operations, Inc.*, 41 Misc 3d 1220[A], 2013 NY Slip Op 51783[U], 2013 WL 5809397 [Sup Ct, NY County 2013]). Class actions alleging uniform misconduct are generally regarded as certifiable (*see* Dickerson, *New York State Class Actions: Make It Work – Fulfill the Promise*, 74 Albany Law Review 711, 722-723 [2011]). The class members all seek the same relief: to receive the wages that they claim they were statutorily entitled to but were deprived of because of their employer's policy not complying with governing law (*see Nawrocki v Proto Constr. and Dev. Corp.*, 82 AD3d 534, 535 [1st Dept 2011]).

C. Typicality

CPLR 901(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Indeed, "[t]he essence of the requirement of typicality ... is that not only must the representative party have an individual cause of action but the interest of the representative must be closely identified with the interests of all other members of the class (*see Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc 2d 941, 945 [Sup Ct, NY County 1978], *quoting* 2 Weinstein-Korn-Miller, NY Civ Prac ¶ 901.09, Fed Rules Civ Pro rule 23[a][3]). Plaintiff's claims need not be identical to those of the class (*see Branch, supra,* 197 AD2d at 557). When a plaintiff's claims derive from the same practice or course of conduct that gives rise to the claims of other class members, and are based upon the same legal theory, the typicality requirement is satisfied (*see Friar, supra,* 78 AD2d at 99). Thus, "[t]ypicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ from those asserted by other members" (*Pludeman, supra*, 74 AD3d at 423).

Here, Plaintiff, like the class he seeks to represent, alleges that he was injured by reason of Defendant's policy of refusing its employees the statutorily required wages. Moreover, he has provided an analysis that shows that, even if the claim was divided into two parts – refusal to pay proper overtime pay and refusal to properly apply the Spread of Hours requirements – he has been injured in both respects. Since the claims arise from the same conduct (*i.e.*, the same alleged wrong committed by Defendant) and Plaintiff's claims are based on the same legal theory as the claims of the class members, the typicality requirement has been satisfied (*Friar, supra,* 78 AD2d at 99). In the wage and hour context, courts have found typicality in cases quite similar to the one here (*see, e.g., Dabrowski v Abax Inc., supra; Nawrocki v Proto Construction and Development Corp, supra; Williams v Air Serve Corp., supra; Weinstein v Jenny Craig Operations, Inc., supra*).

D. Adequacy of Representation

CPLR 901(a)(4) provides that the Plaintiffs must be able to "fairly and adequately protect the interests of the class." A class representative acts as a fiduciary with respect to the interests of other class members (*see City of Rochester v Chiarella,* 65 NY2d 92, 100-101 [1985]). The responsibility of a class representative includes the duty to act

affirmatively to secure the rights of class members and to oppose adverse interests asserted by others (*id.*). In determining whether a named plaintiff is a suitable class representative, the court may consider: (1) whether a conflict of interest exists between the representative and the class members; (2) the representative's background and personal character, as well as his or her familiarity with the lawsuit, to determine the ability to assist counsel in its prosecution; (3) the competence, experience and vigor of the representative's attorneys; and (4) the financial resources available to prosecute the action (*see Pruitt v Rockefeller Ctr. Prop., Inc.*, 167 AD2d 14, 24 [1st Dept 1991] [adequacy of representation requires that counsel for the named Plaintiffs be competent and that the interests of the named Plaintiffs and the members of the class not be adverse]). The Appellate Division, Second Department has framed the issue as "class counsel should have some experience in prosecuting a class action" (*Globe Surgical Supply, supra,* 59 AD3d at 144).

Here, no issue has been raised to Castillo's background or personal character or financial resources sufficient to create any concern with the adequacy of their representation. No conflict of interest exists. Plaintiffs' counsel and co-counsel have provided information concerning their prior experience in representing classes in similar wage and hour actions and the Court finds that counsel and co-counsel, whether viewed separately or as a unit, have the competence, experience and vigor necessary to represent the interests of the class. Accordingly, Plaintiffs have established that they would be able to fairly and adequately protect the interests of the class.

E. Class Action as a Superior Method of Litigation

CPLR 901(a)(5) provides that one of the prerequisites for class action status is a finding that a class action is superior to other methods for the fair and efficient adjudication of the controversy. This requirement is usually satisfied from a weighing of the elements listed in CPLR 902: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the existence of other litigation regarding the same controversy; (4) the desirability of the proposed class forum; and (5) the difficulties likely to be encountered by management of a class action

In order to resolve whether a class action is the superior method of litigating this controversy, the Court will consider the factors identified in CPLR 902. In undertaking this consideration, the Court draws heavily upon its prior decision in *Krebs v Canyon Club, Inc.* (22 Misc 3d 1125[A], 2009 NY Slip Op 50291[U], 2009 WL 440903 [Sup Ct, Westchester County 2009]).

In *Alix v Wal-Mart Stores, Inc.* (16 Misc 3d 844 [Sup Ct, Albany County 2007]), the Court denied class certification, a decision affirmed by the Appellate Division, Third Department (57 AD3d 1044 [3d Dept 2008]). In that case, two former Wal–Mart employees contended that Wal–Mart had used its store-level managers to implement a corporate-wide policy that involved the manipulation of time records and practices that were designed to compel employees to work "off the clock" without compensation. They sought to represent a class of some 200,000 individuals, employed or formerly employed by Wal–Mart in its stores throughout New York State. In denying class certification, the Supreme Court pointed out that an employee is permitted to file a complaint for unpaid wages with the Commissioner of Labor

and that the Commissioner may conduct an investigation and, if the claim is sustained, order payment, with the award subject to Article 78 review (*Alix*, 16 Misc 3d at 860–862). Although it was pointed out that whether to act on the complaint is discretionary with the Commissioner, the Court still concluded that this did not mean that a class action was superior to a relatively swift, cost-free administrative resolution of the claims (*Alix*, 16 Misc 3d at 862). In affirming, the Third Department likewise observed:

> Specifically, an administrative remedy is available by which plaintiffs, in their status as employees, could file wage related complaints with the Department of Labor (*see* Labor Law §§ 196,196–a). Simply because the Commissioner of Labor's authority to pursue such claims is discretionary (*see* Labor Law, § 196[2]), this does not render such a proceeding less effective than a class action. The availability of this administrative process, and its focus on the particulars applicable to each employee's claim, make it in many ways a superior method by which the claims made by plaintiffs, and the proposed members of the class, can be pursued against defendant (*Alix,* 57 AD3d at 1048).

But, it is also important to note that, in *Alix*, establishing the existence of the alleged policies and their impact on a given employee would necessarily require a detailed analysis of the specifics of each employee's complaint (*Alix*, 57 AD3d at 1047). In particular, it would be necessary to examine each employee's time cards and the corporate pay roll records and testimony would be required as to specific circumstances under which entries were made that resulted in a change in the time card of each employee (*id.*).

First Care relies upon *Jara v Strong Steel Door, Inc.* (2008 NY Slip Op 51733[U], 20 Misc 3d 1135[A], 2008 WL 3823769 [Sup Ct, Kings County 2008]), where the court denied class certification in an action complaining of underpayment of prevailing wages, supplemental benefit rates and overtime wages. The action arose out of the employer's public works construction contracts with governmental entities. The court observed that the Labor Law provides a myriad of administrative remedies to investigate and determine whether employees have been paid prevailing wages and overtime. Further, no private right of action exists under the statute dealing with prevailing wage claims (Labor Law § 220) until administrative remedies are exhausted. The court, citing the Supreme Court's decision in *Alix*, stated:

> It is clear that a judicial forum is not the most efficient venue for plaintiffs to pursue their claims ... A trial of this action will consume an enormous amount of time and will significantly delay potential recovery. On other hand, claimants could simply file a complaint individually or collectively with the Department of Labor ... for their prevailing wage claims and ... for other underpayment of wage claims. An administrative investigation would then be undertaken. If it were determined that plaintiffs had been underpaid, defendants could be ordered to pay those wages and that order would be subject to an administrative appeal and, if necessary, Article 78 review, a far more efficient process than the lengthy process of litigation in this Court .... (*Jara*, 2008 WL 3823769 at *17).

A different result was reached in *Lamarca v Great Atl. and Pac. Tea Co.*, 2007 NY Slip Op 51424[U], 16 Misc 3d 1115[A], 2007 WL 2127354 [Sup Ct, NY County 2007], *rearg denied* 2008 NY Slip Op 32115[U], 2008 WL 2958272 [Sup Ct, NY County 2008], *affd* 55 AD3d 487 [1st Dept 2008]). In that case, the complaint alleged that defendants failed to pay overtime and, similar to the contentions in *Alix*, the LaMarca plaintiffs asserted that defendants engaged in a regular practice of forcing or permitting employees to work "off the clock" without compensation. It was also asserted that defendants made improper "meal deductions" from employee paychecks. In certifying the class, Supreme Court stated that the fact that the Labor Law provides a remedy of liquidated damages did not preclude plaintiffs from seeking to maintain a class action, though the Court did not specifically address the issue of whether the administrative remedy was superior. However, defendants moved for reargument and, in connection with that application, relied upon the Supreme Court decision in *Alix*. The Supreme Court denied reargument and concluded that *Alix* was not binding or controlling, though some factors presented were similar in the two cases. The Appellate Division, First Department, affirmed. Although the First Department did not address the issue of whether an administrative remedy was superior, it did state that class action treatment was appropriate because defendant conceded that all of the stores were managed under a uniform policy and that the corporate policies that drove managers to deprive employees of overtime pay were in effect for all stores during the relevant period (*Lamarca*, 55 AD3d at 487).

In *Wilder v May Dept. Stores Co.* (23 AD3d 646 [2d Dept 2005]), the Court held that class action treatment was appropriate as to claims by employees against department stores which the employees sought recovery of amounts deducted from the individual sales receipts upon which their commissions were calculated. The amounts so deducted reflected an apportioned share of so-called "unidentified returns," *i.e.*, merchandise returned to a store by a customer without documentation identifying any particular salesperson as having generated the sale. However, the Court did not address whether any administrative remedy was available and, if so, whether that remedy was preferable to class action certification.

Also, in *Mentor v Imperial Parking Sys., Inc.* (246 FRD 178, 185 [SD NY 2007]), the Court certified a class action where the claims arose from an allegedly unlawful policy of denying overtime pay to employees, upon a finding that there was no other litigation pending, the common questions predominated over questions affecting only individual members of the class, and the individual class members had little need to control their claims separately and, to the extent that such concerns existed, they would be mitigated by the availability of the opt-out option. Again, though, there was no discussion of the utility of an administrative process, perhaps because the plaintiffs also asserted claims based on federal law.

The Court must also bear in mind other significant policy considerations. It is well settled that CPLR Article 9 is to be liberally construed and any error should be resolved in favor of allowing the class action (*Wilder, supra* 23 AD3d at 649, *Liechtung v Tower Air, Inc.*, 269 AD2d 363, 364 [2d Dept 2000]; *see generally Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980]). Class actions are seen as a means of inducing socially and ethically responsible behavior on the part of large and wealthy institutions which will be deterred from carrying out policies or engaging in activities harmful to large numbers of individuals. Absent the class action lawsuit, the theory goes, these institutions will be permitted to operate virtually unchecked and continue to engage in legalized theft which is perpetuated because the injured

potential plaintiffs frequently are damaged in a small sum and, realistically speaking, our legal system inhibits the bringing of suits based upon small claims (*Friar, supra*, 78 AD2d at 94). Put another way, the mission of class actions is "taking care of the little guy" and discouraging behavior harmful to the public.

While an employer's practice of underpaying home health care workers may not be not be physically harmful to the public, it would have the effect of discouraging persons from entering into this important field in which members of the public do count on individuals to help care for their loved ones. Chronic underpayment of wages may also tend to lower worker morale among home health care workers and thus negatively impact their attitudes towards their work and towards those in their care.

1. Interest in Individual Control

There is no indication that the members of the class have expressed any interest in controlling the prosecution of their own claims.

2. *The Impracticality or Inefficiency of Prosecuting Separate Actions*

It is obvious that the prosecution of separate actions by each affected worker would be highly impractical and very inefficient.

3. The Existence of Other Litigation Regarding the Same Controversy

Neither party has disclosed that there is any other litigation, past, present or threatened, over the present controversy.

4. *The Desirability of the Proposed Class Forum*

Defendant suggests that the preferred forum would be the administrative forum provided by the New York State Department of Labor.

The Labor Law authorizes employees to file complaints with the Commissioner of Labor and authorizes the Commissioner to investigate and attempt to "adjust equitably" controversies between employers and employees arising under Article 6 of the Labor Law (*see* Labor Law §§ 196 [subd 1(a)], 196–a). The Labor Law also authorizes the Commissioner to take assignments of wage claims from employees and to sue employers on those claims, with the Commissioner being empowered to join multiple wage claims against the same employer (Labor Law § 196 [subd 1[b]). Thus, the Commissioner may investigate claims and pursue them administratively or the Commissioner may bring an action on claims or the Commissioner may take no action at all, the Commissioner's authority being entirely discretionary. On the other hand, the Labor Law does not generally preclude employees from bringing their own actions and does not generally require employees to exhaust administrative remedies or obtain any sort of right-to-sue letter from the Commissioner. To the contrary, the Labor Law provides additional remedies to employees who sue successfully, specifically, liquidated damages and counsel fees (Labor Law § 198). Since the Legislature has chosen to give employees the option of filing an administrative claim or filing a lawsuit, it cannot be said

that the Legislature has stated a preference for employees to pursue their claims in either an administrative forum or in court.

For this reason, the *Jara* case is readily distinguishable and does not assist Defendant. In *Jara*, a significant portion of the plaintiffs' claims was predicated upon the failure to pay prevailing wages. As the *Jara* Court noted, with respect to a claim of non-payment of prevailing wages, no private right of action exists until administrative remedies are first exhausted (*see Marren v Ludlam*, 14 AD3d 667, 669 [2d Dept 2005], *lv dismissed* 5 NY3d 824 [2005]). While the *Jara* plaintiffs did not bring a claim directly under Section 220 of the Labor Law, they were, by claiming breach of contract and trust diversion, seeking the same relief of payment of prevailing wages and supplemental benefits that was available administratively *(Jara v Strong Steel Door, Inc., supra* at 16). In contrast, here, there is no contention that administrative remedies must be exhausted before a private action can be maintained.

It appears that much, if not all of the dispute, can be readily resolved by an audit of Defendant's payroll records, *i.e.*, simply applying the proper standard for entitlement to the hours worked. It also appears that this task could be readily undertaken by an auditor or an administrative agency. However, the parties to the litigation could agree upon an accountant or bookkeeper to do the ministerial work involved, with the Court to resolve any disputes as to proper construction of the relevant statutes and regulations. Additionally, even if the Court declined to grant class certification, Castillo, or any other class member, could elect to litigate in court anyway; the Court cannot compel an individual class member to make a complaint to the Commissioner or assign a claim to the Commissioner. Nor can the Court compel the Commissioner to commence an administrative proceeding, commence an action, or commence an action on behalf of multiple claimants. Indeed, if individuals, such as Castillo, maintain individual actions and the Commissioner brought litigation as well, or even initiated an administrative process, there would be a multiplicity of litigations over the same issues.

The Court does not presently know how many class members would elect to opt-out and bring administrative claims. If all class members elect to stay in the class action, and decide not to opt-out, there would be no risk of multiple proceedings. On the other hand, if all the class members (except, obviously Castilllo himself) elected to opt-out, the Court could potentially decertify the class or stay the action pending any administrative actions or proceedings by the Commissioner.

Since the statute does not express a preference for forum, it seems just and appropriate to certify the class and afford class members an informed choice of forum, as well as to give Defendant the opportunity to move to decertify the class, if it is so advised, after the period to opt-out has expired.

5. The Difficulties Likely to Be Encountered by Class Action Management

There does not appear to be any significant difficulty to be encountered in the course of class action management.

CERTIFICATION OF CLASS ACTION

Having given consideration to the various factors to be weighed in passing upon a request for certification of a class action, the Court will grant the application and certify the class and designate Plaintiff Gendri Castillo as class representative.

As to the request for the Court to permit MFY Legal Services to act as "of counsel" to Abbey Spanier, LLP, no explanation for this request has been provided. No affirmation has been submitted, whether by Abbey Spanier LLP or by MFY Legal Services which describes the role that MFY Legal Services would play in this case and its qualifications for that role.

That being said, this Court has no objection to an attorney of record being assisted by others, whether within the same firm or not. While this Court is approving Abbey Spanier, LLP to serve as attorney of record for the class, the Court does not perceive that it is required to specifically approve the attorneys within the law firm who will provide services to the class. As long as the law firm retains full responsibility for the conduct of the litigation, the Court will not micro-manage the engagement by designating particular attorneys to work on the case. If the law firm wishes to retain assistance, whether in the form of hiring additional attorneys or by engaging other attorneys to provide services as "of counsel", this Court will not interfere, subject to the Court's obligation, at the conclusion of the case, to determine the reasonableness of any attorneys' fees sought.

The Court does believe that there should not be more than one attorney of record, absent a conflict of interest or other compelling circumstances (*see Kallivokas v. Athanasatos*, 151 AD2d 396 [1st Dept 1989]; *Stinnett by Stinnett v Sears Roebuck & Co.*, 201 AD2d 362 [1st Dept 1994]; *Kitsch v Riker Oil Co.,* 23 AD2d 502 [2d Dept 1965]). Having a single attorney of record, whether a law firm or an individual, enables the Court and opposing counsel to readily identify the attorney who has the authority and responsibility to conduct all appearances and to issue and accept all papers and communications.

Accordingly, the Court will designate Abbey Spanier, LLP as class counsel and the request for permission to retain MFY Legal Services as "co-counsel" is denied as unnecessary.

CONCLUSION

The Court has considered all of the papers recited in the October 2014 Decision as well as the following further supplemental papers:

1) Affirmation of Judith L. Spanier, Esq. dated November 13, 2014 together with the exhibits annexed thereto;

2) Letter to the Court from Vincent M. Avery, Esq. dated December 18, 2014;

3) Letter to the Court from Natalie S. Marcus, Esq., dated December 18, 2014 and the enclosure therewith;

6) Letter dated July 10, 2014 from Natalie Marcus, Esq. (Abbey Spanier LLP); and

7) Letter dated July 24, 2014 from Vincent M. Avery, Esq. (Gordon & Rees LLP).

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Plaintiff Gendri Castillo to certify this action as a class action under CPLR 902, to appoint said Plaintiff to represent the class, to appoint Abbey Spanier, LLP as class counsel and MFY Legal Services, Inc. as "of counsel" to Abbey Spanier, LLP, is granted in part and denied in part as herein set forth; and it is further

ORDERED that this action may be maintained as a class action on behalf of all current and former hourly paid home health care workers employed by Defendant First Care of New York, Inc. in the State of New York for work performed during the period from January 26, 2007 through the entry of judgment; and it is further

ORDERED that Plaintiff Gendri Castillo is appointed representative of the class; and it is further

ORDERED that Abbey Spanier, LLP is appointed attorney of record for the class; and it is further

ORDERED that the Court will conduct a conference on April 3, 2015 at 11:30 a.m. to discuss, *inter alia*, notice to the class and schedules for the completion of all pre-trial proceedings, including disclosure; and it is further

ORDERED that the conference herein ordered may not be adjourned without the express written permission of the Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 11, 2015

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

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