SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**

Justice

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DOROTHY FELLS,

Plaintiff,

- v -

KUEHNE,

Defendant.

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INDEX NO. 160473/2021

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7 were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

By notice of motion, submitted on default, plaintiff moves for approval of a collective action settlement.

Pursuant to CPLR 908, no class action settlement may be effectuated without court approval and notice of such settlement must be disseminated to all class members in the manner directed by the court, which is given broad administrative and adjudicative power over such actions, as they are responsible for protecting the rights of absent class members. (*Wyly v Milberg Weiss Bershad & Schulman, LLP*, 12 NY3d 400, 413 [2009]; *Jiannaras v Alfant*, 124 AD3d 582, 590 [2d Dept 2015], *affd* 27 NY3d 349 [2016], quoting *Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 70 [2d Dept 2006] ["Because the disposition of a class action binds class members who do not directly participate in the action, the trial court must act as the protector of the rights of the absent class members"] [internal marks and citations omitted]).

I. ANALYSIS

A. CPLR 901

Pursuant to CPLR 901(a), a lawsuit may qualify as a class action if the following criteria are met: (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members (commonality); (3) the claims of the representative parties are typical of the claims of the class (typicality); (4) the representative parties will fairly and adequately protect the class's interests (adequacy of representation); and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy (superiority). (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). The moving party bears the burden of establishing each criterion. (*Matter of Colt Indus: Shareholder Litig.*, 155 AD2d 154, 159 [1st Dept 1990], *affd as mod* 77 NY2d 185).

B. Numerosity

Here, the approximately 49-member class is sufficiently numerous such that joinder of all of its members would be impracticable. (*See Borden v 400 E. 55th St. Assocs., L.P.*, 24 NY3d 382, 399 [2014] [thirteen-member class sufficiently numerous in tenant class action]; *Consol. Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 19951, *cert denied* 515 US 1122 [whether 300 or 700 members in class irrelevant, as numerosity presumed at 40 members]).

C. Commonality

Notwithstanding the differences among class members in terms of their damages, common questions of law and fact predominate, namely, whether defendants failed to pay the class overtime wages and thereby violated state labor laws. (*See Borden*, 24 NY3d 382, 384 [2014] [commonality found among current and former tenants of separate apartment buildings

notwithstanding differences in damages among class members]; *Slecko v RLI Ins. Co.*, 121 AD3d 542, 543-44 [1st Dept 2014] [commonality found as all members of class alleged defendant failed to pay required wage and benefits]).

D. Typicality

Plaintiff's claim is typical of the claims of the class, as it arises from overtime work performed for which she was not compensated; a finding in her favor would result in all members of the class obtaining relief. (*See Stecko*, 121 AD3d at 543 [plaintiff's claim typical as all arose from defendants' alleged failure to pay prevailing wages and benefit]).

E. Adequacy of representation

As plaintiff alleges that she worked for defendants as a "WMS Super User" and that they unlawfully deprived her of overtime wages during that period, she adequately represents the class, as she and other members seek the same relief. (*See Nawrocki v Proto Const. & Dev. Corp.*, 82 AD3d 534, 535 [1st Dept 2011]) [representation adequate as plaintiff sought same relief as class members, to receive wages and benefits allegedly owed; defendants did not dispute commonality]).

Having served as class counsel in numerous actions in this county, plaintiff's counsel are adequate representatives for the class. (*See Morris v Alle Processing Corp.*, 2013 WL 1880919, at *12 [ED NY 2013] [counsels are "experienced labor and employment litigators who have successfully represented employees in numerous wage and hour class and collective action lawsuits").

F. Superiority

As the costs of prosecuting individual actions are likely to exceed the damages suffered by one class member, the class action is a superior vehicle for resolving this claim. (*Nawrocki*,

82 AD3d at 536 [class action was best vehicle to recover damages incurred by construction workers deprived of wages]).

II. CPLR 902

Pursuant to CPLR 902, the court must consider "the interest of individual class members in maintaining separate actions and the feasibility thereof; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum; and the difficulties likely to be encountered in managing the class action." (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]).

The impracticability of prosecuting separate actions is addressed *supra*, and plaintiff does not represent that there are any actions commenced by or against the members of the class concerning this controversy. Moreover, the forum is suitable, as New York is the residence of defendant, and as the claims of the class members arise under New York law.

The difficulties of managing this action need not be addressed, as this class is being certified for settlement purposes only. (*See Amchem Prod., Inc. v Windsor*, 521 US 591, 593 [1997] [potential management problems not considered as certification was requested only for settlement]).

III. CPLR 908

A. Settlement agreement

Plaintiff seeks approval of her proposed settlement agreement pursuant to CPLR 908, which states the following, as relevant here: "[a] class action shall not be . . . discontinued or compromised without the approval of the court." In determining whether approval is appropriate, the court looks to whether the proposed settlement is fair, adequate, reasonable, and in the best interests of the class members. (*Gordon v Verizon Communications, Inc.*, 148 AD3d 146, 151

[1st Dept 2017]; *Rosenfeld v Bear Stearns & Co.*, 237 AD2d 199, 199 [1st Dept 1997], *lv dismissed* 90 NY2d 888, *lv denied* 90 NY2d 811).

The following factors are considered: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of he settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. (*In re Initial Pub. Offering Sec. Litig.*, 226 FRD 186, 190 [SD NY 2005]).

Preliminary approval is typically granted where the proposed settlement appears to be "the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." (*Oladapo v Smart One Energy. LLC*, 2017 WL 5956907, at *7 [SD NY 2017]).

Here, the settlement agreement appears to be the product of serious, informed negotiations, and plaintiff's counsel seeks a one-third contingency fee as its attorney fees. However, although incentive awards for named plaintiffs in class actions are permitted under federal law, they are not expressly provided for by state statute. (*Saska v Metro. Museum of Art*, 57 Misc 3d 218, 229-230 [Sup Ct, New York County 2017]). The court in *Saska*, however, permitted further argument on the issue at the "final approval stage." (*Id.* n 16).

B. Notice of proposed settlement and claim form

As relevant here, CPLR 908 provides that notice of the proposed dismissal,

discontinuance, or compromise must be given to all members of the class in such manner as the court directs. The notice should at least inform the potential members of the class of the pending action, composition of the class, the issues, proposed terms of settlement, the methods of and time to object to the settlement and the date of a fairness hearing, and afford due process protections. (*Matter of Colt Industries Shareholder Litigation*, 155 AD2d 154, 154 [1st Dept 1990], *affd as modified* 77 NY 2d 185 [1991]).

Here, class counsel asserts that no notice will be provided to class members. Rather, based on information provided by defendant, eligible class members will be identified and settlement checks will be mailed directly to them.

Absent any authority cited by plaintiff for the proposition that notice need not be given to proposed class members, and as CPLR 908 provides that notice must be given, plaintiff does not establish her entitlement to approval of the settlement.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion for approval of a class action settlement is denied.

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4/8/2022
DATE

BARBARA JAFFE, J.S.C.

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