Divlijanovic v Saks & Co.
2018 NY Slip Op 30236(U)
February 14, 2018
Supreme Court, New York County
Docket Number: 152134/2017
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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AMRA DIVLIJANOVIC, RAMSES CARRANZA, MARK ASKEW, NORA LAJQI, RINA TOLEDANO, MARVIN K. BLAKES, and JUANITA V PARKS, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

SAKS & COMPANY d/b/a SAKS FIFTH AVENUE,

Defendant.

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DECISION AND ORDER
Index No.: 152134/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the facts are taken from the verified complaint and are accepted as true.

Plaintiffs in this putative class action are sales employees of defendant Saks & Co (Saks). They claim that Saks made improper wage deductions based on product returns. The proposed class is described as: "All persons who are or have been employed by [Saks] as sales personnel who were performing the same sort of functions as the named plaintiffs, who were subject to same or similar payment of wages practices, at Saks Fifth Avenue located at 611 5th Avenue, New York, NY 10022 . . . at any time from January 2011 until the final disposition of this case" (Verified Complaint at ¶ 19).

Plaintiffs state that all sales associates were compensated on a "draw versus commission plan" by which they would be advanced $15 per hour for 37.5 hours per week for a total of $562.50 per week. Plaintiffs were told they would earn a commission of 7% after making $8,000 in sales, and if they did not cover the draw, they would owe defendant more the following week. However, in practice, plaintiffs would have to make about $20,000 in sales before receiving any income because certain returns would be deducted from the entire department (*id.* at ¶¶ 32-33). These returns included: returns made without a receipt; returns from another store; returns where the sales person making the sale was unidentified; and returns made because the alterations department erred (the Disputed Returns). Due to these policies and deductions, plaintiffs would take home as little as $200-400 per 5-day, 40+ hour week. The fear of losing sales, and thus commissions, resulted in plaintiffs not taking their breaks, to keep making sales, but failing to stay clocked in, as that would

result in their target sales goals for the next week being higher (*id.* at ¶ 40). Defendant's policies improperly shifted return-related losses to its employees. Defendant subsequently changed to a different payment plan. It now pays employees $21 per hour with a 3% commission, with proper provision for overtime.

In this class action, plaintiffs assert a single claim for unpaid wages and unlawful deductions from wages pursuant to New York Labor Law § 193. They seek unpaid wages and liquidated damages in the amount of one-quarter of their unpaid overtime wages, as well as reasonable attorneys' fees and costs, with interest, pursuant to NYLL § 198(1-a). They also request a declaratory judgment that defendant's practices are unlawful.

Saks moves to dismiss the class claims for failure to state a claim, and seeks to strike those allegations as "scandalous or prejudicial," pursuant to CPLR 3024.

II. ARGUMENTS

A. Saks' Motion to Dismiss Class Allegations

Saks argues that plaintiffs' claims are not an appropriate subject for a class action, because the general practice of commissions, and making deductions for returns, is proper, and as far as plaintiffs contend certain returns are unlawful, it depends on the return and the circumstances. There is no single policy or practice which could unite a class in this dispute (Memo at 2).

This claim was originally raised in the United States District Court for the Southern District of New York. Plaintiffs' request for class certification was denied there, with leave to amend. Saks moved to strike the class claims in the amended federal complaint. The court suggested there were no viable federal claims remaining. The parties then agreed to dismiss the action. This action followed (Memo at 4).

Saks sales associates are compensated in accordance with a written commission plan (Memo at 6, citing Declaration of Theo Christ, attached as Exhibit E to Konkel Aff, NYSCEF Doc. No. 10, ¶ 5). The commission plan was presented to each new sales associate, and was redistributed each year prior to 2015 (Memo at 6, citing Christ Dec ¶¶ 6-7). According to the plan, if an item is returned, the sales associate is usually not paid a commission on that item (Memo at 6, citing Christ Dec ¶ 16). If a receipt is presented, or other information provided, which allows the associate processing the return to identify the associate who made the sale, the selling associate's commission is reduced by the amount of the return. If the associate who made the sale cannot be identified, no one's commission is reduced (Memo at 7).

A variety of factors affect whether items are likely to be returned, including type of item, season, sales, the associate's sale technique, and purchaser's shopping habits (*id.* at 8). Additionally, department supervisors (referred to as "Sales Directors") have discretion to allow a sales associate to keep a commission by making a "productivity adjustment" despite a return, for example, if the product was defective or incorrectly altered (*id.*). Sales Directors can also make adjustments if the commission rightly belonging to one sales associate is credited to another by mistake, mischief, or outright skullduggery (*id.* at 9). In order to receive a productivity adjustment, the sales associate must request the change, and it is left to the Sales Director to decide (*id.*).

Saks argues that NYLL § 193 covers deductions from *wages*, and the commissions at issue here are wages only after returns are factored in. The deductions from commissions are not deductions from wages, as a commission becomes a wage only when it is earned, and that depends on the parties' agreement (Memo at 11, citing *Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 612 [2008] ["when a commission is earned is governed by the parties' express or implied agreement"]). For plaintiffs to have a claim for withheld wages based on deductions from commissions, plaintiffs would have to show that they and Saks had agreed that commissions would be deemed "earned" before accounting for returns (Memo at 11). This would require individualized proof of each class member's agreement with Saks (*id.*at 11-12). Saks presents declarations from various non-party sales associates, who state that they understood and agreed to the commission plan (*id.* at 12). Accordingly, this cannot be a class action, since each possible plaintiff will have a different understanding of their pay structure (*id.*). When claims are not the proper subject of a class action, New York courts have struck the class allegations (*id.* at 12-13).

Saks also argues that evaluating the plaintiffs' claims requires inquiry into all kinds of specific sales and returns, and into Sales Directors' discretion, which are "individual and particularized [inquiries], and courts regularly reject them for class treatment" (*id.* at 14, citing *Yeger v E*Trade Sec. LLC*, 65 AD3d 410, 413–14 [1st Dept 2009] ["There were several actions that customers could have taken to avoid the assessment . . ., as well as other conditions not under their control that could have prevented it. . . . It is this aspect of proof that would be subject to a host of factors peculiar to the individual. This aspect of proof is critical. To allow . . . any class member[] to recover the fee merely because E*Trade collected it early—without proof that each member of the class would have taken steps to avoid the fee had collection occurred at its proper time—would result in a windfall to those plaintiffs who would not have taken corrective action. In certain cases, it could also result in writing the AMF out of the agreement entirely, a fee the parties had agreed

to freely. Accordingly, individualized issues, rather than common ones, predominate"]). Similarly, here, each commission deduction would have to be considered individually (Memo at 15).

Further, there would have to be individualized evaluations of the subjective understanding of each sales associate about, and whether associate had consented to, Saks' policy of reducing commissions for returns (*id.* at 16-17, citing *Vega v T-Mobile USA, Inc.*, 564 F3d 1256, 1272 [11th Cir 2009] [plaintiff failed to show commonality of the breach of contract theory because he failed to allege all members of the class were subject to a common contract, and could not use identical evidence to show offer, acceptance, and consideration, in addition to the terms of the contract]). The circumstances of returns, and whether they properly reduce the sales associates' commissions, and whether the sales associates could have avoided a deduction by seeking the intervention of a Sales Director, will also require considering each transaction separately.

To have a class action, common questions must predominate. A common question is one which can be answered for all class members using the same evidence (Memo at 18, citing *Wal-Mart Stores, Inc. v Dukes*, 564 US 338, 350 [2011] [class "claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"]). Saks argues that the common questions raised by plaintiffs do not satisfy this requirement. For example, whether wage statements were accurate is a question that must be considered based on each individual plaintiff's facts (Memo at 18-19).

Further, several factors inform whether it is likely a particular sales associate will have significant returns, creating many possible permutations of experience (*id.* at 19-20). Additionally, there were many Sales Directors with discretion to cancel commission reductions, creating more variables (*id.*). Since individual inquiries are required, the claims of the named plaintiffs are not typical of the putative class. Nor is there a way to prove class-wide damages. Plaintiffs admit that the amount of specific damages for each member of the class is not a common issue (*id.* at 22, citing Complaint, ¶ 28). With a class of over 200 individuals, a mini-trial on damages would have to be held for each. Further, the class is improper because the class is defined as those who "were subject to same or similar payment of wages practices," specifically, the improper deductions (Memo at 22). Therefore, the class is, by definition, salespeople who suffered a violation of

NYLL, and is an impermissible fail-safe class, because class membership depends on a finding of liability (*id.* at 22-23).

Finally, plaintiffs seek liquidated damages pursuant to NYLL § 198(1-a), and CPLR 901(b) does not allow a class action plaintiff to seek a statutory penalty unless the statute specifically allows a class action, which NYLL § 198(a-1) does not (Memo at 24-25).

B. Plaintiffs' Opposition to Dismissal of Class Allegations

Plaintiffs contend that the claims require no individual fact-finding, as plaintiffs rely on defendant's contract and policies, which were applied to all sales associates equally. Plaintiffs contend that, contrary to Saks' representations, it was Saks' policy to deduct commissions from sales associates' pay for Disputed Returns (Opp at 3). Further, plaintiffs argue that no individualized proof of the claims is required. NYLL § 193 does not prohibit deductions made before wages are earned, but provides that after wages are earned, deductions (with certain exceptions) are barred (*id.* at 4). Plaintiffs contend that returns were made, and commissions reduced, after the commissions had been earned and became wages, because paragraph 5 of the Saks commission plan provides that "Commissions are paid each Friday for merchandise sold two weeks earlier" and reducing commissions more than two weeks after the sale, as Saks did, is improper without the consent of the sales people (*id.* at 3, 6, quoting Commission Compensation Plan Document – Draw Associate, attached as Exhibit B to Opposition, NYSCEF Doc. No. 36, at 5) (the Commission Plan). Plaintiffs concede that they agreed to reductions of their commissions for returns during the applicable 60 or 90 day return policy and for sales where the identity of the original sales associate was known, but claim they did not agree to the Disputed Returns. All of the plaintiffs were subject to the same agreements and policies, and if Disputed Returns were taken from sales associates, those associates are properly part of this class (Opp at 6).

This is not a "fail-safe" class. Plaintiffs describe the class as "All persons . . . employed by Defendant as sales personnel who were performing the same sort of functions as the named Plaintiffs, who were subject to same or similar payment of wages practices, at [Saks' Fifth Avenue location] from January 2011 until the final disposition of this case" (*id.* at 12, quoting Complaint). Should the court deem this an improper "fail-safe" class, plaintiffs seek leave to amend and redefine the proposed class (Opp at 13).

Individualized proof is not required for each return or claim. As far as defendants attack the commonality of the class action claims, "[w]hat matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to

generate common *answers* apt to drive the resolution of the litigation" (*Wal-Mart Stores, Inc. v Dukes*, 564 US 338, 350 [2011]). At issue is the policy of Saks to deduct commissions for Disputed Returns and Saks' policy of allowing returns (and deducting commissions) after the end of the official return period (Opp at 9). Each individual's subjective intention or understanding of the agreement and policy is irrelevant, and mini-trials for each plaintiff will not be necessary. The employees did not agree to commission deductions for the Disputed Returns, which Saks applied to all sales associates (*id.* at 10).

The claims of the named plaintiffs are typical, meaning that "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability" (*Duling v Gristede's Operating Corp.*, 267 FRD 86, 96 [SDNY 2010] [internal quotation omitted]). Plaintiffs' claims turn on whether commissions for Disputed Returns were deducted after their commissions vested, and whether Saks compensated employees for "extra hours" worked, such as for required meetings, selling after they clocked out, or working special events (Opp at 11). Saks' policies on compensation for this extra work was company-wide and applied to all employees (*id.*).

Plaintiffs' claims do not fail for seeking liquidated damages pursuant to NYLL § 198(1-a). CPLR 901(b) provides "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." NYLL § 198(1-a) provides that "[o]n behalf of any employee paid less than the wage to which he or she is entitled under the provisions of this article, . . . the commissioner shall assess against the employer the full amount of any such underpayment, and an additional amount as liquidated damages." Here, liquidated damages are not a penalty, but compensation to employees for delay in paying wages (Opp at 13-14, citing *Herman v RSR Sec. Services Ltd.*, 172 F3d 132, 142 [2d Cir 1999], *holding mod by Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61 [2d Cir 2003]).

C. Saks' Reply

Saks argues that this class must, nonetheless, fails because the prospective class members do not have a common injury. Saks' records would have to be examined to determine which associates agreed to which deductions, which of the thousands of deductions were applied to those members, and whether those deductions were in violation of the employee's agreement (Reply at 1). These are individualized determinations, including as to each plaintiff's understanding of their

agreement with Saks, and whether they agreed to the various reductions (*id.* at 2, 6). Since plaintiffs have admitted that extrinsic evidence of the parties' understanding is relevant, individual determinations are necessary (*id.* at 3, citing Opp at 4-5, *Pachter*, 10 NY at 618). While plaintiffs argue that the terms of the Commission Compensation Plan Document state when commissions vest, the document does not refer to vesting, requiring consideration of extrinsic evidence on the issue (Reply at 4). Further, while plaintiffs provide affidavits claiming improper deductions, defendant provides declarations of other employees stating they were properly paid (*id.*). Notably, Saks contends that the plaintiffs admit that the commission plan is lawful, indicating that the dispute is about how the plan was applied in individual circumstances (Reply at 5). Accordingly, plaintiffs will have to show each deduction which they claim was unlawful, that the commission from which it was deducted had already been earned, and that the petitioner did not agree to that reduction (*id.* at 5-6). The seven named plaintiffs do not speak for the eight sales associates who provided declarations stating that all deductions from their commissions were proper and that they gave their consent (*id.* at 6-7).

Saks reiterates that this is a fail-safe class, as an employee either did not have commissions improperly reduced, and so is not a class member, or had commissions improperly reduced, and thus is a member of the class who has already established liability. The determination of the class membership is a determination of the merits, making this a fail-safe class (*id.* at 7).

Finally, as to the question of whether the claim for liquidated damages makes this case inappropriate for class action status, Saks points out that plaintiffs cite to *Herman v RSR Sec. Services Ltd.*, which applies the Fair Labor Standards Act, and not the CPLR or NYLL. Accordingly, Saks contends this court should ignore it, and credit only the cases cited by Saks.

IV. DISCUSSION

A. Applicable Standards

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading

states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

On this pre-answer motion to dismiss, defendant seeks dismissal of the class action allegations under CPLR 3211 (a) (7) and 3024 (b) on grounds that plaintiffs' claims are inappropriate for treatment as a class pursuant to CPLR 901. The motion will be granted.

Normally, a decision on the propriety of certifying a class follows a motion and hearing under CPLR 902 (*see Bernstein v Kelso & Co.,* 231 AD 2d 314- 323 [1st Dept 1997] [Dismissal of class action allegations prior to service of an answer and pre-certification discovery, premature]). However, courts have also held that "a motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR 902 where it appears conclusively from the complaint and from affidavits that as a matter of law there was no basis for class action relief"]) [internal quotation marks omitted]).

B. Class Action Standard

CPLR 901 provides the "[p]rerequisites to a class action":

> "a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> 4. the representative parties will fairly and adequately protect the interests of the class; and
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
> b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

These requirements are otherwise known, respectively, as numericity, commonality, typicality, adequacy of representation, and superiority. The parties do not dispute that the proposed class is numerous and adequately represented. Saks disputes commonality and typicality.

C. Application of Class Action Standards

1. Commonality

a. Individual Understandings as to the Agreement

Saks argues that common questions do not predominate in this case, because the facts relating to each plaintiff are different. The accuracy of plaintiffs' wage statements, or the propriety of each commission reduction, or whether plaintiff could have obtained an adjustment from a Sales Director, will be different for each plaintiff or class member.

Saks contends that plaintiffs' claim is made pursuant to NYLL § 193, alleging deductions to wages, and so they are required to provide individualized proof, which would destroy commonality. Saks relies on *Pachter v Bernard Hodes Group, Inc.* (10 NY3d 609, 615 [2008]). *Pachter* involved an employee, working on commission, who sued her former employer for making deductions which were improper pursuant to NYLL § 193. The New York Court of Appeals was asked to consider "when, in the absence of a written agreement between employer and employee, a commission is 'earned' and becomes a 'wage' subject to the prohibition on deductions in Labor Law § 193" (*Pachter*, 10 NY3d at 614). The Court of Appeals noted that this question is governed by common law, and parties may contract otherwise, setting out their own formula for computing commissions. "In that event, the commission will not be deemed 'earned' or vested until computation of the agreed-upon formula" (*id.* at 617-18). "Neither section 193 nor any other provision . . . prevented the parties . . . from structuring the compensation formula so that Pachter's commission would be deemed earned only after specific deductions were taken from her percentage of gross billings" (*id.* at 618). That court concluded that "in the absence of a governing written instrument, when a commission is 'earned' and becomes a 'wage' for purposes of Labor Law article 6 is regulated by the parties' express or implied agreement; or, if no agreement exists, by the default common-law rule that ties the earning of a commission to the employee's production of a ready, willing and able purchaser of the services" (*id.* at 618).

Here, the parties have a written agreement, the Commission Plan, which sets forth the relevant policy, unlike the parties in *Pachter*. Saks argues that plaintiffs' claims hinge on the Commission Plan being ambiguous as to when commissions are "earned" and thus will require extrinsic evidence from each plaintiff (and each prospective class member) his/her individual understanding and agreement (Memo at 16). Plaintiffs contend that the questions of when the commissions are earned and the propriety of the deductions taken by Saks are both governed by the terms of the Commission Plan, making *Pachter* inapplicable (*see* Opp at 3). Plaintiffs do not

contend the Commission Plan is ambiguous. Accordingly, viewed from the perspective of a motion to dismiss, the agreement at issue is common to all of the proposed plaintiffs and class members, and individualized proof will not be required as to the terms of the agreement between the parties.

b. Whether Common Questions Predominate over Individual Questions

Saks also argues that there is no commonality here and each prospective class member's claims are distinct, since they will depend on the particular deductions applied to each plaintiff. Accordingly, each plaintiff will have to present evidence showing the deductions, proving them improper, and contradicting Saks' defenses, such as the availability of a Sales Director to override a deduction (Memo at 14-15). Saks relies on *Yeger v E*Trade Sec. LLC* (65 AD3d 410 [1st Dept 2009]), where the First Department reversed a decision granting class certification to E*Trade customers based on allegations that E*Trade assessed certain fees earlier than their customer agreement allowed (*id.* at 413). The First Department determined that, while the motion court had concluded there was a common question of whether E*Trade did, in fact, collect the fee too early, the motion court failed to note that the plaintiffs in that case would have to show damages for the breach of contract claim, and that each plaintiff's damages would have to be proven independently (*id.*). They would have to show that, if E*Trade had not acted early, they would have avoided the fee, which was possible by taking one of several different actions (*id.*).

Plaintiffs argue that all class members will have the same issues, as the question of whether deductions are proper when taken after the commissions were earned will apply to them all (Opp at 9). They note that "the decision as to whether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, 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" (*id.* at 8, quoting *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 97 [2d Dept 1980] [internal quotation omitted]). In *Friar*, the plaintiffs were sellers of residential real property, who were required by Vanguard Holding Corp. to pay an additional mortgage recording tax, which should have been paid by the lender (*id.*). That court determined that, while the details of how Vanguard induced the sellers to pay the tax at the closing may have varied, individual questions did not predominate, and remaining questions specific to individuals may have remained after resolution of the common, predominant, issues (*id.*). The question is "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" (*id.*).

There are significant economies of time, effort, and expense in litigating the proposed class claims together, here. This case is similar to *Orgill v Ingersoll-Rand Co.* (110 AD3d 573, 574 [1st Dept 2013]), in which the First Department considered a class action of employees claiming a violation of NYLL § 193 based on a deduction from their commissions. That court held that the central issue in the case was when commissions were earned, and that this issue would be the same for all class members (*id.*). The "questions of law or fact common to the class would still predominate over any . . . individual question" (*id.*).

c. Classwide Damages

Saks argues that the class must fail because plaintiffs cannot provide a method of calculating damages class-wide (Memo at 21, citing *Comcast Corp. v Behrend*, 569 US 27, 34 [2013] [plaintiffs cannot show "Rule 23(b)(3) predominance" as they present no methodology for calculating damages across the class]; *Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1048 [3d Dept 2008] [admission of payroll records to show alleged practices of employer would also require testimony from witnesses about why changes were made]). However, it is not clear, at this stage, for example, whether "a statistical analysis of defendant's corporate payroll records [may suffice to] establish the existence of these workplace practices and their impact on defendant's personnel" (*Alix*, 57 AD3d at 1048). Plaintiffs admit this is a challenge for them, but giving plaintiff the benefit of every possible inference, it may be possible. This is a question better addressed when determining class certification, as it was in *Alix* and *Comcast*.

2. Typicality

The requirement of typicality is satisfied when the named plaintiffs' "claim derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory" (*Friar*, 78 AD2d at 99). Here, the proposed class members' claims are derived from Saks' alleged practice of taking deductions for returns from sales associates' commissions after the commissions have been earned, and the legal theory for each proposed class member is the same. While there are questions as to what are the relevant deductions, and thus the damages for each proposed class member, the named plaintiffs' claims are typical.

3. Fail-Safe Class

Saks argues that plaintiffs present an inappropriate "fail-safe" class, where the class is defined as people who suffered a violation of the law (Memo at 22). Plaintiffs propose defining the class as:

> "All persons who are or have been employed by Defendant as sales personnel who were performing the same sort of functions as the named Plaintiffs, who were subject to same or similar payment of wages practices, at [the 5th Avenue Saks store after January 2011]"

(Complaint, ¶ 19). Again, giving the plaintiffs the benefit of every inference, this description of the class could be interpreted as, for example, sales associates who had commissions deducted for returns after expiration of the return period specified in the Commission Plan. While this definition may not survive a motion to certify a class, it could be amended or redefined.

4. Liquidated Damages under NYLL 1981(1-A)

As far as defendant Saks argues that the claim for liquidated damages may not be brought as a class action, it is correct. CPLR 901(b) provides that

> "Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action"

Plaintiffs argue that liquidated damages are compensation, and not a penalty (Opp at 13-14), relying on *Herman v RSR Sec. Services Ltd.* (172 F3d 132, 142 [2d Cir 1999], *holding mod by Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61 [2d Cir 2003]), which held that "[l]iquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving wages due caused by the employer's violation of the FLSA." However, under the NYLL, they are considered a penalty, and may not be sought in a class action without statutory authority (*Carter v Frito-Lay, Inc.*, 74 AD2d 550, 551 [1st Dept 1980], *affd,* 52 NY2d 994 [1981] ["The Governor's message accompanying this legislation pointedly refers to liquidated damages as a "stronger sanction against an employer for willful failure to pay wages [and] should result in greater compliance with the law." (NY Legis Ann, 1967, p 184.) It is clear that liquidated damages as provided in this statute, and especially as viewed in this context, constitute a penalty."]; *Ballard v Community Home Care Referral Serv., Inc.*, 264 AD2d 747, 748 [2d Dept 1999] ["The fact that the plaintiff's complaint contains a claim for liquidated damages precludes class action relief"]). The claim for liquidated damages fails, but "a plaintiff can avoid application of § 901(b) by waiving his right to liquidated or punitive damages" (*Klein v Ryan Beck Holdings, Inc.*, 06 CIV. 3460 WCC, 2007 WL 2059828, at *2 [SDNY July 13, 2007], *as amended* July 20, 2007).

5. Motion to Strike

Saks does not discuss the branch of its motion seeking to strike pursuant to CPLR 3024(b), and does not explain how the class allegations in the complaint are "scandalous or prejudicial." Accordingly, that portion of the motion shall be denied.

V. ORDER

Accordingly, it is hereby

ORDERED that the motion to dismiss the class action allegations of the complaint is granted, as the claim for liquidated damages defeats class action status; and it is further

ORDERED that the class action allegations are dismissed with leave to replead within twenty-one (21) days of the date of service of this Decision and Order with notice of entry, and it is further

ORDERED that defendant shall serve and file its answer within thirty-five (35) days of the date of service of the Decision and Order with notice of entry, except in the event of filing of an amended complaint, then within twenty (20) days of such filing; and it is further

ORDERED that the branch of the motion seeking to strike certain allegations of the complaint pursuant to CPLR 3024 (b) is denied.

This constitutes the decision and order of the court.

DATED: February 14, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.