SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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JOHNNY PEREZ, ARCADIO FRIAS, and NESTOR RAMIREZ, on behalf of themselves and all others similarly situated who were employed by Long Island Concrete, Inc.,

Plaintiffs,

- v -

LONG ISLAND CONCRETE INC., REGULATOR CONSTRUCTION CORP., THOMAS J. PERNO, TJM CONSTRUCTION CORP., ZHL GROUP INC., LANMARK GROUP, INC., THE GUARANTEE COMPANY OF NORTH AMERICA USA, VIGILANT INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, and JOHN DOE BONDING COMPANIES 1-10,

Defendants.

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INDEX NO. 654227/2018

MOTION DATE 11/22/2021

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279

were read on this motion to/for ORDER MAINTAIN CLASS ACTION.

In this putative class action seeking unpaid prevailing wages, supplemental benefits and overtime compensation, plaintiffs Johnny Perez (Perez), Arcadio Frias (Frias) and Nestor Ramirez (Ramirez) (collectively, plaintiffs) move, pursuant to CPLR article 9, for an order granting class certification, ordering dissemination of a proposed notice to the class, appointing plaintiffs' counsel as class counsel, and appointing plaintiffs as class representatives.

BACKGROUND

The relevant facts are set forth in the court's prior decision and order dated May 24, 2021 (*Perez v Long Is. Concrete Inc.*, 2021 NY Slip Op 31895[U] [Sup Ct, NY County 2021], *affd as mod* 203 AD3d 552 [1st Dept 2022]). Briefly, plaintiffs are non-union workers whom

defendants Long Island Concrete, Inc. (LIC), Regulator Construction Corp. (Regulator) and Thomas J. Perno (Perno) employed on public and private works construction projects in New York. Defendants TJM Construction Corp., ZHL Group Inc. and Lanmark Group, Inc. (Lanmark), acting as a joint venturer with LIC, entered into public works contracts or, acting as a prime contractor, retained LIC or Regulator as a subcontractor on public works projects. Defendants The Guarantee Company of North America USA (Guarantee), Vigilant Insurance Company (Vigilant), The Ohio Casualty Insurance Company (Ohio Casualty), John Doe Bonding Companies 1-10 or their subsidiaries issued labor and material payment bonds in connection with various public works projects.

Plaintiffs bring this putative class action on behalf of themselves and other similarly situated non-union workers alleging that defendants failed to pay them prevailing wages, supplemental benefits and overtime compensation in contravention of New York Labor Law and the public works construction contracts. The complaint against Lanmark has been discontinued (NYSCEF Doc No. 207).

Plaintiffs now move to certify a class of approximately 111 non-union workers employed by LIC, Regulator and Perno from August 24, 2012 to the present.[1] The motion incorporates affidavits from the three named plaintiffs as well as from Adam Pizarro (Pizarro), Erling Salinas (Salinas), Ewrin Manaiza Bonilla (Bonilla), Eswin Salguero (Salguero), Herminio Noe Hernandez (Hernandez), Hernan Molina Perez (Molina Perez), Rafael Campos (Campos), Ramiro Zurita (Zurita) and Victor Lozado (Lozado) (collectively, the Proposed Class Affiants); a list of potential class members; deposition transcripts; and other exhibits. LIC, Perno, TJM, ZHL, Guarantee, Vigilant and Ohio Casualty (collectively, the LIC Defendants) oppose. They

[1] Claims accruing six years before August 24, 2018 are time barred (*Perez*, 2021 NY Slip Op 31894[U], *8]).

rely on an affidavit from Perno; deposition transcripts; a project labor agreement for the Plymouth Paint Warehouse project at 424 Wythe Avenue; pay stubs; and other exhibits. Regulator opposes and submits the memoranda of law from its earlier motion to dismiss.

DISCUSSION

"The determination whether plaintiffs have a cause that may be asserted as a class action turns on the application of CPLR 901" (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019]). CPLR 901 (a) provides that:

> "One or more members of a class may sue or be sued as representative parties on behalf of all if:
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> 4. the representative parties will fairly and adequately protect the interests of the class; and
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

More simply, these five prerequisites are "numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). Pursuant to CPLR 902, an "action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied."

CPLR 902 also sets forth additional factors to 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;

> 5. the difficulties likely to be encountered in the management of a class action."

A party moving for class certification bears the burden of satisfying the prerequisites in CPLR 901 and 902 (*Cupka v Remik Holdings LLC*, 202 AD3d 473, 474 [1st Dept 2022]), through the submission of evidentiary facts sufficient to support certification (*Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 [1st Dept 2009] [stating there must be an "evidentiary basis" for certification]; *Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [1st Dept 2003] [stating the plaintiff must submit "competent evidence in admissible form"]). Because CPLR article 9 must be liberally construed, "any error, if there is to be one, should be … in favor of allowing the class action" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 21 [1st Dept 1991] [internal quotation marks and citation omitted]; *Kudinov*, 65 AD3d at 481 [stating that it is within the court's discretion to grant class certification but the "court must be mindful … that the class certification statute should be liberally construed"]). "Class action certification is … appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]).

A. CPLR 901

1. Numerosity

A class of 40 meets the "presumed threshold of numerosity for class certification" (*Agolli v Zoria Hous., LLC*, 188 AD3d 514, 514 [1st Dept 2020]).

Plaintiffs have satisfied this element. Apart from Zurita, the Proposed Class Affiants uniformly attest to having worked for LIC on public and private projects with at least 50 non-union workers (NYSCEF Doc No. 209, Pizarro aff, ¶ 30; NYSCEF Doc No. 210, Frias aff, ¶ 33; NYSCEF Doc No. 211, Salinas aff, ¶ 32; NYSCEF Doc No. 212, Bonilla aff, ¶ 29; NYSCEF Doc No. 213, Salguero aff, ¶ 31; NYSCEF Doc No. 214, Hernandez aff, ¶ 31; NYSCEF Doc No.

215, Molina Perez aff, ¶ 28; NYSCEF Doc No. 216, Perez aff, ¶ 46; NYSCEF Doc No. 217, Ramirez aff, ¶ 43; NYSCEF Doc No. 268, Campos aff, ¶ 37; NYSCEF Doc No. 220, Lozado aff, ¶ 52). Plaintiffs also submit a list of 43 potential class members compiled from the Proposed Class Affiants' affidavits (NYSCEF Doc No. 231, Avi Mermelstein [Mermelstein] aff, Ex I), and a list of its employees from 2015 to 2018 that Regulator provided in discovery (NYSCEF Doc No. 232, Mermelstein aff, Ex J, ¶ 1). Plaintiffs contend that, after removing potential duplicates, the lists yield a total of 111 non-union workers. This is sufficient to satisfy the numerosity requirement (*see Lewis v Hallen Constr. Co., Inc.*, 193 AD3d 511, 512 [1st Dept 2021] [reasoning that affidavits from plaintiffs and three former employees stating they worked with 30 to 50 others established numerosity]; *Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014] [numerosity satisfied where plaintiffs averred they had worked with at least 50 others]; *Galdamez v Biordi Constr. Corp.*, 50 AD3d 357, 357 [1st Dept 2008] [stating that plaintiffs satisfied the numerosity element through affidavits from proposed class members]).

The LIC Defendants counter that plaintiffs have identified, at most, only 26 potential class members. They claim that seven of the 43 persons on the list are union members, and another 10 persons are unidentifiable or duplicative. On this point, Perno avers that Jose Bonilla, Freddie Cardona, Jose Sinchi, Duane Lennox and Darwin Carrera are union members, and offers copies of their union membership cards, a union book excerpt or letter sponsoring their membership (NYSCEF Doc No. 235, Perno aff, ¶¶ 3-6). The exhibits, however, are not dispositive. The alleged violations began as early as 2011 (NYSCEF Doc No. 223, Mermelstein aff, Ex A, ¶ 7), and the LIC Defendants fail to establish that these four employees had gained union membership prior to August 24, 2012. The union cards for "A. Carrera" and "J. L. Bonilla" show they entered Local Union 20 in September 2015 (NYSCEF Doc Nos. 236-237,

Perno aff, Exs 1-2). The union card for "F. Cardona" shows that he entered Local Union 18A on September 30, 2020 (NYSCEF Doc No. 238, Perno aff, Ex 3). The letter sponsoring Jose Sinchi for union membership is dated August 21, 2014 (NYSCEF Doc No. 240, Perno aff, Ex 5), but the receipt for his initiation is dated July 27, 2021 (NYSCEF Doc No. 239, Perno aff, Ex 4). The letters sponsoring Duane Lennox and Darwin Carrera for union membership are both dated December 19, 2017 (NYSCEF Doc Nos. 241-242, Perno aff, Exs 6-7), and there is no documentary evidence showing that they ever gained membership. Perno does not identify the other four persons who are alleged to be union members. In addition, the LIC Defendants only speculate that 10 names on the list of potential class members are entirely duplicative.

The LIC Defendants next argue that a collective bargaining agreement between The Cement League and the District Counsel of Cement and Concrete Workers, Local Nos. 6A, 18A and 20 (the CBA) bars several proposed class members from pursuing this action. Section 1 in Article XV of the CBA, titled Disputes and Trade Board, provides, in relevant part, that "[a]ll complaints, disputes and differences arising under this agreement between the Association and the Union or between any Employer and any Employee shall be referred to the Joint Trade Board of the Cement League" (NYSCEF Doc No. 243, Perno aff, Ex 8 at 50-51). The CBA, though, was in effect between July 1, 2014 to June 30, 2017 (NYSCEF Doc No. 243, Perno aff, Ex 8), and, as discussed above, the actionable violations began to accrue on August 24, 2012. Additionally, the CBA applied only to those workers who were members of Unions 6A, 18A or 20 during the period the CBA was in effect. The only two workers it could possibly exclude for that period are "A. Carrera" and "J. L. Bonilla," whose union cards show they had entered Local Union 20 in September 2015. Moreover, plaintiffs' first cause of action is predicated upon LIC, Regulator and Perno breaching the prevailing wage provisions in their public works contracts or

subcontracts (NYSCEF Doc No. 223, ¶¶ 85-88; *Perez v Long Is. Concrete Inc.*, 203 AD3d 552, 553 [1st Dept 2022]), and not a breach of the CBA.

Regulator contends that plaintiffs are merely "casting a net wide enough to gather employees of two corporate entities" in order to meet the numerosity requirement (NYSCEF Doc No. 267, Regulator mem of law at 1). However, plaintiffs appear to be proceeding on an alter ego theory (*Perez*, 203 AD3d at 553-554 [determining that "plaintiffs sufficiently alleged that defendant Regulator is the alter ego of defendants LIC and/or Perno and may also be held liable for breach of contract"]). Thus, Regulator has not adequately shown that the numerosity requirement is lacking.

2. Commonality

Commonality for purposes of CPLR 901 (a) (2) looks at whether common questions of law and fact predominate over any individual issues (*C.H. v Columbia Grammar & Preparatory Sch.*, — AD3d —, 2022 NY Slip Op 02864, *1 [1st Dept 2022]). Commonality "should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 97 [2d Dept 1980] [internal quotation marks and citations omitted]). 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*, 14 NY3d at 514, quoting *Friar*, 78 AD2d at 98). "[I]t is 'predominance, not identity or unanimity,' that is the linchpin of commonality" (*id.*).

Plaintiffs have established commonality. Apart from Zurita, the Proposed Class Affiants uniformly attest that they were non-union members working for LIC and thatLIC foremen and superintendents supervised them on projects where they routinely worked six days a week from 7

a.m. to 5:30 p.m. or 7 a.m. to 3:30 p.m. or longer when concrete was poured (NYSCEF Doc No. 209, ¶¶ 8, 14-16 and 29; NYSCEF Doc No. 210, ¶¶ 8, 14-16 and 32; NYSCEF Doc No. 211, ¶¶ 9, 14-16 and 31; NYSCEF Doc No. 212, ¶¶ 8, 13-15 and 28; NYSCEF Doc No. 213, ¶¶ 8, 13-15 and 30; NYSCEF Doc No. 214, ¶¶ 8, 14-16 and 30; NYSCEF Doc No. 215, ¶¶ 8, 13-15 and 27; NYSCEF Doc No. 216, ¶¶ 11, 17-19 and 45; NYSCEF Doc No. 217, ¶¶ 10, 15-17 and 42; NYSCEF Doc No. 268, ¶¶ 10, 15-17 and 36; NYSCEF Doc No. 220, ¶¶ 10, 17-19 and 51). They aver that, during their employment with LIC, they were not paid prevailing wages or supplemental benefits on LIC's public projects, and they were not paid overtime if they worked more than 40 hours a week on LIC's public and private projects (NYSCEF Doc No. 209, ¶¶ 17 and 19; NYSCEF Doc No. 210, ¶¶ 17 and 21; NYSCEF Doc No. 211, ¶¶ 17 and 19; NYSCEF Doc No. 212, ¶¶ 16 and 18; NYSCEF Doc No. 213, ¶¶ 16 and 18; NYSCEF Doc No. 214, ¶¶ 17 and 19; NYSCEF Doc No. 215, ¶¶ 16 and 18; NYSCEF Doc No. 216, ¶¶ 20 and 23; NYSCEF Doc No. 217, ¶¶ 18 and 25; NYSCEF Doc No. 268, ¶¶ 18 and 21; NYSCEF Doc No. 220, ¶¶ 20 and 27). Their paychecks from Regulator routinely omitted their hourly pay rates, overtime rates and supplemental benefits and stated only their pay for that week (NYSCEF Doc No. 209, ¶¶ 23-24; NYSCEF Doc No. 210, ¶ 26; NYSCEF Doc No. 211, ¶ 24; NYSCEF Doc No. 212, ¶ 23; NYSCEF Doc No. 213, ¶ 23; NYSCEF Doc No. 214, ¶ 24; NYSCEF Doc No. 215, ¶ 23; NYSCEF Doc No. 216, ¶ 28; NYSCEF Doc No. 217, ¶ 30; NYSCEF Doc No. 268, ¶ 25; NYSCEF Doc No. 220, ¶ 31).[2] Ramirez and Lozado also challenge the certified payroll reports Perno signed for the Plymouth Paint Warehouse project, alleging that Perno had misrepresented the actual amounts they were paid that week (NYSCEF Doc No. 217, ¶¶ 21-24; NYSCEF Doc No. 220, ¶¶ 21-25).

[2] Perez, Ramirez and Lozado aver that the paychecks they received from Regulator up to February 2015 failed to state their hourly rate of pay and overtime rate.

This proof is sufficient to establish that common questions of law and fact predominate as to whether defendants failed to pay plaintiffs prevailing wages, supplemental benefits and overtime compensation (*see Vandee v Suit-Kote Corp.*, 162 AD3d 1620, 1620-1621 [4th Dept 2018] [commonality satisfied because "one common legal issue dominates the claims of all putative class members, i.e., whether similarly situated employees who worked on public projects were deprived of the prevailing wages to which they were entitled"]; *Stecko*, 121 AD3d at 543 [commonality satisfied where the proposed class members' claims were predicated upon the alleged failure to pay prevailing wages and supplemental benefits]; *Kudinov*, 65 AD3d at 482 [finding that commonality existed "given the same types of subterfuges allegedly employed to pay lower wages"]).

The LIC Defendants' argument that individual issues predominate is unpersuasive. First, they allege that Frias never worked for LIC (NYSCEF Doc No. 247, Rattner aff, Ex 3 at 5), and that similar determinations on whether a particular class member had worked for LIC must be made. Whether LIC ever formally employed Frias, however, does not bear on the issue of class certification as plaintiffs rely, in part, on an alter ego theory of liability (*see Perez*, 203 AD3d at 553-554 ["plaintiffs sufficiently alleged that defendant Regulator is the alter ego of defendants LIC and/or Perno and may also be held liable for breach of contract"]). Further, "[t]he threshold determination made in connection with class certification is not intended to be a substitute for summary judgment or trial" (*Isufi v Prometal Constr., Inc*., 161 AD3d 623, 624 [1st Dept 2018], citing *Kudinov*, 65 AD3d at 482). To the extent the LIC Defendants contend the evidence fails to establish that Regulator and LIC are alter egos of the other, that argument is more appropriate for summary judgment. Therefore, while the contention that LIC never formally employed Frias or other class members may impact a motion for summary judgment, it does not bear on the

motion for class certification, especially because the Proposed Class Affiants, including Frias, state LIC employed them and they received paychecks bearing Regulator's name.

Second, the LIC Defendants contend the court must conduct individual inquiries to ascertain when each class member worked for LIC; whether the member worked on a public works project for LIC; if that member is entitled to receive prevailing wages on a particular public works project; and if a particular public works project is covered by a project labor agreement, whether the member was aware of that agreement's arbitration provision. These issues, however, center on each class member's damages, and "the fact that damages may vary by class member does not per se foreclose class certification" (*Andryeyeva v New York Heath Care, Inc*., 33 NY3d 152, 185 [2019]). Indeed, the court may try the liability issues in a class action first and allow a special master to handle the individual damages issues (*Maddicks*, 34 NY3d at 127). Moreover, these issues, including whether a particular project labor agreement precludes litigation, affect the entire class, and can be resolved by looking at "payroll and other documentary evidence" (*Kudinov*, 65 AD3d at 482).

Regulator's argument that commonality is lacking is equally unpersuasive. Regulator proposes that the Proposed Class Affiants may have worked for both LIC and Regulator at different times. Regulator posits that the Proposed Class Affiants never stated that each had worked exclusively for LIC. It claims this would explain why some putative class members received paychecks from LIC and from Regulator. Specifically, Regulator notes that Perez and Ramirez claim they stopped receiving Regulator paychecks in February 2015 (NYSCEF Doc No. 216, ¶ 4; NYSCEF Doc No. 217, ¶ 4). However, others, such as Hernandez, Molina Perez and Salguero continued to receive Regulator paychecks after March 2015 (NYSCEF Doc No. 214, ¶¶ 2 and 4; NYSCEF Doc No. 215, ¶¶ 2 and 4; NYSCEF Doc No. 213, ¶¶ 2 and 4). Regulator

argues that Campos' affidavit cannot be relied upon as the paychecks submitted with his affidavit bear the name "Rafael Campos" and "Rafael Campos Moreno" (NYSCEF Doc No. 268 at 12-15), and Campos has not explained this discrepancy. Regulator also challenges Zurita's affidavit, claiming it is deficient because he does not state whether Regulator ever employed him or whether he is making a claim for unpaid prevailing wages, supplemental benefits or overtime compensation. Regulator maintains that Zurita's affidavit is also unhelpful because he fails to estimate the number of projects LIC and Regulator worked on during the relevant time period and is deliberately ambiguous as to alleged dual role Augustin Serge Joseph played as Regulator's president and as LIC's foreman (NYSCEF Doc No. 219, Zurita aff, ¶¶ 2-4). These arguments, though, fail to demonstrate that the potential class members' individual issues predominate. Plaintiffs allege that Regulator is an alter ego of LIC and/or Perno, and common issues related to defendants' failure to pay prevailing wages, supplemental benefits and overtime compensation predominate over these individual issues.

3. Typicality

Typicality is met under CPLR 901 (a) (3) when the named plaintiffs' claims and defenses are the same (*Pludeman*, 74 AD3d at 423) or where the claims derive from the same practice, course of conduct and legal theory (*see C.H.*, 2022 NY Slip Op 02864, *1]).

Plaintiffs have demonstrated that their claims arise from the same practice, course of conduct and legal theory (*see Lewis*, 193 AD3d at 512 [finding that typicality was satisfied where the claims all stem from the alleged failure to pay prevailing wages]; *Stecko*, 121 AD3d at 543 [same]).

The LIC Defendants fail to demonstrate that this element has not been satisfied. The LIC Defendants contend that their defenses to this action differ from those Regulator raised. As an

example, the LIC Defendants claim that LIC never employed Frias, but as discussed earlier, plaintiffs are proceeding on an alter ego theory of liability against LIC, Regulator and Perno (*see Perez*, 203 AD3d at 553-554).

The LIC Defendants further argue that Perez did not work on all the public works projects identified in the complaint and that he is not pursuing a claim for overtime compensation. The excerpts from Frias' deposition transcript the LIC Defendants cite, though, do not support their contentions. The overtime question concerned a paycheck for the week ending April 10, 2015, and Frias acknowledged he received 11 hours of overtime pay in that specific paycheck (NYSCEF Doc No. 248, Benjamin M. Rattner [Rattner] aff, Ex 4 at 176). This testimony does not negate the allegation that he was not paid overtime on other projects or in other work weeks. Additionally, Perez's testimony as to the public works projects he worked on is not entirely clear. Perez confirmed that he did not work on the FDNY Rescue Company 2 project, an EMS station at 501 Zerega Avenue, and the Polonsky Theater for a New Audience, but he could not specifically recall or was unsure if he worked at the Park Avenue Armory, Middle College High School at LaGuardia, Ferry Point Park or the Brooklyn Academy of Music (*id*. at 157-160). In any event, "[t]ypicality 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 another example, the LIC Defendants contend that, contrary to Lozado's averment (NYSCEF Doc No. 220, ¶ 8), a certified payroll report dated April 15, 2016 for the Plymouth Paint Warehouse project shows that Lozado never worked there. However, the report discusses payroll only for the week ending July 3, 2015 (NYSCEF Doc No. 249, Rattner affirmation, Ex 5) and is insufficient to establish that Lozado never worked on that project. In fact, Lozado avers

that he worked on the Plymouth Paint Warehouse project for several months, including the week of July 3, 2015 (NYSCEF Doc No. 220, ¶¶ 21 and 26).

Regulator relies on the same arguments for commonality and typicality, but the arguments are unpersuasive, as above.

4. Adequacy of representation

In determining whether a named plaintiff will fairly and adequately represent the class under CPLR 901 (4), the court may consider whether there is a conflict of interest between the representative and the class; the representative's background, character, and familiarity with the lawsuit; whether the representative can act as a check on counsel; class counsel's competence and experience; and, the representative's financial ability to prosecute the action (*Pruitt*, 167 AD2d at 24).

Plaintiffs have demonstrated there is no conflict of interest between themselves and the class members, even though plaintiffs ceased working for LIC, Regulator and Perno in 2014 or 2016 (*see e.g. Nawrocki v Proto Constr. & Dev. Corp*., 82 AD3d 534, 535 [1st Dept 2011] [reasoning that plaintiffs, who ceased worked for defendants in 2004, are adequate representatives for employees who worked for defendants in 2007, as defendants did not challenge commonality and typicality had been satisfied]). The affidavits also show that each plaintiff possesses a "'general awareness of the claims' at issue" (*Stecko*, 121 AD3d at 543).

The LIC Defendants advance three arguments in support of their contention that plaintiffs are not adequate class representatives. First, the LIC Defendants claim that all three named plaintiffs have ulterior motives for pursuing this action. Generally, having an ulterior motive renders a named plaintiff an inappropriate class representative (*see Jara v. Strong Steel Door, Inc.*, 20 Misc 3d 1135[A], 2008 NY Slip Op 51733[U], *18-19 [Sup Ct, Kings County 2008]

[stating that plaintiffs' aim in commencing the action was to punish defendants, making them questionable representatives]). Here, the LIC Defendants' assertions are entirely speculative. The LIC Defendants claim that Perez has a "vendetta" against them because his brother, Sergio (Sergio), an LIC employee, died after suffering a stroke, and Perez testified for his sister-in-law against LIC in a Workers' Compensation proceeding (NYSCEF Doc No. 235, ¶ 10; NYSCEF Doc No. 248 at 11-15). Documents from the Workers' Compensation proceeding, though, appear to show that the claim Perez's sister-in-law brought has been resolved (NYSCEF Doc No. 274, Steve Arenson [Arenson] aff, Ex C at 12). The LIC Defendants further allege that Frias harbors a grudge because LIC refused to hire him and hired his brother instead (NYSCEF Doc No. 235, ¶ 9). Perez and Ramirez testified they hoped Perno would sponsor them for union membership (NYSCEF Doc No. 248 at 179; NYSCEF Doc No. 261, Rattner aff, Ex 17 at 115-117), but Perno testified that Perez and Ramirez could not have joined a union because they "both had fake Social Security Numbers that did not match their names or their information" (NYSCEF Doc No. 224, Mermelstein aff, Ex B at 267). However, whether Perez and Ramirez may have used false Social Security numbers does not invalidate their claims that they were not paid prevailing wages, supplemental benefits or overtime compensation, or establish that their interests conflict with those of the class.

The LIC Defendants next contend that plaintiffs are unsuitable representatives because none are willing to pay any of the costs associated with this litigation. Perez questioned why he had to pay anything if he was owed money (NYSCEF Doc No. 248 at 186). Ramirez replied "no" when asked if he would be willing to pay for expert testimony (NYSCEF Doc No. 261 at 48). Frias "imagine[d]" that his lawyer was paying the filing costs (NYSCEF Doc No. 246, Rattner aff, Ex 2 at 97). Although a class representative's financial ability is a factor to consider

(*see Pruitt*, 167 AD2d at 24), the court is satisfied that plaintiffs have the financial ability to represent the class, as the testimony cited above fails to establish that "plaintiffs lack the financial means to prosecute this case" (*Dabrowski v Abax Inc*., 84 AD3d 633, 635 [1st Dept 2011]). Further, plaintiffs aver in their reply affidavits that they understand they will be responsible for reimbursing their attorneys' expenses, disbursements and costs in the event they do not prevail in this action (NYSCEF Doc No. 277, Perez reply aff, ¶¶ 4 and 6; NYSCEF Doc No. 278, Ramirez reply aff, ¶¶ 4 and 6; NYSCEF Doc No. 279, Frias reply aff, ¶¶ 4 and 6).

The LIC Defendants also allege that plaintiffs cannot act as an adequate check on counsel. CPLR 901 (a) (4) is satisfied where the named plaintiff can act as a check on counsel (*Roberts v Ocean Prime, LLC*, 148 AD3d 525, 526 [1st Dept 2017]). That said, "rigid application of this requirement is inappropriate where, as here, the class is comprised of laborers" (*Nawrocki*, 82 AD3d at 535).

Last, class counsel has significant experience litigating class actions involving wage violations, albeit mostly in federal court (*see Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998] [stating that counsel adequately demonstrated its experience and skill in class action litigation]). Regulator did not expressly address this element.

5. Superiority

Plaintiffs have established that a class action is the superior method for resolving wage disputes (*see Lewis*, 193 AD3d 512, citing *Stecko*, 121 AD3d at 543; *Dabrowski*, 84 AD3d at 635 [concluding that a class action was superior "in view of the difference in litigation costs, the laborers' likely insubstantial means, and the modest damages to be recovered by each individual laborer, if anything"]). Joinder of possibly 43 or even 111 separate actions would be

impracticable (*see Galdamez*, 50 AD3d at 357 [granting certification because joinder in an action seeking to recover prevailing wages and supplemental benefits would have been impracticable]).

The LIC Defendants fail to demonstrate that this element has not been satisfied. Regulator did not address this prerequisite.

B. CPLR 902

"Most of the considerations [in CPLR 902] are implicit in CPLR 901" (*Gilman v Merrill Lynch, Pierce, Fenner & Smith, Inc*., 93 Misc 2d 941, 948 [Sup Ct, NY County 1978]). In view of the foregoing analysis under CPLR 901, the court finds that plaintiffs have also satisfied CPLR 902. It would be impracticable and inefficient to require class members to commence and defendants to defend separate actions in different venues (CPLR 902 [2] and [4]), and a class action will "conserve judicial resources, reduce litigation expenses, and avoid inconsistent outcomes" (*Roberts*, 148 AD3d at 526). It does not appear that there is other litigation pending against defendants related to the allegations raised in this action (CPLR 902 [3]). Managing this class action also will not be too difficult.

The LIC Defendants fail to demonstrate that this requirement has not been satisfied. Regulator did not raise an express argument addressing this requirement.

C. Notice

Plaintiffs also move for an order allowing them to disseminate a proposed Notice of Class Action Lawsuit (NYSCEF Doc No. 233, Mermelstein affirmation, Ex K).

CPLR 904 provides, in part, that:

> "(b) … reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs.
> (c) The content of the notice shall be subject to court approval. In determining the method by which notice is to be given, the court shall consider
> I. the cost of giving notice by each method considered

> II. the resources of the parties and
> III. the stake of each represented member of the class, and the likelihood that significant numbers of represented members would desire to exclude themselves from the class or to appear individually, which may be determined, in the court's discretion, by sending notice to a random sample of the class."

"Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice" (*Williams v Marvin Windows & Doors*, 15 AD3d 393, 395-396 [2d Dept 2005] [internal quotation marks and citation omitted]). The method for giving notice, though, must be "reasonably calculated to reach the plaintiffs" (*id*. at 396), and "[t]he law requires that the parties provide the best notice practicable under the circumstances to class members" (*Drizin v Sprint Corp*., 7 Misc 3d 1018[A], 2005 NY Slip Op 50661[U], *2 [Sup Ct, NY County 2005]).

Here, plaintiffs have not set forth the method and manner of the proposed notice to the class. Glen Larkin, Regulator's controller, submitted an affidavit stating that Regulator lacks responsive documents that predate August 2014 (NYCSEF Doc No. 254, Rattner affirmation, Ex 10, ¶ 6). Plaintiffs have not stated how the names for the proposed class members may be ascertained nor have they stated how they intend to furnish the proposed notice to the class.

As to the content of the proposed notice, the court observes that each affidavit from the Proposed Class Affiants was translated into English from Spanish, although the affidavits lacked both the original Spanish-language version and an affidavit from the translator stating his or her qualifications and that the translation was accurate (*see* CPLR 2101 [b]). Plaintiffs also testified through a Spanish interpreter (NYSCEF Doc No. 246 at 7; NYSCEF Doc No. 248 at 7; NYSCEF Doc No. 261 at 6). The proposed notice is written entirely in English, and plaintiffs have not shown that an English-only notice is appropriate in this instance. In addition, the proposed notice provides that an individual class member may decline to participate in the action by

contacting class counsel by mail or facsimile. The notice provides counsel's mailing address but not its facsimile number.

Finally, the LIC Defendants request an "opt in" provision as opposed to an "opt out" provision. This request is denied as CPLR 903 provides, in relevant part, that "[w]hen appropriate the court may limit the class to those members who do not request exclusion from the class within a specified time after notice." Thus, the statute envisions a provision allowing a class member to opt out of the class.

Accordingly, it is

ORDERED that the part of the motion brought by plaintiffs Johnny Perez, Arcadio Frias and Nestor Ramirez seeking class certification is granted; and it is further

ORDERED that the certified class shall consist of "All individuals employed by Long Island Concrete, Inc., Regulator Construction Corp. and Thomas J. Perno who furnished labor to these Defendants on various New York public and private works jobs, and who performed various types of concrete-related work, including but not limited to bricklaying, masonry, demolition, excavation, fireproofing, carpentry, and concrete-related work, from August 24, 2012 through the present. The defined class shall not include any clerical, administrative, professional, or supervisory employees"; and it is further

ORDERED that the part of the motion seeking to appoint plaintiffs Johnny Perez, Arcadio Frias and Nestor Ramirez as class representatives is granted, and said plaintiffs are appointed as class representatives; and it is further

ORDERED that the part of the motion seeking to appoint Arenson, Dittmar & Karban as class counsel is granted, and the court hereby appoints Arenson, Dittmar & Karban as class counsel; and it is further

ORDERED that part of the motion seeking an order approving dissemination of a proposed notice to the class is denied with leave to renew upon the submission of a revised proposed Notice of Class Action Lawsuit printed in both English and Spanish; inclusion of a facsimile number for appointed class counsel; and clarification of how the notice shall be given to all class members so as to afford them the best notice practicable.

6/6/2022
DATE

MELISSA CRANE, J.S.C.

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