SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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LESLY MEJIA BERNAREZ, INGRID GARCIA, and JORGE GONZALES, individually and on behalf of all other persons similarly situated who were employed by defendant ALTERNATE STAFFING, INC.,

Plaintiffs,

Index No. 150826/17

-against-

ALTERNATE STAFFING, INC.,

Motion Sequence No. 005

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 114-143 were read on this motion to/for CLASS CERTIFICATION.

This is a putative class action brought on behalf of home health aides and personal care assistants who currently are or were formerly employed by defendant Alternate Staffing, Inc. in New York State, seeking, inter alia, unpaid wages. Plaintiffs Lesly Mejia Bernardez (Bernardez)[1] Ingrid Garcia (Garcia), and Jorge Gonzalez (Gonzalez)[2] move, pursuant to CPLR 901 and CPLR 902, for an order: (1) certifying this action as a class action; (2) designating Virginia & Ambinder, LLP and Catholic Migration Services as class counsel; and (3) approving for publication plaintiffs' proposed notice of class action lawsuit and publication.

[1] Bernardez indicates in her affidavit that her name is spelled Bernardez. Accordingly, the clerk will be directed to amend the caption to reflect the correct spelling (CPLR 5019 [a]; *Family Foot Ctr. v Gioeli*, 51 Misc 3d 136 [A] [App T 2nd Dept 2016] [directing clerk to amend the caption to reflect defendants' correct names]).

[2] Gonzalez indicates in his affidavit that his name is spelled Gonzalez, not Gonzales. Acordingly, the clerk will be directed to amend the caption to reflect the correct spelling (*id.*).

BACKGROUND

Defendant provides nursing and home health services at the residences of its clients (NYSCEF Doc No. 137, amended complaint, ¶¶ 6, 15). Plaintiffs allege that Bernardez was employed by defendant as a home health aide from approximately April 2011 through January 5, 2015 (*id.*, ¶ 16). According to plaintiffs, Garcia was employed by defendant as a home health aide from approximately 2009 through November 30, 2011 (*id.*, ¶ 17). Gonzalez was allegedly employed by defendant as a home health aide from February 2008 through November 2012 (*id.*, ¶ 18).

Plaintiffs allege that they typically performed 8-hour, 12-hour, and 24-hour shifts (NYSCEF Doc No. 116, Gonzalez aff, ¶ 8; NYSCEF Doc No. 117, Bernardez aff, ¶ 8; NYSCEF Doc No. 118, Medina aff, ¶ 8; NYSCEF Doc No. 119, Arriola aff, ¶ 8; NYSCEF Doc No. 120, Garcia aff, ¶ 8). Plaintiffs further allege that, when they worked overnight and 24-hour shifts, they maintained their own residences and did not live in the homes of defendant's clients (*id.*, ¶¶ 6-7). During their shifts, defendant did not permit plaintiffs to leave the clients' residences and instructed plaintiffs not to leave defendant's clients by themselves (*id.*, ¶ 10). According to plaintiffs, defendant failed to ensure that plaintiffs who worked 24-hour shifts were provided with adequate sleeping facilities (*id.*, ¶¶ 10-12). Defendant allegedly did nothing to ensure that plaintiffs were provided with sleep and meal breaks required by law (*id.*, ¶¶ 13-17). Plaintiffs were paid a flat rate that only compensated them for 12 hours per 24-hour shift, and then were paid an hourly rate for only 12 hours per 24-hour shift (NYSCEF Doc No. 116, Gonzalez aff, ¶¶ 18-19; NYSCEF Doc No. 117, Bernardez aff, ¶¶ 18-19; NYSCEF Doc No. 118, Medina aff, ¶¶ 19-20; NYSCEF Doc No. 119, Arriola aff, ¶¶ 19-20; NYSCEF Doc No. 120, Garcia aff, ¶¶ 18-19).

According to plaintiffs, defendant did not track whether plaintiffs actually received sleep and meal breaks during their shifts (NYSCEF Doc No. 116, Gonzalez aff, ¶ 21; NYSCEF Doc No. 117, Bernardez aff, ¶ 21, NYSCEF Doc No. 118, Medina aff, ¶ 23; NYSCEF Doc No. 119, Arriola aff, ¶ 22; NYSCEF Doc No. 120, Garcia aff, ¶ 21). Defendant simply required plaintiffs to call an automated telephone system to record the beginning and end of their shifts (NYSCEF Doc No. 116, Gonzalez aff, ¶ 22; NYSCEF Doc No. 117, Bernardez aff, ¶ 21; NYSCEF Doc No. 118, Medina aff, ¶ 24; NYSCEF Doc No. 119, Arriola aff, ¶ 23; NYSCEF Doc No. 120, Garcia aff, ¶ 24). Plaintiffs complained to staff coordinators that they were unable to take breaks to sleep or eat during their 24-hour shifts (NYSCEF Doc No. 116, Gonzalez aff, ¶¶ 23-25; NYSCEF Doc No. 117, Bernardez aff, ¶¶ 22-23; NYSCEF Doc No. 118, Medina aff, ¶¶ 25-27; NYSCEF Doc No. 119, Arriola aff, ¶¶ 24-26; NYSCEF Doc No. 120, Garcia aff, ¶¶ 22-23). When plaintiffs complained about not being able to take breaks, they were told that that was what the job required, and they had to accept it if they wanted more work (NYSCEF Doc No. 116, Gonzalez aff, ¶¶ 23-25; NYSCEF Doc No. 117, Bernardez aff, ¶¶ 22-23; NYSCEF Doc No. 118, Medina aff, ¶¶ 25-27; NYSCEF Doc No. 119, Arriola aff, ¶¶ 24-26; NYSCEF Doc No. 120, Garcia aff, ¶¶ 22-23).

The amended complaint alleges that "[b]eginning in 2011 and throughout the relevant time period, Defendant has maintained a policy and practice of requiring Plaintiffs to regularly work in excess of ten hours per day, without providing the proper hourly compensation for all hours worked, overtime compensation for all hours worked in excess of 40 hours in any given week, and 'spread of hours' compensation" (NYSCEF Doc No. 137, amended complaint, ¶ 3). Plaintiffs seek, on behalf of themselves and all similarly situated employees, minimum wages, overtime compensation, "spread of hours" compensation, reimbursement for business expenses

(including the purchase and laundering of uniforms), and damages for breach of contract (*id.*, ¶ 4).

The amended complaint alleges the following seven causes of action: (1) violation of the Labor Law's minimum wage provisions (*id.*, ¶¶ 67-75); (2) violation of the Labor Law's overtime provisions (*id.*, ¶¶ 76-82); (3) violation of the Labor Law's spread of hours provisions (*id.*, ¶¶ 83-88); (4) failure to promptly pay minimum wage, overtime, and spread of hours compensation under the Labor Law, and for alleged impermissible de facto deductions in violation of the Labor Law (*id.*, ¶¶ 89-98); (5) failure to pay additional amounts for purchasing and laundering of required uniforms (*id.*, ¶¶ 99-105); (6) breach of defendant's contracts with governmental agencies that required defendant to pay wages pursuant to Public Health Law § 3614-c (*id.*, ¶¶ 106-112); and (7) breach of City Service Contracts, which required defendant to pay wages to plaintiffs (*id.*, ¶¶ 113-119).

DISCUSSION

The class action statute should be liberally construed (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 21 [1st Dept 1991]) and provides that a class action may be maintained 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

(CPLR 901 [a]). Once these prerequisites are satisfied, the factors in CPLR 902 must be considered (*Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]).

The plaintiff must establish by competent evidence the requirements set forth in CPLR 901 and 902 for obtaining class certification (*see Ackerman*, 252 AD2d at 191) but a trial court

has broad discretion in determining whether a matter qualifies as a class action (*Rabouin v Metropolitan Life Ins. Co.*, 25 AD3d 349, 350 [1st Dept 2006]).

"In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). However, "inquiry on a motion for class action certification vis-à-vis the merits is limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham" (*Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]).

In *Andryeyeva v New York Health Care, Inc.* (33 NY3d 152, 168 [2019]), two potential classes of over a thousand home health care aides alleged that their employers violated the Labor Law by failing to pay for each and every hour of the 24-hour shifts that the workers spent at patients' residences. The Court of Appeals reviewed whether, pursuant to the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order (Wage Order), an employer must pay for each hour of a 24-hour shift (*id.* at 164). DOL interpreted the Wage Order to mean that payment is required for at least 13 hours of a 24-hour shift if the employee is allowed a sleep break of at least eight hours, and the employee actually receives five hours of uninterrupted sleep, and three hours of meal break time -- known as the "13-hour rule" (*id.* at 166). The Court of Appeals upheld DOL's interpretation of the Wage Order, since it did not conflict with the promulgated language, and DOL had not adopted an irrational or unreasonable construction (*id.* at 176-180).

The plaintiffs in *Andryeyeva* asserted that their employers systematically abused DOL rules by failing to adequately compensate home health care aides when they did not receive the minimum time for sleep and meal breaks during their 24–hour shift, maintain records of employees' actual work times, and provide adequate sleep facilities (*id.* at 184). The defendants

argued that individualized factual questions predominated over any remaining common issues and thus precluded class certification (*id.* at 183). Although the Court did not pass on the merits of class treatment, the Court noted that CPLR article 9 should be liberally construed in accordance with the legislative intent to establish "an effective, flexible and balanced group remedy" for economically small wrongs that would not be pursued if they had to be litigated on an individual basis (*id.* at 183-184 [internal quotation marks and citation omitted]). The Court instructed the lower courts to consider the following upon remittal: "[c]laims of uniform systemwide violations are particularly appropriate for class certification," and that "plaintiffs' allegations suggest a policy or practice of unlawful action of the type our courts have previously found ripe for class treatment" (*id.* at 184).

A. CPLR 901 (a) (1) – Numerosity

Plaintiffs argue that the class is so numerous that joinder of all members is impracticable. Defendant does not challenge numerosity in opposition to plaintiffs' motion.

"There is no 'mechanical test' to determine whether ... 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 AD2d 83, 96 [2d Dept 1980]). "Each case depends upon the particular circumstances surrounding the proposed class . . . and the court should consider the reasonable inferences and commonsense assumptions from the facts before it" (*id.* [citation omitted]). However, "the threshold for impracticability of joinder seems to be around forty" (*Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SD NY 1999]).

Defendant produced a putative class identification list indicating that it employed approximately 1,458 home health aides in 2016 (NYSCEF Doc No. 129). In addition, plaintiffs and members of the putative class aver that they worked with at least 100 other home health

aides who worked for defendant and were subject to the same alleged unlawful pay practices (NYSCEF Doc No. 116, Gonzalez aff, ¶ 3; NYSCEF Doc No. 117, Bernardez aff, ¶ 3; NYSCEF Doc No. 118, Medina aff, ¶ 3; NYSCEF Doc No. 119, Arriola aff, ¶ 3; NYSCEF Doc No. 120, Garcia aff, ¶ 3). Therefore, the numerosity prerequisite has been satisfied.

B. CPLR 902 (a) (2) – Commonality

Plaintiffs contend that the claims of each member arise out of the same course of unlawful conduct. According to plaintiffs, there was no system in place to track or report the number of hours actually worked, and thus there was no system for tracking or reporting whether plaintiffs received regularly scheduled, uninterrupted meal breaks and rest breaks, as required by the 13-hour rule. In addition, plaintiffs argue that defendant paid plaintiffs a flat-rate of 12 hours per shift, which was below the minimum 13 hours required by the DOL rule. Moreover, plaintiffs did not receive proper overtime compensation for all hours worked beyond 40 hours per week, did not receive spread of hours compensation, and did not receive the proper prevailing wages and benefits required by the Living Wage Law or the Wage Parity Act.

Defendant argues that determining whether hundreds of different aides received required breaks requires fact-specific, individualized inquiries.

CPLR 901 (a) (2) requires that questions of law or fact common to the class predominate over any such questions affecting individual class members. "[C]ommonality cannot be determined by any mechanical test and . . . the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action" (*City of New York v Maul*, 14 NY3d 499, 514 [2010] [internal quotation marks and citation omitted]). Instead, the court should focus on whether class treatment will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Friar*, 78 AD2d at

97 [internal quotation marks and citation omitted]). "[T]he rule requires predominance not identity or unanimity among class members" (*Pludeman*, 74 AD3d at 423).

Andryeyeva is instructive here:

> "Plaintiffs allege, and claim there is evidence of, defendants' systemic violations of the Wage Order and Labor Law, such as defendants' failure to adequately compensate home health care aides when they did not receive the minimum time for sleep and meal breaks during their 24–hour shifts, maintain adequate records of, or compensate for, the hours actually worked, and provide appropriate sleep facilities"

(*Andryeyeva*, 33 NY3d at 184). The Court wrote that "plaintiffs' allegations suggest a policy or practice of unlawful action of the type our courts have previously found ripe for class treatment" (*id.*).

Here, defendant produced time and pay records for the named plaintiffs, and a sampling of records for some putative class members. For 24-hour shifts, plaintiffs were paid either a flat rate of approximately $115 to $130 per shift or an hourly rate for 12 hours (NYSCEF Doc Nos. 124, 125, Lusher affirmation in support, exhibits I, J; NYSCEF Doc No. 116, Gonzalez aff, ¶¶ 18-19; NYSCEF Doc No. 117, Bernardez aff, ¶¶ 18-19; NYSCEF Doc No. 118, Medina aff, ¶¶ 19-20; NYSCEF Doc No. 119, Arriola aff, ¶¶ 19-20; NYSCEF Doc No. 120, Garcia aff, ¶¶ 18-19). Additionally, plaintiffs submit affidavits indicating that defendant did not keep any records of meal or sleep breaks, that defendant had no policies for recording meal and sleep breaks, and did not pay for all 24 hours even when it was directly informed that plaintiffs were not receiving the requisite meal and sleep breaks (NYSCEF Doc No. 116, Gonzalez aff, ¶¶ 12-25; NYSCEF Doc No. 117, Bernardez aff, ¶¶ 13-23; NYSCEF Doc No. 118, Medina aff, ¶¶ 12-27; NYSCEF Doc No. 119, Arriola aff, ¶¶ 12-26; NYSCEF Doc No. 120, Garcia aff, ¶¶ 13-23). As noted by the Court of Appeals,

> "[i]f the home health care aide does not receive a minimum of five hours uninterrupted sleep and work-free meal breaks, the employer must pay for every

> hour of a 24-hour shift – meaning the employer cannot exclude 11 hours from the compensable hours total – because when the aide is not provided with actual and substantial duty-free periods for personal use, the employer rather than the employee benefits from the time and the employer must pay for profiting off the employee's labor"

(*Andryeyeva*, 33 NY3d at 166). Plaintiffs' evidence indicates that they should have been paid for all 24 hours of work since they were not provided with sleep and meal breaks required under the 13-hour rule. Thus, plaintiffs' evidence demonstrates that they have a cause of action which is not a sham (*see Pludeman*, 74 AD3d at 422). Plaintiffs have demonstrated entitlement to class certification on the basis that defendant allegedly violated the law by failing to compensate them for all hours of a 24-hour shift.

In addition, plaintiffs aver that they consistently worked more than 40 hours per week for which defendant failed to pay them at all, or paid an incorrect amount of overtime pay (NYSCEF Doc No. 116, Gonzalez aff, ¶ 26; NYSCEF Doc No. 117, Bernardez aff, ¶ 24; NYSCEF Doc No. 118, Medina aff, ¶ 28; NYSCEF Doc. No. 119, Arriola aff, ¶ 27; NYSCEF Doc No. 120, Garcia aff, ¶ 25). In fact, defendant's "live-in" agreement expressly states that overtime would only be paid for hours worked "in excess of *44 hours* in any work week" (NYSCEF Doc No. 122 at 1-9 [emphasis added]). Plaintiffs further allege that defendant did not pay them for spread of hours compensation when they worked 10 or more hours per day (NYSCEF Doc No. 116, Gonzalez aff, ¶ 28; NYSCEF Doc No. 117, Bernardez aff, ¶ 26; NYSCEF Doc No. 118, Medina aff, ¶ 30; NYSCEF Doc. No. 119, Arriola aff, ¶ 29; NYSCEF Doc No. 120, Garcia aff, ¶ 27). "Claims of uniform systemwide violations are particularly appropriate for class certification" (*Andryeyeva*, 33 NY3d at 184).

Although defendant relies on federal cases denying certification on the 13-hour rule issue, the court is "not required to apply the 'rigorous analysis' standard utilized by the federal

courts in addressing class certification motions under rule 23 (b) of the Federal Rules of Civil Procedure" (*Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014]). Courts have recognized that CPLR 901 (a) "should be broadly construed" and that "the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it" (*id.* at 543-544 [internal quotation marks and citation omitted]).

Moreover, "the fact that damages may vary by class member does not per se foreclose class certification" (*Andryeyeva*, 33 NY3d at 185; *see also Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011] ["different levels of damages does not defeat certification"] [internal quotation marks and citation omitted]; *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [1st Dept 2009] ["The fact that different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification"]). In any event, "any error, if there is to be one, should be . . . in favor of allowing the class action" (*Pruitt*, 167 AD2d at 21 [internal quotation marks and citation omitted]).

Therefore, the commonality prerequisite has been satisfied.

C. CPLR 901 (a) (3) – Typicality

Plaintiffs argue that the named plaintiffs' claims are typical of the putative class claims. According to plaintiffs, the named plaintiffs provide similar services to patients in their homes.

Defendant counters that the named plaintiffs' claims are not typical of the claims of the proposed class. Defendant points out that the proposed class encompasses all non-residential home health aides who performed work for defendant from January 25, 2011 through October 27, 2016, regardless of the type and number of shifts that these individuals worked.

The typicality prerequisite is met where a "plaintiff's 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). "Typicality 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 class members" (*Pludeman*, 74 AD3d at 423).

As argued by plaintiffs, plaintiffs and members of the putative class provide similar services to patients in their homes (NYSCEF Doc No. 116, Gonzalez aff, ¶ 4; NYSCEF Doc No. 117, Bernardez aff, ¶ 4; NYSCEF Doc No. 120, Garcia aff, ¶ 4). Plaintiffs allege that they were paid pursuant to identical policies and suffered from defendant's failure to record and maintain adequate records of hours worked. Plaintiffs' claims are not antagonistic to or in conflict with the other class members' claims. Contrary to defendant's contention, typicality does not require that the named plaintiffs' claims be identical to those of the class (*see Pludeman*, 74 AD3d at 423). Therefore, the typicality prerequisite has been satisfied (*see Galdamez v Biordi Constr. Corp.*, 13 Misc 3d 1224[A], 2006 NY Slip Op 51969[U], *3 [Sup Ct, NY County 2006], *affd* 50 AD3d 357 [1st Dept 2008] [proposed class representatives' claims were typical of the other class members' claims, since they (arose) "out of the same course of conduct as the class members' claims and (were) based on the same cause of action"] [internal quotation marks and citation omitted]).

D. CPLR 901 (a) (4) -- Adequacy of Representation

> "Whether the representative party will fairly and adequately protect the interests of class involves a number of considerations -- whether a conflict of interest exists between the representative and the class members, the representative's background and personal character, as well as his [or her] familiarity with the lawsuit, to determine his [or her] ability to assist counsel in its prosecution and, if necessary, to act as a check on the attorneys, and, significantly, the competence, experience and vigor of the representative's attorneys, and the financial resources available to prosecute the action"

(*Pruitt*, 167 AD2d at 24 [internal quotation marks and citations omitted]).

Plaintiffs persuasively argue that they stand to gain a pecuniary benefit through the successful prosecution of the action, and that they seek the same relief as the putative class members. Additionally, plaintiffs contend that class counsel has demonstrated a level of competence ensuring that they can fairly and adequately represent plaintiffs and the class.

Defendant has not challenged whether plaintiffs will adequately represent the class, or the competency of counsel, or any other relevant consideration. Therefore, the adequacy of representation prerequisite has been satisfied.

E. CPLR 901 (a) (5) -- Superiority

Courts have held that "[a] class action is the 'superior vehicle' for resolving wage disputes '[where] 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'" (*Ferrari v National Football League*, 153 AD3d 1589, 1593 [4th Dept 2017], quoting *Stecko*, 121 AD3d at 543). Therefore, plaintiffs have established that a class action is a superior method for resolving this dispute.

F. CPLR 902

The proposed class action must also meet the requirements of CPLR 902. Pursuant to CPLR 902, the court must consider:

> (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and] (5) the difficulties likely to be encountered in the management of a class action.

"Most of these considerations are implicit in 901" (*Gilman v Merrill Lynch, Pierce, Fenner & Smith*, 93 Misc 2d 941, 948 [Sup Ct, NY County 1978]), and have already been

analyzed above. Given that there are 1,458 class members, it would be impracticable and inefficient to prosecute or defend separate actions (*see* CPLR 902 [2]). Moreover, this court is an appropriate forum since the class members live in New York (*see* CPLR 902 [4]). Therefore, the requirements of CPLR 902 have been satisfied.

G. CPLR 903

CPLR 903 provides that "[t]he order permitting a class action shall describe the class. When appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice."

In their moving papers, plaintiffs seek to certify the following class: "All individuals who performed work on behalf of Defendant as non-residential home health aides and/or personal care assistants in the State of New York from January 25, 2011 to October 27, 2016" (NYSCEF Doc No. 133 at 7).

In response, defendant contends that aides covered by a collective bargaining agreement, which was executed on October 28, 2016 and which became effective on September 10, 2015, cannot be part of any class because the claims of those aides must be resolved through a grievance and arbitration procedure.[3] Thus, defendant argues that any home health aide

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[3] Article VI, Section 6 of the collective bargaining agreement provides that:

"The parties agree a goal to this Agreement is to ensure compliance with all federal, state, and local wage hour law and wage parity statutes. Accordingly, to ensure the uniform administration and interpretation of this Agreement in connection with federal, state, and local wage-hour and wage parity statutes, *all claims brought by the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act ('FLSA'), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the 'Covered Statutes'), in any manner, shall be subject exclusively, to the grievance and arbitration procedure described in this Article . . . All such claims if not resolved in the grievance procedure, including class grievances filed by the Union, or mediation as described below shall be submitted to final and binding arbitration . . . .*"

(NYSCEF Doc No. 141, Friedman affirmation in support, exhibit C [emphasis supplied]).

employed by defendant on or after September 10, 2015 is covered by the arbitration provision. In addition, defendant maintains that, for these individuals, the grievance and arbitration procedures apply retroactively to any claims that accrued prior to the effective date. Defendant argues that, to the extent that there is any doubt about the scope of the arbitrable issues, the court should resolve those issues in favor of arbitration.

In reply, plaintiffs agree to amend the definition of the class to the following: "All individuals who performed work on behalf of Defendant as non-residential home health aides and/or personal care assistants in the State of New York from January 25, 2011 to October 27, 2016 *and who ceased working for Defendant on or before October 27, 2016*" (NYSCEF Doc No. 143 at 5 [emphasis supplied]). As a result, plaintiffs contend that the amended proposed class carves out those class members bound by the October 28, 2016 collective bargaining agreement, and the court need not address the retroactive effect of the collective bargaining agreement. Plaintiffs assert that defendant's employees who ceased working for defendant on or before October 27, 2016 are not bound by the grievance and arbitration provision.

"'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit'" (*Matter of Monarch Consulting, Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 26 NY3d 659, 674 [2016], quoting *AT & T Technologies, Inc. v Communications Workers*, 475 US 643, 648 [1986]).

In *Konstantynovska v Caring Professionals, Inc.* (172 AD3d 486, 487 [1st Dept 2019]), the First Department held that a named plaintiff Severin and other class members could not be compelled to arbitrate their claims based upon an arbitration provision executed after their employment ceased. The Court explained that "[t]he record shows that Severin's employment ceased on July 12, 2016, and that the class was made up of defendant's former employees who

were employed during the period of November 2010 until December 1, 2016 but ceased working for defendant on or before December 1, 2016" (*id.*). Thus, these parties were not bound by the arbitration provision "because they were no longer defendant's employees when it was executed, they were not parties to that agreement, and there is no evidence that the Union was authorized to proceed on their behalf" (*id.*; *cf. Safonova v Home Care Servs. for Ind. Living Inc.*, 165 AD3d 482, 483 [1st Dept 2018] [former employee was bound by arbitration provision contained within collective bargaining agreement where collective bargaining agreement was entered into when she was still employed, even though it was ratified after she resigned]).

Here, the collective bargaining agreement relied upon by defendant was executed on October 28, 2016, even though it states that it became effective on September 10, 2015 (NYSCEF Doc No. 141 at 6, 46). Therefore, any class members that ceased working for defendant before October 28, 2016, the date of the signing of the collective bargaining agreement, are not bound by the grievance and arbitration provision contained therein (*see Hichez v United Jewish Council of the E. Side, Home Attendant Serv. Corp.*, 179 AD3d 576, 577 [1st Dept 2020]; *Lorentti-Herrera v Alliance for Health, Inc.*, 173 AD3d 596, 596 [1st Dept 2019]; *Chu v Chinese-American Planning Council Home Attendant Program, Inc.*, 194 F Supp3d 221, 228 [SD NY 2016]). "As former employees or retirees 'whose work has ceased with no expectation of return,' plaintiffs were not members of the bargaining unit represented by the Union" (*Hichez*, 179 AD3d at 577, quoting *Chemical Workers v Pittsburgh Plate Glass Co.*, 404 US 157, 172 [1971]).

In light of the above, the class should be defined as all individuals who performed work on behalf of defendant as non-residential home health aides and/or personal care assistants in the

State of New York from January 25, 2011 to October 27, 2016 and who ceased working for defendant on or before October 27, 2016.

H. CPLR 904 -- Notice of Class Action

CPLR 904 (b) provides that "reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs." In addition, CPLR 904 (c) states that "[t]he content of the notice shall be subject to court approval."

Plaintiffs submit a proposed notice of class action in support of their motion. Defendant argues, in opposition, that plaintiffs' proposed notice is "overbroad" and that it objects to several aspects of the proposed notice. Plaintiffs' proposed notice is directed to "All individuals who performed work on behalf of Defendant Alternate Staffing as non-residential home health care aides and/or personal care assistants in the State of New York from January 25, 2011 to October 27, 2016" (NYSCEF Doc No. 131 at 1). Defendant has not identified any objections to the notice other than the fact that it fails to include the language "and who ceased working for [defendant] on or before October 27, 2016." Therefore, plaintiffs will be directed to resubmit the proposed notice of class action with this modification for approval by the court.

CONCLUSION

Accordingly, it is

ORDERED that the caption shall be amended to replace Bernarez with Bernardez; and Gonzales with Gonzalez and plaintiff shall file a Notice to County Clerk (form EF-22 available on NYSCEF) to notify the clerk of the amended caption within 10 days of entry of this order and the clerk is directed to amend its records accordingly; and it is further

ORDERED that the motion (sequence number 005) of plaintiffs for class certification is granted and leave is granted, pursuant to CPLR 901 and 902, for plaintiffs to prosecute their

action on behalf of a class consisting of all individuals who performed work on behalf of defendant as non-residential home health aides and/or personal care assistants in the State of New York from January 25, 2011 through October 27, 2016 and who ceased working for defendant on or before October 27, 2016; and it is further

ORDERED that, within 20 days of entry of this order, plaintiffs shall submit (via NYSCEF and email to vzolotar@nycourts.gov) a revised proposed notice of class action with the addition of "and who ceased working for defendant on or before October 27, 2016" for court approval; and it is further

ORDERED that, within 45 days of entry of this order, defendant shall furnish to plaintiffs' counsel a list of the names and last known addresses of all individuals who performed work on behalf of defendant as non-residential home health aides and/or personal care assistants in the State of New York from January 25, 2011 through October 27, 2016 and who ceased working for defendant on or before October 27, 2016; and it is further

ORDERED that plaintiffs shall send the notice approved by the court to all of the individuals identified by defendant, within 60 days of entry of this order, and the notice shall include a provision that each individual may "opt-out" of the class action, by sending a signed form to plaintiffs' counsel.

9/17/20
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE