At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 8th day of November 2018.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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SELVIN LIVINGSTON, JOAN MOBLEY, CARLISLE BAPTISTE, JOYCELYN SMALL, JOAN MARRIOTT and JOSE RODRIGUEZ,

Plaintiffs,

-against-

LONG ISLAND UNIVERSITY,

Defendant.

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Index No.: 500960/2018

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	13-15, 17-19, 24
Opposing Affidavits (Affirmations)	31-32
Reply Affidavits (Affirmations)	33

Introduction

Plaintiffs move by notice of motion, sequence number two, pursuant to CPLR §§ 901 and 902 for an order certifying a class action and allowing the case to proceed as a class action. Defendant, Long Island University, opposes this application.

Procedural History

Plaintiffs commenced a prior action against Long Island University ("LIU"), Kimberly R. Cline, Brad Cohen, Allied Barton Security Services and Michael Siciliano on April 17, 2015, index number 4902/2015 (*see* Affirmation of Stefanie Munsky, Esq., NYSCEF doc. # 32, Exhibit A, 2015 Summons and Verified Complaint) ("2015 Complaint"). Plaintiffs moved, in that action, to amend the complaint to add a cause of action, *inter alia,* against LIU for disparate pay based on gender, age and/or race in violation of the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL). Plaintiffs' motion was denied by the Hon. Theresa Ciccotto on October 2, 2017. They subsequently moved to renew and reargue that order; plaintiffs' motion was denied on November 27, 2017.

Thereafter, plaintiffs commenced the instant action on January 16, 2018 (*see* Affirmation of Stefanie Munsky, Esq., NYSCEF doc. # 32, Exhibit B) ("2018 Complaint"). Plaintiffs pleaded one cause of action alleging disparate treatment under NYCHRL. Each plaintiff seeks $500,000.00 in compensatory damages and attorney's fees, including costs and disbursements, as well as $6,000,000.00 in punitive damages.

Plaintiffs allege that LIU utilized discriminatory practices based on race, age and gender, and as a result, plaintiffs employed in security positions at LIU Brooklyn campus were paid 20% less than similarly situated security employees at the LIU C.W. Post campus. Additionally, plaintiffs allege,

> LIU's compensation, assignment and promotion policies, practices and/or procedures incorporate the following discriminatory practices: (a) failing to compensate older. Black and/or female employees the same as similarly situated younger, white and/or male employees; (b) failing to promote older, Black

> and/or female employees at the same rate and on the same terms and conditions as similarly situated younger white and/or male employees; (c) relying on subjective judgments, procedures and criteria which permit and encourage the incorporation of racial-, age- and/or gender-based stereotypes and bias by LIU's predominantly white managerial and supervisory staff in making compensation, assignment, promotion and termination decisions; (d) generally refusing to provide equal terms and conditions of employment for older. Black, and/or female employees; and (e) selecting and accepting older, Black and/or female employees for "buyouts" as part of privatization of security when it hired the private security firm Allied Barton in January 2015.

(2018 Complaint at ¶ 19).[1]

Defendant then moved to dismiss the complaint on the basis that the pay discrimination claims were barred by the statute of limitations under NYCHRL, plaintiff failed to state a cause of action and the complaint was duplicative of plaintiffs' discrimination claims in the 2015 action. This Court, by a decision and order dated May 21, 2018, granted defendant's branch of the motion to dismiss with respect to all claims prior to January 16, 2015, which were time-barred based on the three-year statute of limitations (*see* Affirmation of Stefanie Munsky, Esq., NYSCEF doc. # 32, Exhibit C). The branch of defendant's motion to dismiss for failure to adequately state a cause of action was denied, as plaintiffs' claims were not substantially the same as that pleaded in the 2015 complaint (*id.*).

Plaintiffs now move for an order, pursuant to CPLR §§ 901 and 902, "declaring plaintiffs herein representative parties on behalf of all...LIU/Brooklyn Public Safety Officers

[1] This Court notes that plaintiffs' complaint and motion papers include numerous typographical errors. All block quotations from plaintiffs' papers included herein are verbatim.

since the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable" (Notice of Motion, NYSCEF doc. #24 at ¶ 1).

Background

Plaintiffs were employed as Public Safety Officers at LIU, at the campus located in Brooklyn, New York. Plaintiffs allege that they "received disparate treatment and less pay" (2018 Complaint at ¶¶ 9, 12, 14, 16, 18; *see also id.* at ¶ 5). Plaintiffs maintain that they were paid approximately 20% less than similarly situated public safety officers employed by LIU at the C.W. Post campus, located on Long Island, in Brookville, New York. Plaintiffs allege that

> LIU, several years ago became dissatisfied with private security it hired and brouh security services in house and created the LIU Public Safety Department and hired security personnel that were LIU employees. Unfortunately, LIYU has ateempted to match student and security demographics to match the surrounding area. This would not be undesirerable in itself, howver , LIU has systematically and consistently pais LIU Post campus security, faculrty and staff twenty percent less than campus security , faculty and staff at LIU Broooklyn, LIU has also maintaint a most mowhite higher paaid secirity staff at LIU Post and has been engaging in in deplorab e disparate pay discrimination that has remained largely off the record.The ideal security officer and supervisor at LIU Post was(young, white, and resided on Long Island The ideal LIU Brooklyn security staffer lived in Brooklyn, was black or hispanic and paid 20% less than their LIU Post counterpartts. LIU , in effect, created an aoparthied security system whth mostly minority security satff and students in Brooklyn, and mostly white security and staff at LIU Post The two security staffs created a workplace rife with disparities. The PIU Post security has a union the LIU Brooklyn security staff does not The LIU Post security officer received a higher starting hourly wage and supervisors received a higher salary at LIU Post than those at LIU Brooklyn..

(2018 Complaint at ¶ 2).

Plaintiff Selvin Livingston, a "black male", was employed by LIU at the Brooklyn campus from September 1997 to January 14, 2015. Over the years, he was employed in numerous security positions at the LIU Brooklyn campus, including security guard, sergeant, captain, assistant director of public safety, acting director and director of public safety (*see* 2018 Complaint at ¶¶ 4-5). The complaint states that "[w]hen Livingston was hired he was told he would receive a an [*sic*] hourly rate of $15.00 per hour at CW Post Hoebrver [*sic*] beciuase [*sic*] of his race ghe [*sic*] was offered a security position at the LIU Brooklyn campus and received approximately $11.00 per our [*sic*] as a LIU Brooklyn security guard (*id.* at ¶ 4). After termination, plaintiff was offered, but did not accept, a two-month severance package (*see* 2015 Complaint at ¶ 11).

Plaintiff Joan Mobley was employed by LIU at the Brooklyn campus from 1990 to January 14, 2015. Over the years, she was employed in numerous security positions at the LIU Brooklyn campus, including security officer, sergeant, and captain (*see* 2018 Complaint at ¶ 8). The complaint indicates that from the beginning of her employment until her termination, Mobley received less pay and other disparate treatment solely based on her race (*id.* at ¶ 11).

Plaintiff Carlisle Baptiste, was employed at the LIU Brooklyn campus from 1997 until January 14, 2015. He was employed as a security officer and was later promoted to sergeant (*see* 2018 Complaint at ¶ 10). The complaint asserts that plaintiff "was 54" (*id.*). Assuming this is a reference to his age, it is unclear whether he was 54 years of age at the time he was terminated from his position or something else.

Plaintiff Joycelyn Small, was employed at the LIU Brooklyn campus from 1987 to January 14, 2015. She was employed in various positions at the university. She worked in the cafeteria before becoming a security guard. "Small became a security officer employed by LIU after LIU terminated a contact [*sic*] with HSC Security to provide security services" (2018 Complaint at ¶ 13). The complaint indicates that plaintiff is "67 years of age" but it is unclear whether this was her age at the time she was terminated from her position, at the commencement of this action or something else (*id.*).

Plaintiff Joan Marriot, was employed at the LIU Brooklyn campus as a safety officer and a lieutenant of campus security until January 14, 2015 (*see* 2018 Complaint at ¶ 15). The complaint indicates that plaintiff is 54 years of age, but it is unclear if this was her age at the time she was terminated from her position (*id.*).

Plaintiff Jose Rodriguez, was employed at the LIU Brooklyn campus until January 14, 2015. He worked in various positions at the university, including security officer, sergeant and lieutenant (*see* 2018 Complaint at ¶ 17). The complaint asserts that plaintiff is 42 years of age, but again, it is unclear whether this was his age at the time he was terminated from his position or something else (*id.*).

On December 29, 2014, the employees were informed that LIU contracted Allied Barton Security Services to take over security services at the university (*see* 2015 Complaint at ¶ 8-9). At this meeting, "Allied Barton brought documents providing instructions on how to apply to Allied Barton and advised that everyone would apply to AlliedBarton online. During this meeting all were assured they would have a job at AlliedBarton" (*id.* at ¶ 9). All security officers were terminated from their positions on January 14, 2015 (*see* 2015

Complaint, ¶ 21). Effective on January 15, 2015, LIU Brooklyn's security officers, with the exception of the six plaintiffs, became employees of AlliedBarton to maintain security at LIU's Brooklyn campus (*see* Affirmation of Stefanie Munsky, Esq., NYSCEF doc. #32, Exhibit F).

Plaintiffs' Contentions

Plaintiffs contend that they and the former LIU Brooklyn's security officers should be certified as a class. Plaintiffs assert that they have satisfied the prerequisites set out in CPLR § 901 by establishing that the class is so numerous that joinder would be impracticable; the questions affecting individual members do not predominate over the common questions of law or fact of the class; the representative parties' claims are typical of the claims of the class; the proposed representatives can adequately and fairly protect the interests of the class, and the class action would be superior to other adjudication methods. Additionally, plaintiffs contend that they further satisfy CPLR § 902.

Defendant's Contentions

Defendant contends that plaintiffs have failed to establish that they have met any of the prerequisites of CPLR § 901, and class certification should be denied. Defendant asserts that the proposed class is not so numerous that joinder cannot be made, there are no common questions of law or fact that predominate over the individual questions that affect the class members and the claims of plaintiffs are not typical of those within the class. Defendant further contends that plaintiffs cannot and will not fairly and adequately protect the interests of the class as representatives, and a class action is not superior to the other adjudicative methods available. Defendant further states that if this Court were to reach the conclusion

that the proposed class can be certified, the request for an order allowing the class action to proceed should be denied based on the analysis of the factors in CPLR § 902.

Discussion

Class Action Certification Statutory Requirements

"'CPLR article 9, which authorizes and sets forth the criteria to be considered in granting class action certification, is to be liberally construed'" (*Argento v. Wal-Mart Stores, Inc.*, 66 A.D.3d 930, 888 N.Y.S.2d 117 [2 Dept., 2009] [quoting *Beller v. William Penn Life Ins. Co. of N.Y.*, 37 A.D.3d 747, 830 N.Y.S.2d 759 [2 Dept., 2007]). A class action may be maintained in New York only after the following prerequisites of CPLR § 901(a) have been met:

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.

(CPLR § 901(a); *see City of New York v. Maul*, 14 N.Y.3d 499, 903 N.Y.S.2d 304 [2010]; *see also CLC/CFI Liquidating Trust v. Bloomingdale's, Inc.*, 50 A.D.3d 446, 855 N.Y.S.2d 497 [1 Dept., 2008]).

"'These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority.'" (*Bartis v. Harbor Tech, LLC*, 147 A.D.3d 51, 45 N.Y.S.3d 116 [2 Dept., 2016], quoting *City of New York v. Maul*, 14 N.Y.3d 499, *supra*). "The class representative 'bears the burden of establishing

compliance with the requirements of . . . CPLR 901 . . . , and the determination is ultimately vested in the sound discretion of the trial court'" (*id.*, quoting *Cooper v. Sleepy's, LLC*, 120 A.D.3d 742, 992 N.Y.S.2d 95 [2 Dept., 2014]).

Once these prerequisites are satisfied, the court must next consider the factors set out in CPLR § 902:

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;
5. The difficulties likely to be encountered in the management of a class action.

(CPLR § 902, *see Rife v. Barnes Firm, P.C.*, 48 A.D.3d 1228, 852 N.Y.S.2d 551 [4 Dept., 2008*], lv. dismissed in part and denied in part* 10 N.Y.3d 910, 861 N.Y.S.2d 270 [2008]; *see also Ackerman v. Price Waterhouse,* 252 A.D.2d 179, 683 N.Y.S.2d 179 [1 Dept., 1998]; *Jiannaras v. Alfant*, 124 A.D.3d 582, 1 N.Y.S.3d 332 [2 Dept., 2015], *aff'd*, 27 N.Y.3d 349, 33 N.Y.S.3d 140 [2016]; *Dowd v. Alliance Mtge. Co.*, 74 A.D.3d 867, 903 N.Y.S.2d 104 [2 Dept., 2010]).

"The plaintiffs had the burden of establishing compliance with the statutory requirements for class action certification under CPLR 901 and 902. General or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden…'A class action certification must be founded upon an evidentiary basis'" (*Rallis v. City of New York*, 3 A.D.3d 525, 770 N.Y.S.2d 736 [2 Dept., 2004] [internal citations and quotations omitted]).

CPLR § 901

Numerosity

CPLR § 901[a][1] requires that "the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable" (CPLR § 901[a][1]). "There is no 'mechanical test' to determine whether the first requirement numerosity has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified" (*Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 434 N.Y.S.2d 698 [2 Dept., 1980]; *see also Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 871 N.Y.S.2d 263 [2 Dept., 2008]).

In the instant case, plaintiffs "assert that the proposed class has approximately forty-one members, which would make joinder impracticable" (Plaintiffs' Attorney Affirmation, ¶ 19). Plaintiffs annexed to the attorney's affirmation a list of "LIU Brooklyn campus security employees", which plaintiffs state is "the number of LIU security in the prospective class" (Plaintiffs' Attorney Affirmation ¶ 20; *see also id.* at ¶ 11). Defendant asserts that plaintiffs' annexed list is incomplete and annexed what it believes to be "a true and accurate copy of the document produced by LIU" (Affirmation of Stefanie Munsky, Esq., NYSCEF doc. #32 at ¶ 22; *see also* Exhibit F). Defendant's list of LIU Brooklyn security employees sets forth which LIU campus security employees were offered severance packages from LIU and were not offered employment from AlliedBarton (*see id.*) ("Allied Barton's hiring list"). The list contains an additional fourteen security officers compared to plaintiffs' list (*see id.*). Whether the proposed class is forty-one or fifty-five, these numbers are so numerous that joinder of all members would be impracticable (*see Dornberger v. Metro. Life Ins. Co.*, 182 F.R.D 72,

[S.D.N.Y. 1998] [...the threshold for impracticability of joinder seems to be around forty]; *see also, Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, *supra).* Plaintiffs' proposed class of forty-one members satisfies the numerosity requirement for the purposes of a class action.

Commonality

To satisfy the prerequisite of commonality, there must be "questions of law or fact common to the class which predominate over any questions affecting only individual members" (CPLR § 901[a][2]). Plaintiffs claim that "older, Black, and/or female employees" are compensated differently than "younger, white and/or male employees" (2018 Verified Complaint ¶ 19).[2] Plaintiffs assert that "each class member's claim centers on the same or similar legal conclusions, namely that they were employed at LIU Brooklyn, and...received less pay than similarly situated employees at LIU Post." (Plaintiffs' Attorney Affirmation ¶ 21). Plaintiffs further contend that "LIU/Brooklyn Public Safety Officers were paid 20% less based upon their race gender and ethnicity." (*id.* at ¶ 11). Within the proposed class, there are public safety officers ("PSO"), PSO sergeants, PSO lieutenants, PSO captains, and directors, all of whom are of various ages, ethnicities and genders (*see* Affirmation of Stefanie Munsky, Esq., NYSCEF doc. #32, Exhibits F and G).

While plaintiffs and the proposed class members assert a claim for pay discrimination, that claim is predominated by the individual analysis required to assess the pay of those similarly situated to each plaintiff at LIU Post on the basis of age, race and gender (*see*

[2] Although plaintiff asserts in his affirmation in reply that "the common legal issue is simply racial discrimination in pay", plaintiffs' pleadings allege discrimination on the basis of age, race, and gender (Plaintiff's Reply Affirmation, ¶ 21).

Strauss v. Long Island Sports, Inc., 60 A.D.2d 501, 401 N.Y.S.2d 233 [2 Dept., 1978] ["...there is no advantage to be gained from permitting the action to proceed as a class action since the proceeding is likely to 'splinter into individual trials'"]). The proposed class members, including plaintiffs, are not the same age, race or gender (*see* Affirmation of Stefanie Munsky, Esq. [2A], Exhibit G) ("LIU security officer list"). Defendant provides a detailed list of LIU's Brooklyn security officers that includes each officer's year of birth, ethnicity and gender (*see id.*). This list establishes that there are fifty-five officers of which forty are male and fifteen are female (*see id.*). The list also provides that the officers are of different ethnicities, thirty-six are Black, sixteen are Hispanic, two are White, and one is Asian (*see id.*).

In the instant case, while each proposed class member and plaintiffs assert a claim for pay discrimination, the basis for each claim differs, whether it be race, age and/or gender discrimination. With each class member having a distinct basis for the pay discrimination, an individual analysis for each class member would be required. "[T]he fact that wrongs were committed pursuant to a common plan or pattern does not permit invocation of the class action mechanism where the wrongs done were individual in nature or subject to individual defenses" (*Mitchell v. Barrios-Paoli*, 253 A.D.2d 28, 687 N.Y.S.2d 319 [1 Dept., 1999]). In *Kleinberg*, the Appellate Division Second Department held that the prerequisite of commonality was not satisfied because "the need of each patient varie[d], the nature of services to be provided under each particular contract necessarily varie[d]. In any class action the court would have to examine each member of the class, determine what treatment was called for and what treatment was administered, and determine whether there was such a

lack of treatment as to constitute a default under the particular contract" (89 A.D.2d 556, 452 N.Y.S.2d 117 [2 Dept., 1982]). To conduct individual comparisons of each LIU Brooklyn security officer to an officer similarly situated at LIU Post on the basis of race, age and/or gender defeats the commonality principal of the class. Accordingly, plaintiffs have failed to meet the second prerequisite of CPLR § 901[a], in failing to show that "questions of law or fact common to the class predominate over any questions affecting individual members" (CPLR § 901[a][2]; *see also Corsello v. Verizon New York, Inc.*, 76 A.D.3d 941, 907 N.Y.S.2d 431 [2 Dept., 2010], *aff'd*, 18 N.Y.3d 777, 944 N.Y.S.2d 732 [2012]).

Typicality

To satisfy the requirement of typicality, plaintiff must illustrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (CPLR § 901[a][3]). "Typical claims are those that arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, *supra*). Plaintiffs and proposed class members allege that LIU has "systemically and consistently" paid the LIU Post campus security, faculty, and staff twenty percent more than LIU's Brooklyn campus security, faculty and staff (2018 Verified Complaint ¶ 2). All members of the proposed class were employed by LIU as security for the Brooklyn campus for the pay periods in which plaintiffs allege they were discriminated against. The claims of the representative parties would be typical of those of the class members. All members of the class allege pay discrimination on the basis of age, race and/or gender. Accordingly, the element of typicality, under CPLR § 901[a][3], is satisfied.

Adequacy of Representation

"The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (*e.g.* familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel" (*Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, *supra*).

In the instant matter, the claims of the prospective representatives would directly conflict with the claims of those in the proposed class. Defendant asserts that the prospective representatives are different ethnicities, genders, and ages, and therefore, they cannot adequately represent the proposed class members because "the proposed class is not comprised of individuals all within the same protected classifications of race, age, and gender" (LIU's Memorandum of Law in Opposition, NYSCEF doc. #31, p 18). Plaintiffs and the proposed class members are not all within the same age range. Each individual's claim that he or she was allegedly discriminated against for being over the age of forty would be directly in conflict with any individual who alleges age discrimination and is under the age of forty. The LIU security officer list shows that the youngest security officer was born in 1983 and the oldest was born in 1943 (*see* Affirmation of Stefanie Munsky, Esq., NYSCEF doc. #32, Exhibit G). The youngest individual may have been thirty-two years of age and the eldest individual may have been seventy-one years of age at the time of termination (*see id.*). Plaintiffs allege that LIU discriminated against older security officers but does not define what age range qualifies as older. The LIU security list further provides that the security officers are of different ethnicities. Thirty-six of the security officers are Black, sixteen are

Hispanic, two are White, and one is Asian (*see id.*). The same conflict for gender and age would present itself for any claim of discrimination on the basis of race. Due to the claims of pay discrimination being based on race, age and/or gender, the prospective representatives would not be able to adequately represent each proposed class member or the class as a whole because claims of representatives would directly conflict with the claims of class members.

As to the personal characteristics of the proposed class representatives, this Court needs to consider the proposed representatives "familiarity with the lawsuit and his or her financial resources" (*Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 12, *supra*). In this matter, plaintiffs failed to provide any evidence that the prospective representatives are familiar with the current action and financially able to prosecute this case. Plaintiffs' counsel provided a blanket assertion that the six plaintiffs have "a familiarity with the law suit[] and sufficient financial resources to prosecute the action." (Plaintiff's Attorney Affirmation, NYSCEF doc. #24 at ¶ 25). The complaint was not verified by any plaintiff nor were affidavits provided to establish plaintiffs' familiarity with the action or to indicate their financial ability to adequately prosecute this case.

This Court must also consider the adequacy of counsel in this matter as a factor in determining if this proposed class can be adequately represented. "In order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions" (*Globe Surgical Supply v. GEICO Ins. Co.*, 59 AD3d 129, *supra*). Plaintiffs' counsel has not presented any evidence establishing his experience in prosecuting class action lawsuits.

The prospective class members would not be able to adequately represent the class as there would be direct conflict with the proposed class members claims, and plaintiffs have not established familiarity with the case and financial ability to prosecute the case. Furthermore, plaintiffs' counsel has not established that he can adequately represent this class, as there has been no showing that counsel has any experience litigating class actions. Accordingly, adequacy of representation, pursuant to CPLR § 901[a][4], is satisfied.

Superiority

"A prime requisite of a class action is that it be superior to all other available methods for the fair and efficient adjudication of the controversy" (*Cannon v. Equitable Life Assur. Soc. of U. S.*, 87 A.D.2d 403, 451 N.Y.S.2d [2 Dept., 1982]). Defendant contends that "there are at least three administrative agencies at which [p]laintiffs and/or the [p]roposed [c]lass can file administrative complaints of pay discrimination, if timely – U.S. Equal Employment Opportunity Commission, the New York State Division of Human Rights and the New York City Commission on Human Rights", and therefore, the class action is not superior to the alternative adjudicative measures available (Defendant's Memorandum of Law [2B], p 20). This Court finds that while these government entities were viable options for plaintiffs to pursue their discrimination claims, plaintiffs are now time barred and therefore, unable to file complaints therein. The time to file with those entities range from 180 days to one year from the date of the alleged discrimination. This Court must consider "other *available* methods for the fair and efficient adjudication of the controversy" (CPLR § 901[a][5] [emphasis added]). At this time, the proposed class' only options are individual trials or the class action, since the plaintiffs are time barred from filing with the government entities. This Court notes that the

individual claims by class members would be based on paychecks received on or after January 16, 2015, since claims involving paychecks prior to that date were dismissed as barred by the three-year statute of limitations. Plaintiffs were terminated by LIU on January 14, 2015, so the alleged discrimination claims involve one to two paychecks after termination. "[S]ince 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," this Court finds that the class action is the superior method to adjudicate this controversy (*Nawrocki v. Proto Const. & Dev. Corp.*, 82 A.D.3d 534, 919 N.Y.S.2d 11 [1 Dept., 2011]; *see generally Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 434 N.Y.S.2d 698, *supra*). Accordingly, plaintiffs satisfied the element of superiority pursuant to CPLR § 901[a][5].

Conclusion

Plaintiffs failed to satisfy the prerequisites of CPLR § 901[a], therefore, this court need not consider the factors in CPLR § 902. Accordingly, plaintiffs' application to have a class certified, pursuant to CPLR §§ 901[a] and 902, is denied. Although plaintiffs met the elements of numerosity, typicality, and superiority, plaintiffs failed to satisfy the elements of commonality and adequacy of representation.

The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

Lara J. Genovesi
J.S.C.

2018 NOV 14 AM 9:44

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