At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of March, 2022.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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LYUDMYLA KONSTANTYNOVSKA, individually and on behalf of all other persons similarly situated who were employed by FRIENDLY HOME CARE INC.,

Plaintiff,

-against-

FRIENDLY HOME CARE, INC.,

Defendant.

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Index No.: 523015/2017
Motion Seq. 2

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	42-58
Opposing Affidavits (Affirmations)	62-75
Reply Affidavits (Affirmations)	81-84

Upon the foregoing papers in this action to recover wages and benefits, plaintiff Lyudmyla Konstantynovska, individually and on behalf of all other persons similarly situated who were employed by Friendly Home Care Inc., moves for an order: (1) certifying this action as a class action; (2) granting her leave to file an amended complaint; (3) designating Virginia & Ambinder, LLP (V&A) as class

action counsel; and (4) and approving the proposed Notice of Class Action Lawsuit and Publication Order for publication (Seq 2).

Background

The Class Action Complaint

On April 14, 2017, plaintiff commenced this action on behalf of herself and a putative class consisting of "each and every person who is a citizen of the State of New York and who is or was employed by Defendant Friendly Home Care Inc. (FHC or defendant) to provide personal care, assistance, health-related tasks and other home care services to Defendant's clients [at their residences] within the State of New York . . . from April 2011 up to the present (the 'Putative Class')" (complaint at ¶¶1, 7 and 10). Plaintiff seeks to "recover wages and benefits" to which she and the proposed class were "statutorily and contractually entitled to receive pursuant to New York Labor Law ('NYLL') . . ." (*id.* at ¶ 2). Specifically, the complaint seeks "minimum wages, overtime compensation, 'spread of hours' compensation, reimbursement for business expenses borne for the benefit and convenience of the [d]efendant, as well as damages arising from [d]efendant's breach of contract . . ." (*id.* at ¶4).

The complaint alleges that "[b]eginning in April 2011 and, upon information and belief, continuing through the present, [d]efendant has maintained a policy and practice of requiring [p]laintiffs to regularly work in excess of ten hours per day, without providing proper hourly compensation for all hours worked, or

overtime compensation for all hours worked in excess of 40 hours a week in any given week, and 'spread of hours' compensation" (*id.* at ¶ 3).

Regarding the Putative Class, the complaint alleges that:

> "[t]he Putative Class is so numerous that joinder of all members is impracticable. Although the precise number of such persons is presently unknown to Plaintiffs, and calculation of such number would require facts in the sole control of Defendant, upon information and belief the size of the Putative Class is believed to be in excess of 100 individuals. In addition, the names of all potential members of the Putative Class are not known" (*id.* at 11).

The complaint further alleges that:

> "The questions of law and fact common to the Putative Class predominate over any questions affecting only individual members. These questions of law and fact include, but are not limited to: (1) whether Defendant failed to pay the minimum wage for all hours worked; (2) whether Defendant failed to pay overtime wages, at the applicable overtime hourly rate, for all hours worked in excess of 40 hours in any given week; (3) whether Defendant failed to pay 'spread of hours' compensation; and, (4) whether Defendant failed to reimburse Plaintiffs for business expenses borne for the benefit and convenience of the Defendant" (*id.* at 12).

The complaint alleges that plaintiff's individual claims are "typical to the claims of the class, because they are all current or former home health care employees of defendant, who sustained damages, including underpayment of wages as a result of defendant's common compensation policies and practices" (*id.* at ¶ 13). The complaint also alleges that plaintiff and her counsel at V&A will "fairly and adequately protect the interests of the Putative Class" and that plaintiff's counsel at V&A is "experienced in complex wage and hour class action litigation" (*id.* at ¶

14). The complaint further alleges that "[a] class action is superior to other available methods for the fair and efficient adjudication of this controversy" because plaintiff and the Putative Class members "lack the financial resources to adequately prosecute separate lawsuits against Defendant[,]" and it will "prevent unduly duplicative litigation resulting from inconsistent judgments pertaining to the Defendant's policies" (*id.* at ¶ 15).

Regarding the individual plaintiff, the complaint alleges that she was employed by FHC as a home attendant from approximately June 18, 2014 through January 1, 2015, during which time she provided "personal care services" to FHC's "ailing elderly clients" including:

> "assistance with dressing, bathing and personal grooming, cooking, serving food and feeding, changing diapers, cleaning, such as mopping, cleaning bathrooms, doing laundry, and taking out garbage, escorting clients to the doctor, lifting and transferring Defendant's clients from and to bed, wheelchair, toilet and etc., and walking clients outside in the wheelchair. (*id.* at ¶¶ 17-18).

Plaintiff allegedly "maintained her own residence and did not 'live in' the homes of Defendant's clients . . ." (*id.* at ¶ 19). The complaint alleges that plaintiff "generally worked more than 40 hours per week" and "generally worked seven 24-hour shifts per week, amounting to approximately 168 hours per week" (*id.* at ¶ 20). When plaintiff worked 24-hour shifts caring for elderly clients suffering from health and mental ailments, she was allegedly "required to stay overnight at the residences of Defendant's clients, and needed to be ready and available to provide assistance . . . as needed[,]" "was generally not permitted to leave the client's

residence during her shift[,]" "did not get an opportunity to sleep without any interruption" and "did not get a one-hour break for each of three meals per day" (*id.* at ¶¶ 21, 24, 25 and 27). The complaint alleges that plaintiff "was only paid for approximately 13 hours of her 24-hours shifts"; "was not paid any hourly rate for the other 11 hours worked"; and "did not receive the 'spread of hours' premium of one additional hour at the minimum wage rate for the days in which she worked 10 or more hours" (*id.* at ¶¶ 23 and 29). In addition, the complaint alleges that plaintiff "was paid an hourly rate of approximately $10.00 per hour, however, she was not paid for every hour that she worked" (*id.* at ¶ 30).

The complaint alleges that plaintiff's "co-workers" and the "Putative Class members" performed the same and/or similar work . . ." and that they were not paid for every hour that they worked in violation of NYLL (*id.* at ¶¶ 31-38). The complaint also alleges that plaintiff and the Putative Class members were required "to purchase supplies, such as toilet paper, paper towels, and/or soap to use during the performance of certain job responsibilities" for FHC's benefit, for which they were not reimbursed, and thus, "[d]efendant is making impermissible de facto deductions from the wages of Plaintiffs" (*id.* at ¶¶ 39-41).

The complaint alleges that plaintiff and the Putative Class members are "'Home Care Aides' within the meaning of NY Public Health Law § 3614-c" (*id.* at ¶ 42). Upon information and belief, FHC "entered into contract(s) with government agencies which called for [it] to pay Plaintiffs prevailing rates of wages and benefits as required by NY Public Health Law § 3614-c[,]" and "the schedule

of prevailing rates of wages and benefits to be paid all workers furnishing labor pursuant to the contracts was included in and formed a part of the contract(s)" (*id.* at ¶¶ 44-45). "[B]eginning in or about 2010, plaintiffs allegedly furnished labor to [FHC] in furtherance of [FHC's] performance of the contract(s)" and FHC "willfully paid plaintiffs less than the prevailing rates of wages and benefits to which plaintiffs were entitled" (*id.* at ¶ 46).

The complaint asserts the following six causes of action for: (1) failure to pay plaintiff and the Putative Class members the statutory minimum wages due and owing for work performed in violation of the NYLL; (2) failure to pay plaintiff and the Putative Class members the applicable overtime hourly rate in violation of the NYLL; (3) failure to pay plaintiff and the Putative Class members "spread of hours" compensation in violation of the NYLL; (4) unlawful deduction of wages by withholding wages and overtime payments and requiring plaintiff and the Putative Class members to purchase their own supplies; (5) breach of FHC's "contract(s) with government agencies to pay wages as required by the NY Health Care Worker Wage Parity Act . . ." (plaintiff and the Putative Class members are alleged "third party beneficiaries"); and (6) breach of the "City Service Contract(s)" "by willfully failing to pay Plaintiffs the living wages and health benefits or health benefit supplements for all labor performed."

Defendant FHC's Answer

On December 7, 2017, FHC answered the complaint, denied the material allegations therein and asserted ten affirmative defenses, including "Plaintiff was

a manager or supervisor or otherwise exempt from the [NYLL,]" "Plaintiff lacks the capacity to sue in a representative capacity and otherwise does not meet state procedural requirements for maintaining a class action" and "failure to exhaust administrative remedies and/or arbitrable remedies" (*see* answer at ¶¶ 105, 107 and 112). After issue was joined, the parties commenced pre-class certification discovery.

Plaintiff's Instant Motion

On April 12, 2021, plaintiff filed the instant motion for an order granting class certification and for leave to file an amended complaint.

Plaintiff, in support of her motion to amend the complaint, submits a redlined version of the original complaint showing the proposed amendments (*see* NYSCEF Doc No. 44). The proposed amended complaint asserts the same six causes of action as the original complaint, contains substantially similar factual allegations, yet adds the following allegations: (1) in addition to violating NYLL, FHC violated "applicable regulations and common law principles of contract . . ."; (2) FHC "failed to preserve records required for properly calculating the wages due to Plaintiffs"; (3) FHC "fail[ed] to ensure Plaintiffs received regularly scheduled, work-free uninterrupted periods for Plaintiffs to sleep and eat, as required by law"; (4) FHC "fail[ed] to ensure Plaintiffs received appropriate sleeping facilities when they performed 24-hour shifts"; and (5) "Defendant knew, should have known, or had reason to know that Plaintiffs were working throughout their entire shift, including during meal and sleep breaks" (*compare* NYSCEF Doc

Nos. 44 and 45). The proposed amended complaint removes the allegation that FHC failed to reimburse plaintiff and the Putative Class members for business expenses.

Plaintiff asserts that she "seek[s] to amend the [ ] complaint to include factual allegations to conform with the New York Court of Appeals decision in *Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152 (2019)" in which the Court of Appeals held that "Employers who assign 24-hour shifts are required to ensure and record that HHAs receive these uninterrupted, duty-free breaks during each shift, and are provided with adequate sleeping facilities." Plaintiff argues that leave to amend should be granted because her "Proposed First Amended Complaint is not palpably insufficient or devoid of merit, and would not cause prejudice to [d]efendant . . ." Plaintiff asserts that the proposed amendment seeks to add factual allegation already within FHC's knowledge and possession in support of the very same claims that were asserted in the original complaint, and thus, defendant cannot demonstrate prejudice. Plaintiff contends that the amendment will not cause delay and will not cause defendant to undergo a change in position.

Plaintiff also moves for an order certifying this action as a class action, designating V&A as class action counsel and approving for publication the proposed Notice of Class Action Lawsuit and Publication Order annexed to her their moving papers as Exhibit 15. In particular, plaintiff seeks an order certifying the class as:

> "[a]ll individuals who performed work on behalf of Defendant Friendly Home Care, Inc. . . . as non-residential home health aides and/or personal care assistants in the State of New York at any time between April 14, 2011 and today . . ."

Plaintiff submits an affidavit from herself and affidavits from putative class members Javlon Astanakulov (Astanakulov) and Nina Tokhtaman (Tokhtaman), in which they make similar factual allegations. Plaintiff, Astanakulov and Tokhtaman all attest that they were employed by FHC as home health aides who provided services to FHC's homebound clients during various periods from 2014 through 2018.[1] They attest that they worked overnight, and 24-hour shifts while they maintained their own residences and did not live in the homes of FHC's clients. In addition, plaintiff, Astanakulov and Tokhtaman attest that FHC required that when working 24-hour shifts, they stay in the clients' homes and assist them as needed.

They further attest that they typically worked between two and seven 24-hour shifts per week, during which they did not receive regularly scheduled, uninterrupted sleep and three uninterrupted one-hour duty free breaks for meals. They attest that they were never told that they were entitled to receive wages for these time periods when sleep and meal breaks were not received. Furthermore, plaintiff, Astanakulov and Tokhtaman attest that FHC did not maintain a procedure or schedule that tracked whether they received regularly scheduled

[1] Plaintiff alleges that she worked for FHC from June 2014 to June 2015. Astanakulov alleges that he worked FHC from May 2018 through June 2018. Tokhtaman alleges that she worked for FHC from March 2016 through April 2017.

sleep and meal breaks during the 24-hour shifts, and that they were never told by FHC to maintain or submit logs of meal and sleeping times when they worked 24-hour shifts. They attest that FHC required that they call an automated telephone system to record their attendance at the beginning and/or end of their shifts but FHC did not have means for them to report whether they received sleep or meal breaks. Further, plaintiff, Astanakulov and Tokhtaman attest that, notwithstanding the lack of meal and sleep breaks during these 24-hour shifts, they were only paid for 13 of the hours worked.

Plaintiff, Astanakulov and Tokhtaman allege that they were not paid overtime during weeks that they worked in excess of 40 hours, did not receive benefits while working for FHC and were not paid the lawful wage rate. Additionally, they attest that FHC employed at least 100 home health aides when they worked there, and that their co-workers also worked 24-hour shifts but were only paid for 13 hours of this time and were not given uninterrupted breaks for meals or sleep. Finally, plaintiff, Astanakulov and Tokhtaman aver that when they worked more than 10 hours per day, they were not paid a "spread hours" premium of one additional hour at minimum wage.

In addition to an attorney affirmation, a memorandum of law and the fact affidavits, plaintiff also submits the following exhibits: (1) excerpts from her deposition transcript, her caregiver calendar, duty sheets and pay stubs; (2) sample paystubs from purported class members; (3) a home health aide description from FHC's policy and procedure manual; and (4) a proposed class action notice and

publication order. These records reflect, among other things, that plaintiff was paid a flat rate of $145 per 24-hour shift, and that other purported class members were also paid a flat rate.

Notably, at her deposition, plaintiff testified that she worked 24-hours a day, seven days a week for an elderly, mentally infirm client of FHC, and that she was required to provide that FHC client with around-the-clock assistance. Plaintiff testified that she slept on a sofa in the client's living room, but that she never received five hours of uninterrupted sleep because the client woke her up nightly at 2:00 a.m. and required observation.

Plaintiff asserts that she has met the criteria to certify a class under CPLR 901 and 902, especially since courts have routinely certified classes in factually similar cases. Plaintiff argues that the class is so numerous that joinder of all members is impracticable, and points out that she, Astanakulov and Tokhtaman all attested that defendant employed no fewer than 100 individuals. Plaintiff also contends that common questions of law and fact predominate over any questions affecting individual members. Plaintiff thus contends that the Putative Class members' claims arise out of the same unlawful conduct by FHC regarding regularly scheduled duty-free meals and rest breaks, and failure to receive prevailing wages and benefits, overtime compensation and spread of hour compensation. Plaintiff contends that Astanakulov's and Tokhtaman's affidavits demonstrate that her claims are typical of those of the Putative Class members' because all of the claims arise from the same alleged misconduct by FHC, the home

health aides all suffered the same wrongs, and the Putative Class members' claims are based on identical legal theories.

Plaintiff argues that she will adequately protect the interests of the Putative Class and that her personal interest is not adverse to the Putative Class since she seeks the same relief. Plaintiff also contends that the Second Department has recognized that V&A, the proposed Putative Class action counsel, is experienced, competent and has zealously represented plaintiffs in prior class action cases.

Plaintiff further contends that consideration of the factors enumerated in CPLR 902 supports class certification. Plaintiff argues that resolving the issues on a class basis will provide class members who have insubstantial means with an avenue of redress, that it is both impracticable and inefficient to prosecute or defend separate actions, given the fact that there are over 100 proposed class members, and that the forum is appropriate because the class members live in New York and the claims are asserted under New York law.

FHC's Opposition

FHC, in opposition, submits an affidavit from Alla Petrovitsky (Petrovitsky), its administrator, and exhibits, including: (1) employee contracts and rules of employment and conduct that are signed by Astanakulov and Tokhtaman; (2) agreement regarding sleep time and meal time during 24 hours shifts signed by plaintiff, Astanakulov and Tokhtaman; (3) FHC's employee handbook; (4) Astanakulov's, Tokhtaman's and other putative class members' signed acknowledgements of receipt of FHC's employee handbook; (5) Putative Class

members' signed wage parity notices issued to them by FHC; and (6) correspondence from the New York State Office of the Medicaid Inspector General (OMIG). FHC also submits an attorney affirmation with select excerpts from plaintiff's deposition transcript and email correspondence from OMIG.

FHC contends that plaintiff has failed to meet her burden under CPLR 901 because she failed to establish that the Putative Class members were subject to a uniform illegal wage and hour policy and that individual issues predominate over class issues. FHC contends that the record proves that it paid home health aides lawfully in accordance with New York Department of Labor policy which permits payment of 13 hours for a live-in shift. FHC asserts that the home health aides were advised of this policy and signed acknowledgements that they were provided with three one-hour meal breaks and eight hours of sleep time, as required by law. FHC claims that the employment contracts and sleep and meal-time agreements demonstrate that home health aides were advised to report any interruptions in their meal and sleep time to FHC to be paid for that time in accordance with the law. To the extent that any home health aide alleges that they did not receive their meal or sleep breaks on a particular date, FHC contends that that is an individual claim that is not subject to resolution on a class-wide basis. FHC argues that plaintiff's deposition, at which she testified that she received meal breaks and admitted to napping and rest breaks, demonstrates the individualized nature of the inquiry.

With respect the second factor under CPLR 901, defendant contends that plaintiff cannot prove that her claims are typical to those of the Putative Class members. FHC argues that the policy of paying home health aides for 13 hours of a 24-hour shift is lawful and that it has submitted its employment policies as proof. In addition, FHC contends that plaintiff has not identified any other home health aide that worked a live-in shift and did not receive their required meal and sleep breaks. FHC also contends that plaintiff cannot establish that a class action is superior to other available methods of resolving the controversies and that the class definition is also overbroad, because it includes all hourly employees, including employees who have waived their right to participate in this class action.

FHC does not oppose plaintiff's motion for leave to amend the complaint.

Plaintiff's Reply

Plaintiff, in reply, reiterates her contention that there is sufficient evidence to warrant class certification and that the Putative Class members were all subject to defendant's common policies and practice of failing to ensure that home health aides received regularly scheduled breaks, failing to keep adequate records, and failing to pay employees when they did not receive breaks. Plaintiff contends that recent case law has granted class certification under similar factual circumstances.

Discussion

Plaintiff's Motion to Amend the Complaint

A party may amend its pleading by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of

the parties (*see* CPLR 3025 [b]). "Leave shall be freely given upon such terms as may be just" (*Cullen v Torsiello*, 156 AD3d 680, 681 [2d Dept 2017]). As a general rule, "a court hearing a motion for leave to amend will not examine the merits of the proposed amendment 'unless the insufficiency or lack of merit is clear and free from doubt . . .'" (*Ricca v Valenti*, 24 AD3d 647, 648 [2d Dept 2005]). A court has broad discretion to grant a motion to amend the pleadings . . . when there is no actual prejudice or surprise to the opposing party (*see Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Murray v City of New York*, 43 NY2d 400, 405 [1977], *rearg dismissed* 45 NY2d 966 [1978]). "Prejudice is more than mere exposure of the party to greater liability" (*Kimso*, 24 NY3d at 411) [internal quotations and brackets omitted]). Rather, the party opposing the amendment must demonstrate that it has been hindered in preparing its case or prevented from taking some measure in support of its position (*id.*; *National Recruiting Group, LLC v Bern Ripka LLP*, 183 AD3d 831, 832 [2d Dept 2020]). Finally, a motion to amend must be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions made to the pleading (CPLR 3025 [b]; *Drice v Queens County District Attorney*, 136 AD3d 665, 666 [2d Dept 2016]; *Codrington v Wendell Terrace Owners Corp.*, 118 AD3d 844, 845-846 [2d Dept 2014]).

Here, plaintiffs have submitted the proposed amended complaint with a redlined version reflecting the additional factual allegations. FHC did not oppose that branch of plaintiff's motion seeking leave to amend the complaint, and there

is nothing in the record to suggest that plaintiff's new factual allegations in the proposed amended complaint are palpably insufficient or patently devoid of merit. Accordingly, that branch of plaintiff's motion for leave to amend the complaint is granted without opposition, and the amended complaint is deemed served as of the date of the filing of this decision and order with notice of entry thereof.

Plaintiff's Motion for Class Certification

In moving for class certification, "[t]he proposed class representative bears the burden of establishing compliance with the requirements of both CPLR 901 and 902" (*Krobath v South Nassau Comm. Hosp.*, 178 AD3d 805, 806 [2d Dept 2019]). In particular, "[a] class action may be maintained in New York only after the five prerequisites of CPLR 901 [a] have been satisfied [and] [o]nce those prerequisites are satisfied, the court 'shall consider' the factors set forth in CPLR 902" (*Cooper v Sleepy's LLC*, 120 AD3d 742, 743 [2d Dept 2014], quoting CPLR 902). "New York's statutory class certification provisions are to be liberally construed" (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 183 [2019]; *see also Krobath*, 178 AD3d at 806). Claims of systematic violations of the Labor Law, such as 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, or maintain records of actual hours worked, "are particularly appropriate for class certifications" (*Andryeyeva*, 33 NY3d at 184). Finally, the determination of whether to grant class certification is vested in the sound discretion of the trial court (*Cooper*, 120 AD3d at 743).

CPLR 901 (a) (1) requires a showing that the class is so numerous that joinder of all members is impracticable. "[T]he minimum number permissible may depend on a variety of factors [and] '[t]here is no mechanical test to determine whether . . . numerosity has been met'" (*Globe Surgical Supply v GEICO Ins.* Co., 59 AD3d 129, 137 [2d Dept 2008], quoting *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [1980]). Although there is no set number which establishes numerosity, "'[i]t has been held that the threshold for impracticability of joinder seems to be around forty'" (*Globe Surgical Supply* at 138, quoting *Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SD NY 1999]). Here, Astanakulov, Tokhtaman and plaintiff state in their affidavits that they worked with at least 100 other home health aides who were subject to the same underpayment of wages and benefits that they experienced. Under these circumstances, the numerosity requirement has been satisfied.

CPLR 901 (a) (2) requires that there be "questions of law or fact common to the class which predominate over any questions affecting only individual members." Courts have consistently certified class actions notwithstanding differing individual damages where "there is uniformity in contractual agreements and/or statutorily imposed obligations (*Globe Surgical Supply*, 59 AD3d at 139). Indeed, where there is evidence of underpayment of statutorily and contractually required wages based upon an employers' uniform and systematic policy, "[a] difference in damage awards is an insufficient basis to deny certification as a

matter of law where the class may rely on representative evidence of the class wide violations" (*Andryeyeva*, 33 NY3d at 185).

Here, Astanakulov, Tokhtaman and plaintiff attest that they and other FHC home health aides were paid a flat rate for 13 hours per 24-hour shift when they did not receive the required uninterrupted sleep and meal breaks, there was no system in place to track whether or not they received such breaks, they did not receive overtime pay for hours worked beyond 40 hours per week, they did not receive the spread of hours premium payment and they did not receive the prevailing wages and benefits required under the Public Health Law and New York City Administrative Code. Plaintiff has further alleged that this illegal underpayment of wages and benefits took place in the context of a systematic and uniform policy adopted by FHC. Moreover, plaintiff has submitted evidence in the form of Astanakulov, Tokhtaman, and her affidavit, as well as payroll records, which support those allegations. Under these circumstances, the commonality requirement set forth in CPLR 901 (a) (2) has been satisfied. FHC's contention that each class member's damages will have to be individually calculated does not defeat plaintiff's motion for class certification, as a matter of law (*Andryeyeva*, 33 NY3d at 185).

CPLR 901 (a) (3) requires that the "claims and defenses of the representative parties [be] typical of the claims or defenses of the class." "Typical claims are those that arise from the same facts and circumstances of the claims of the class members" (*Globe*, 59 AD3d at 143). "Typicality does not require identity of issues

and the typicality requirement is met even if the claim asserted by class members differ from those asserted by other class members" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 423 [1st Dept 2010]). Here, plaintiff and the Putative Class members, Astanakulov and Tokhtaman, attest that they (and other Putative Class members) provided similar care to FHC's clients and that they were subject to the same illegal and systemic wage policies instituted by FHC. Accordingly, the typicality requirement has been satisfied.

CPLR 901 (a) (4) requires that a party moving for class certification demonstrate that the representative plaintiff "will fairly and adequately protect the interests of the class." "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*, 59 AD3d at 144). Here, plaintiff stands to gain a pecuniary benefit through the successful prosecution of this action and seeks the same relief as the Putative Class members. Thus, there are no potential conflicts of interests between plaintiff and the Putative Class members. Finally, it is undisputed that plaintiff's labor law attorneys at V&A are experienced in class actions and labor and employment law issues and have successfully represented classes in prior class action lawsuits. Accordingly, plaintiff has satisfied the requirements of CPLR 901 (a) (4).

CPLR 901 (a) (5) provides that a class action may be certified only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The Court of Appeals has specifically held that claims regarding the systemic failure to pay statutorily required wages, provide the minimum time for sleep and meal breaks and to maintain adequate records of the hours that employees actually worked "are particularly appropriate for class certifications" (*Andryeyeva*, 33 NY3d at 184). Moreover, the fact that members of the Putative Class have an administrative remedy under the Labor Law is not a basis for denial of class certification, since an individual class member may opt out of the class sought to be certified if they wish to pursue this administrative remedy (*Globe*, 59 AD3d at 146). Accordingly, plaintiff has satisfied the requirements of CPLR 901 (a) (5).

Having determined that plaintiff has satisfied the five prerequisites set forth in CPLR 901 (a), the court must consider the additional factors contained in CPLR 902 which include:

> "(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 the class action."

Initially, the court notes that most of the factors set forth in CPLR 902 have already been considered by the court in its CPLR 901 analysis. Moreover, there does not appear to be any litigation concerning the underlying controversy that has already been commenced. Additionally, this court is an appropriate forum, since all of the proposed class members were employed by FHC as home health aides in the State of New York. Thus, plaintiff has satisfied the requirements of CPLR 902.

Importantly, in *Andryeyeva*, the Court of Appeals held that claims such as "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" are an example of "[c]laims of uniform systemwide violations" which "are particularly appropriate for class certification" (*Andryeyeva*, 33 NY3d at 184).

While FHC argues that employees were required to sign sleep time agreements acknowledging that they would only be paid for 13 hours of a 24-hour shift unless they report any missed breaks, defendant has not submitted any evidence that such policies were actually enforced or that plaintiffs actually received such breaks. In any event, at this stage of the litigation, plaintiff is not required to prove that her claims have merit; instead, the inquiry is limited to "whether on the surface there appears to be a cause of action for relief which is neither spurious nor sham" (*see Bloom v Cunard Line*, 76 AD2d 237, 240 [1st Dept 1980]).

Finally, the class is properly defined to include both live-in 24-hour workers and those FHC home health aides who received an hourly wage, as the claims are for nonpayment of overtime wages, spread of hours pay, and wages pursuant to the Living Wage Law and the Wage Parity Act (see *Andreyeyeva v New York Health Care Inc.*, 2020 NY Slip Op 31362 [U]). The court has considered the parties' remaining contentions and finds them to be without merit. Accordingly, it is

ORDERED that plaintiff's motion (Seq 2) for an order granting leave to file an amended complaint and certifying this action as a class action, designating Virginia & Ambinder, LLP as class counsel, and approving for publication the proposed Notice of Class Action Lawsuit and Publication Order is granted; and it is further

ORDERED that the amended complaint is deemed served as of the date of the filing of this order with notice of entry; and it is further

ORDERED that the defendant shall have 30 days from the filing of this order with notice of entry to file an answer to the amended complaint; and it is further

ORDERED that plaintiff shall have leave to prosecute her action on behalf of a class consisting of:

> "All individuals who performed work on behalf of Friendly Home Care, Inc. as non-residential home health aides and/or personal care assistants in the State of New York at any time between April 14, 2011 and today."

And it is further

ORDERED that the proposed Notice of Class Action Lawsuit attached to plaintiff's motion papers as exhibit 14 (NYSCEF Document no. 57) is approved for publication; and it is further

ORDERED that within 45 days after service of this decision and order with notice of entry thereof, FHC shall furnish plaintiff's counsel with a class list containing the names of all individuals employed by FHC as non-residential home health aides in New York between April 14, 2011 and the date of this order, including the individuals' last known mailing and email addresses and that such list is to be furnished in electronic form, to the extent possible; and it is further

ORDERED that within 30 days after plaintiff's counsel receives this list, plaintiff shall cause a copy of the Notice of Class Action to be mailed to every class member in English, Russian, Spanish, Polish, and Chinese once by first class mail and once by electronic mail (when possible); and it is further

ORDERED that within 30 days after plaintiff's counsel receives the class list, counsel shall cause a copy of the Notice of Class Action to be made available at a designated location on Virginia and & Ambinder's website located at www.vandallp.com.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT
J.S.C.