SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

CHEREDA IVORY and JACQUELINE SISTRUNK, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

- v -

ALL METRO HEALTH CARE, OR ANY OTHER RELATED ENTITIES, ALL METRO HOME CARE SERVICES OF NEW YORK, INC., ALL METRO FIELD SERVICES WORKERS PAYROLL SERVICES CORP., ALL METRO AIDES INC., ALL METRO HOME CARE SERVICES INC., ALL METRO MANAGEMENT AND PAYROLL SERVICES CORP., and ALL METRO PAYROLL SERVICES CORP.,

Defendants.

----------X

INDEX NO. 160341/2017

MOTION DATE 06/16/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87

were read on this motion for CLASS CERTIFICATION.

LOUIS L. NOCK, J.

In this statutory wage and hour litigation, plaintiffs and putative class representatives Chereda Ivory and Jacqueline Sistrunk ("plaintiffs") move to amend their complaint and to certify a proposed class action, with the class defined as

> All individuals who performed home care services on behalf of defendants All Metro Health Care, All Metro Home Care Services of New York, Inc., All Metro Field Services Workers Payroll Services Corp., All Metro Aides Inc., All Metro Home Care Services Inc., All Metro Management And Payroll Services Corp., and All Metro Payroll Services Corp. (collectively "All Metro" or "defendants") as non-residential home care workers in the State of New York at any time between November 21, 2011 and today (the "Class Period").

So much of the motion that seeks to amend the complaint is granted, and the Second Amended Complaint in the form attached to plaintiffs' papers is deemed served and filed without

opposition. The motion for class certification is resolved as set forth below. The court assumes familiarity with the facts and prior history of this action as set forth in the decision of Hon. Barbara Jaffe dated September 18, 2018, denying defendants' motion to dismiss the complaint (NYSCEF Doc. No. 27).

As an initial matter, defendants argue that the Collective Bargaining Agreement ("CBA") which covered plaintiffs during their employment with defendants, as well as two subsequent memoranda of understanding ("MOUs") between defendants and 1199SEIU United Healthcare Workers East (the "Union"), require plaintiffs to forgo a class action and submit their dispute with defendants to binding arbitration. A purported waiver of a union member's right to pursue statutory claims before a judicial forum must be explicitly stated in the CBA (*Wright v Universal Mar. Serv. Corp.*, 525 US 70, 80 [1998]). "The inclusion of such claims must be unmistakable, so that the wording is not susceptible to a contrary reading" (*Lawrence v Sol G. Atlas Realty Co., Inc.*, 841 F3d 81, 83 [2d Cir 2016], *citing Wright* 525 US at 80-81). Thus, where a mandatory arbitration provision in a CBA lacks "the necessary explicit incorporation of statutory . . . requirements," there is no waiver (*Conde v Yeshiva Univ.*, 16 AD3d 185, 186 [1st Dept 2005]).

Here, the MOUs (NYSCEF Doc. Nos. 76 and 77) do not contain provisions regarding specific dispute resolution procedures, instead incorporating by reference the provisions of the CBA. To the extent that either of the MOUs references dispute resolution, the 2014 MOU says only that the parties to the MOU will meet in good faith to negotiate an alternative dispute resolution procedure related to claims under certain unspecified federal and state statutes (2014 MOU, NYSCEF Doc. No. 76, ¶ 27). To the extent the parties to the MOU later agreed to such a procedure, it is not specifically set forth in the record. The CBA itself provides that, following an internal grievance procedure, the union may submit to binding arbitration "a dispute arising

between the Union and the Employer concerning an alleged breach of a specific provision of [the CBA]" (CBA, NYSCEF Doc. No. 75, Art. XXV, § 1). As there is no specific reference to any statutory claims being subject to arbitration or any waiver of the right to bring a class action, plaintiffs cannot be held to have waived the right to seek redress before the court, either on their own behalf or in the form of a class action (*Conde*, 16 AD3d at 186). The case of *Abdullayeva v Attending Homecare Services LLC* (928 F3d 218, 223-224 [2d Cir 2019]), cited by defendants, supports the lack of waiver, as there the agreement at issue specifically referenced statutory claims as being subject to arbitration. Similarly, in *Agarunova v Stella Orton Home Care Agency, Inc.* (794 Fed Appx 138, 139-40 [2d Cir 2020]), the Second Circuit, in considering language similar to that in the 2014 MOU, found that such language was an unenforceable agreement to agree.

Having held that plaintiffs have not waived the right to bring this action, the court now considers whether it should certify the proposed class. CPLR 901 provides that a class action may be commenced where the class is so numerous as to render joinder impracticable, the class predominantly shares common questions of law and fact, the class representatives' claims are typical of the class, the class representatives will fairly protect the interests of the class, and a class action is superior to other available methods of resolving the controversy. In addition, the court is directed by statute to consider whether the putative class members have an interest in individually controlling the prosecution of separate actions, whether separate actions are impracticable or inefficient, the existence of any other litigation regarding the controversy, whether the forum is a desirable choice to resolve the dispute, and what difficulties will be encountered in managing a class action (CPLR 902). The statutory requirements are to be liberally construed (*Wilder v May Dept. Stores Co.*, 23 AD3d 646, 649 [2d Dept 2005]). "While

it is appropriate in determining whether an action should proceed as a class action to consider whether a claim has merit, this inquiry is limited, and such threshold determination is not intended to be a substitute for summary judgment or trial" (*Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 482 [1st Dept 2009] [internal quotation marks and citation omitted]). Courts should therefore err in favor of allowing the class action to proceed (*Pruitt v Rockefeller Ctr. Properties, Inc.*, 167 AD2d 14, 21 [1st Dept 1991]). "Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court" (*Kudinov*, 65 AD3d at 481).

Here, defendants do not challenge that plaintiffs have met the numerosity requirement. Instead, defendants argue that plaintiffs do not meet any of the other five requirements. At the core of the parties' dispute is whether plaintiffs and the putative class were fairly compensated under the New York State Department of Labor's ("DOL") 24-hour rule for home health aides (the "24-hour rule"). As set forth in the DOL's regulations, the minimum wage for a home health aide working a 24-hour period need not be paid during the aide's meal and sleep periods (12 NYCRR 142-2.1[b]). The DOL later expounded upon this requirement, stating that home health aides "be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals" (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 166 [2019], *citing* NY St Dept of Labor Op No. RO-09-0169 at 4 [Mar. 11, 2010]). If the aide does not actually receive five uninterrupted hours of sleep and three hours for meals, then those exclusions do not apply (*id.*). Defendants take the position that determining whether each member of the class actually received the required meal and sleep time for each shift so as to determine whether they would be paid appropriately is a fact-intensive inquiry, and thus common questions of law or fact do not predominate for the class, and a class action would

not be the most appropriate manner of resolving this controversy. Nor, defendants say, are plaintiffs' claims typical of the class, as plaintiffs did not frequently work 24-hour shifts for which such a calculation would be necessary.

The case of *Kurovskaya v Project O.H.R. (Office for Homecare Referral), Inc.*, a similar wage and hour litigation in which the Appellate Division, First Department, affirmed the decision to certify a class, is instructive. The court found the plaintiffs' initial submission of affidavit testimony, the defendant's policy manual, and paystubs to sufficiently establish, *inter alia*, that the defendant "did not have any system to ensure that home health aides received meal breaks and appropriate sleep benefits, despite the fact that it was only paying them for 12 hours out of a 24-hour shift" (*Kurovskaya v Project O.H.R. [Office for Homecare Referral], Inc.*, 194 AD3d 612, 613 [1st Dept], *appeal dismissed* 37 NY3d 1104 [2021]). Significantly, the court stated that at the certification stage, a putative class plaintiff need only demonstrate "that their claim is not a sham" (*id.*). Moreover, the court asserted, "[c]laims of uniform systemwide [wage] violations are particularly appropriate for class certification" (*id.*, *citing Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 184 [2019]).

Here, plaintiffs submitted affidavit testimony, time records, pay records, and defendants' policy regarding calling in and out for shifts. The court notes that the procedures for calling in and out to register that a particular aide is on duty for a 24-hour shift do not provide for reporting whether the aide has received the required meal and sleep breaks in order to justify payment for only 13 hours out of the shift (NYSCEF Doc. No. 59). Accordingly, plaintiffs have sufficiently demonstrated that their claim is not a sham, that common questions of law or fact predominate, and that a class action is the most appropriate means of resolving this controversy. Additionally, and for the same reasons set forth in *Kurovskaya*, the court finds that plaintiffs have adequately

shown that their claims are typical of the class and that they will adequately represent the class (*Kurovskaya*, 194 AD3d at 613 ["Both named plaintiffs submitted evidence to show that they were not paid proper wages by defendant due to its policies, and the motion court properly determined that these claims are typical of the claims of the proposed class"]).

Accordingly, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served; and it is further

ORDERED that the defendant shall serve an answer to the second amended complaint or otherwise respond thereto within 20 days from the date of filing hereof; and it is further

ORDERED that the motion by plaintiffs to certify this action as a class action pursuant to CPLR 901 and 902 is granted; and the class is to be defined as:

> All individuals who performed home care services on behalf of defendants All Metro Health Care, All Metro Home Care Services of New York, Inc., All Metro Field Services Workers Payroll Services Corp., All Metro Aides Inc., All Metro Home Care Services Inc., All Metro Management And Payroll Services Corp., and All Metro Payroll Services Corp. (collectively "All Metro" or "defendants") as non-residential home care workers in the State of New York at any time between November 21, 2011 and today (the "Class Period").

And it is further

ORDERED that publication of notice to the members of the class shall proceed in accordance with the annexed publication order of even date herewith; and it is further

ORDERED that counsel are to appear for a preliminary conference in Room 1166, 111 Centre Street on March 15, 2023, at 10:00 AM.

This constitutes the decision and order of the court.

ENTER:

12/12/2022
DATE

LOUIS L. NOCK, J.S.C.

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