At an IAS Term, Part 9 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 12th day of April, 2023.

P R E S E N T:
HON. DEBRA SILBER,
Justice.

- X

LATISHA THOMAS and AIESHAI LONDON,
Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

- against -

JRCRUZ CORP.,

Defendant.

- X

JRCRUZ CORP.,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.

- X

DECISION / ORDER

Motion Sequence 5 & 6
Index No. 511297/2020

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion and Affidavits (Affirmations) Annexed	91-116; 122-125
Opposing Affidavits (Affirmations)	126-156; 158-160
Reply Affidavits (Affirmations)	157; 162-165

Upon the foregoing papers, plaintiffs Latisha Thomas and Aieshai London move (MS #5) for an order, pursuant to CPLR 901: 1) certifying their breach of contract, unjust enrichment and lack of required wage notice claims as class action claims on behalf of the proposed class of "all persons employed by defendant [JRCruz Corp.] any time since June 30,

2014 through the entry of judgment in this case who worked as non-union flaggers on public works projects in New York City[;]" 2) appointing counsel for plaintiffs as class counsel; 3) authorizing plaintiffs to use the proposed notice as the requisite class action notice; and 4) directing defendant to provide the names, telephone numbers, last known addresses and email addresses of all proposed class members, as well as "Social Security Numbers for all Class Members whose Notice is returned as undeliverable without a forwarding address[.]" Defendant moves (MS #6) for an order, pursuant to CPLR 901: 1) granting defendant an order dismissing plaintiffs' complaint; or, in the alternative; 2) dismissing only plaintiffs' third cause of action, their class-based Labor Law §198 (1-b) claim. The third-party action was commenced on June 10, 2022, after plaintiffs' motion was filed. The third-party defendant has not submitted any papers with regard to either motion.

Background

Plaintiffs commenced the instant action by electronically filing a summons and verified complaint in this court on June 30, 2020. As relevant to the instant motion, the named plaintiffs allege that they are "former construction flaggers" who, from December of 2018 to March of 2021, worked for defendant on several public works projects on the roadways of New York City. "Flagger" activities involved, while on or near public works construction sites, "holding stop/go signs, directing pedestrian and vehicular traffic to stop or walk/drive around construction sites, directing construction vehicles in and out of the construction zones, positioning barrels and cones in and around the construction site, positioning caution tape in and around the construction site, sweeping the construction site, and walking behind the construction vehicles as they move from one place at the construction site to another."

The subject construction projects were pursuant to contracts entered into between defendant and New York City municipal departments, including but not limited to the New York City Department of Transportation and the New York City Department of Design and Construction. The main allegation is that construction contractors, such as defendant herein, that perform work pursuant to public works contracts, are required by the New York State Labor Law to pay certain employees a minimum local prevailing wage rate, including any applicable supplemental benefits and overtime for hours worked beyond 40 hours per week, eight hours per day, for hours worked on Saturdays and Sundays and hours worked during the evening. These "prevailing wage schedules" are generally either annexed to the applicable public works contract or are expressly or impliedly incorporated into them.

Plaintiffs claim that their work qualified them to receive "prevailing wages" under the Labor Law; however, defendant here failed to pay them accordingly. Moreover, plaintiffs contend that the Labor Law required defendant, upon employing them, to provide them with formal wage notices that contained specified information, such as the name of the employer, the regular pay rate, overtime pay rate and the regular pay day. Plaintiffs further claim that defendant failed to provide these required wage notices. Moreover, plaintiffs allege that these practices—the failure to pay prevailing wages for public roadway work, and the failure to provide wage notices—constituted defendant's pattern with respect to all employees. Plaintiffs assert breach of contract claims (and alternatively, unjust enrichment claims) for the unpaid prevailing wages, as well as claims for statutory damages which arise because of defendant's failure to provide the requisite wage notices. Additionally, given defendant's practices with respect to its employees, plaintiffs contend that these claims should be certified

as class action claims on behalf of the applicable current and former employees of defendant from June 30, 2014, six years prior to the date of commencement.

On October 20, 2020, defendant electronically filed an answer to the complaint which denied the allegations therein. As relevant to the instant motions, defendant asserted, among other things, general denials that plaintiffs performed work that qualified them for prevailing wages, and averring that the stated claims are not proper for the class action mechanism. Discovery then commenced.

Pursuant to CPLR 901, a timely motion for class certification must be made within 60 days after the last answer is due. On January 27, 2021, plaintiffs moved for an extension of time to move for certification of the proposed class, arguing, in essence, that at least some discovery was necessary before a motion for class certification could reasonably be made. Defendant opposed the motion, arguing, among other things, that plaintiffs needed no discovery to timely move for class certification. By order dated May 14, 2021, another justice of this court, noting that it has "discretion to extend the deadline upon good cause shown, such as plaintiff's need to conduct class certification discovery," found that such good cause existed, and extended the deadline to "within 60 days after defendant's deposition is held."

More discovery and motion practice ensued; however, defendant's deposition was not held and a motion for class certification was not made. Concurrently, the parties were involved in settlement negotiations, and defendant, apparently frustrated with plaintiffs' negotiating tactics, moved for an order essentially compelling plaintiffs to accept a settlement offer and imposing sanctions against plaintiffs for bad-faith negotiations. Plaintiffs opposed

the motion, arguing, among other things, that their settlement negotiations were consistent with defendant's potential exposure, given other "flagger" prevailing-wage class action cases. By order dated May 27, 2022, this court denied the defendant's motion, but imposed a firm deadline for plaintiffs to move for class certification, specifically directing plaintiffs to e-file their motion for class certification within 60 days, that is, on or before July 26, 2022.

On July 26, 2022, plaintiffs made the instant motion for an order, among other things, certifying the proposed class. Defendant responded with the instant motion to dismiss. These are the motions presently before the court.

Plaintiffs' Arguments in Support of Their Motion

In support of their motion for an order certifying the proposed class, plaintiffs first assert that they were, at all relevant times, employed by defendant as non-union construction-site "flaggers" performing traffic and pedestrian safety duties; specifically, their work involved directing pedestrians, street vehicles and construction vehicles toward and away from construction site areas. Also, they claim that they performed other construction site duties, including placing barriers, cleaning, sweeping and carrying tools. At all relevant times, they continue, the named plaintiffs and putative class members performed their work with the primary purpose of ensuring the safety of the public and the construction crews at and within close proximity of construction sites.

Plaintiffs next state the factors, set forth in Article 9 of the CPLR, that should be considered on a motion for class certification. Specifically, plaintiffs note that parties seeking class certification must demonstrate numerosity of class members, commonality of questions of fact and or law, typicality of the named plaintiffs' claims, adequacy of the class

representatives, and superiority over other available methods of adjudicating the controversies. Moreover, plaintiffs aver that courts should consider the interests of members of the class in individually controlling the prosecution or defense of separate actions, the impracticability or inefficiency or prosecuting or defending separate actions, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, the desirability or undesirability of concentrating the litigation of the claim in the particular forum, and the difficulties likely to be encountered in the management of a class action. Lastly, plaintiffs note that the case law states that the decision whether to grant a motion for class certification rests within the sound discretion of the court.

Next, plaintiffs argue that although it is their burden to demonstrate that the class-certification requirements of CPLR §901 (a) are satisfied, the requirements should be liberally construed when the court considers granting class action certification. Indeed, plaintiffs claim that any doubts must be resolved in favor of class certification. Moreover, they argue that the court must accept the allegations in the complaint as true for class certification purposes, and any inquiry into the merits of the claims must be limited and not intended as a substitute for summary judgment or trial. Given the pleaded facts, plaintiffs conclude that class certification is appropriate here.

Further, plaintiffs contend that class certification is appropriate in the context of prevailing-wage and wage-notice claims on behalf of all non-union flaggers who worked for defendant in New York City at any time during the period specified. Plaintiffs argue that courts have consistently recognized that prevailing-wage claims are suited to class litigation.

Indeed, plaintiffs claim that class litigation is preferred in these instances. Plaintiffs note that such cases are routinely approved for class certification.

Plaintiffs next address the requirements and considerations in connection with questions of class certification as applied to the instant matter. Plaintiffs state that there are no unique facts about flaggers, such as the named plaintiffs, that are relevant to the class certification inquiry. No facts meaningfully distinguish the named plaintiffs from any other construction worker alleging entitlement to prevailing wages, plaintiffs aver. As for numerosity, although there is no algorithm used to determine whether this criterion has been met, courts have held that the requirement is presumably met if the class has at least 40 members. Here, plaintiffs contend that the preliminary list of class members—non-union employees of defendant who flagged traffic at construction sites in the relevant time period—has at least 230 members. In this regard, plaintiffs point out that this list was compiled from payroll records and sign-in logs produced by defendant. Plaintiffs reason that, therefore, joinder of all class members is impracticable, and plaintiffs have thus met the numerosity requirement.

Plaintiffs next address the issue of commonality. Plaintiffs claim that the court must determine whether the proposed class action asserts a common legal grievance—put differently, whether common issues predominate over or outweigh any subordinate issues that pertain to individual members of the class. Plaintiffs emphasize that, similar to numerosity, the question of whether common questions predominate should not be determined by a mechanical test; the court, argue plaintiffs, should instead determine whether the use of a class action would be more efficient. Further, plaintiffs contend that the court should take into

consideration whether the class action form would promote uniformity of results for similarly situated workers. Plaintiffs argue that courts routinely find commonality in cases such as the instant matter, where the main allegations are that the defendant used a common scheme to affect the wages of its employees, and that the scheme was illegal under the Labor Law. Indeed, plaintiffs argue, defendant's pleadings here suggest such a scheme. Plaintiffs reason that since each proposed class member was subjected to the same allegedly unlawful wage policy, the defendant's liability is essentially identical for each member. Also, plaintiffs add, common facts permeate the proposed class action, since the subject flaggers were required to undergo the same safety training, were assigned and supervised in the same manner, were instructed that they were responsible for ensuring both the public's and construction crews' safety, and were all similarly requested to perform additional duties. Plaintiffs reason that since all flaggers had largely similar duties, the associated legal questions lend themselves to common determinations. In sum, plaintiffs claim that if defendant is liable to one putative class member for failure to pay prevailing wages, defendant is liable to all class members for the same violation; similarly, if defendant is liable to one putative class member for wage notice violations, defendant will have identical liability to each member. Plaintiffs conclude that the commonality and predominance requirements are thus satisfied.

Moreover, the named plaintiffs contend that their claims are typical of the claims that would be asserted by the proposed class members. Plaintiffs note that the typicality requirement is satisfied when the representatives' claims derive from the same conduct that underlie the claims of the proposed class members and are based on the same legal theory. Here, plaintiffs continue, similar events and practices occurred with respect to both the

representative members and the proposed members. Moreover, plaintiffs assert that courts have held in similar wage cases that differences among class members about work site locations, job descriptions, projects and specific hourly rates are nevertheless consistent with typicality, especially when calculating class-wide damages can be accomplished by reference to employment documents. Indeed, plaintiffs claim, the only immutable requirement relevant to typicality is that the named plaintiffs' claims must not be antagonistic to or in conflict with the interests of proposed class members. Plaintiffs conclude that the typicality requirement is thus satisfied here, because the representatives' claims and the claims of all proposed class members arise from the same conduct, the representatives and the proposed members were subjected to the same unlawful wage practices, and all claims are based on the same legal theories.

Next, counsel for the named plaintiffs argue that they should be appointed as class counsel. Counsel for plaintiffs aver that their firm is highly experienced in complex wage and hour litigation generally, and is specifically experienced with prevailing-wage claims. They further point out that they have filed several actions on behalf of construction site flaggers seeking prevailing wages. Also, counsel notes that courts have repeatedly found that the firm has the necessary expertise to be appointed class counsel in these types of actions.

Plaintiffs point out that before a class can be certified, a court must find that the named plaintiffs are in a position to adequately protect the interests of the class members—specifically, the interests of the named plaintiffs may not be adverse to those of the class members. Here, plaintiffs continue, defendant has uniformly classified the named plaintiffs and proposed class members as non-union flaggers or "crossing guards" who do not qualify

for the prevailing-wage protections of the Labor Law. Plaintiffs also aver that they, as well as every proposed class member, are entitled to the same statutory damages stemming from defendant's failure to provide the required wage notices. Plaintiffs claim that the record demonstrates that there are no conflicts between the named plaintiffs and the proposed class members, and no potential problems which would prevent counsel for the named plaintiffs from adequately and vigorously representing the interests of the proposed class members. Therefore, plaintiffs conclude that both the adequacy requirements for the class representatives and for the class counsel are satisfied here.

Moreover, plaintiffs argue that the class action mechanism is the superior method for the resolution of the claims of the named plaintiffs and the proposed class members here. Plaintiffs reiterate that courts of this State have frequently opined that the class action mechanism is the superior vehicle for resolving wage disputes, since the damages allegedly sustained by any individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic opportunity for individual litigation. Plaintiffs emphasize that their proposed class has more than two hundred members, and that joinder would be impractical. Moreover, plaintiffs contend that it would be difficult for the proposed class members to pursue individual claims, since the expense and time of multiple trials would be wasteful and duplicative. Instead, plaintiffs aver, resolving the common issues on a class-wide basis will create uniform resolution of the issues; class litigation will also achieve economies of scale for putative class members, conserve judicial resources, avoid repetitive proceedings and prevent inconsistent

adjudications. For these reasons, plaintiffs conclude that the proposed class action here is superior to any alternative means of obtaining judicial relief.

Plaintiffs next address the additional factors that a court must consider before granting class certification. On the issue of whether wage-related class action cases are considered manageable, plaintiffs note that courts have held that in unpaid wage actions, a class action is the preferred and best way to adjudicate disputes. Moreover, plaintiffs state that there are currently no other known wage actions against this defendant pending on behalf of any class member. Plaintiffs also point out that many members of the proposed class are current employees of defendant; given the possibility that employees would be dissuaded from pursuing individual claims by fear of reprisal, plaintiffs argue that the class action mechanism is especially appropriate. Plaintiffs aver that this forum is appropriate because many of defendant's construction sites and public works projects where the proposed members worked were located in Kings County, and given the types of evidence (payroll records and party testimony) necessary to establish liability with regard to every proposed member, it would promote efficiency and judicial economy to concentrate the claims in one forum. Moreover, plaintiffs claim that granting class certification will not materially change the evidence that will be adduced, the witnesses who will be called, or the legal questions to be decided in every member's claim.

Plaintiffs also emphasize that since defendant has produced payroll records, the proposed class members are easily identifiable and damages can be readily calculated; indeed, plaintiffs submit a preliminary analysis of damages based on defendant's disclosed records, and this analysis can easily be updated. Given the ease of such determinations, plaintiffs

urge that denying class certification on manageability grounds is disfavored by courts. Therefore, plaintiffs conclude, because this is the appropriate forum and there are no particular difficulties concerning the management of the class action, class certification is appropriate.

Lastly, plaintiffs address the proposed class action notice. Plaintiffs point out that the class notice is subject to court approval. Plaintiffs note that the proposed class notice [Doc 114] informs class members of their right to opt out of the class action; plaintiffs add that the proposed notice is based on the notice approved by the Supreme Court, New York County, in a similar wage class action. In order to facilitate notice, plaintiffs state, defendant must be compelled to provide the names, last known addresses, phone numbers and email addresses of applicable workers employed by defendant during the time period from June 30, 2014 to present. Plaintiffs further claim that defendant must be compelled to produce the Social Security Numbers of any class member if the notice to that member is returned by the postal service as undeliverable and without a forwarding address. Plaintiffs characterize this discovery as standard in wage class actions.

In sum, plaintiffs argue that this matter is, in all respects, a wage claim class action for which certification is both preferred and routinely granted by courts of this State. For these reasons, plaintiffs conclude that their motion should be granted in its entirety.

Arguments in Support of Defendant's Motion

In support of its motion for an order dismissing plaintiffs' complaint, both their prevailing wage claims and their wage notice claims, defendant first asserts that plaintiffs' motion for class certification is untimely. Defendant points out that the deadline contained in Article 9 of the CPLR for motions for class certification is sixty days after a defendant's

answer is due. Here, defendant notes that according to a stipulation, it was required to interpose an answer no later than October 1, 2020. Accordingly, defendant continues, plaintiffs were required to move for class certification no later than November 30, 2020, which was sixty days from the answer deadline. However, defendant argues, plaintiffs failed to do so.

Defendant claims that nearly two months later, plaintiffs moved for an order granting them a retroactive extension of time to move for class certification, based on the alleged need for pre-certification discovery; defendant states that it "vigorously opposed" this motion on the 60-day deadline ground. Nevertheless, continues defendant, by order dated May 14, 2021, another justice of this court granted plaintiffs' motion and extended the time to move for class certification. Specifically, the order directed plaintiffs to move for class certification "within 60 days after defendant's deposition is held." Defendant argues that, based both on the court's discovery directives and discussions with plaintiffs' counsel, the understanding was that all party depositions would be concluded by May 21, 2021; therefore, defendant argues, the underlying order did not "serve as some sort of open-ended license to delay, seemingly indefinitely, filing a motion for class certification." In other words, defendant suggests that it was "understood" that plaintiffs would have 60 days from May 21, 2021 to timely move for class certification.

Defendant points out that plaintiffs did not move for class certification by that date. Defendant claims that instead of depositions, settlement negotiations ensued—although not necessarily in good faith—which led defendant to move for an order "directing the parties, and their counsel, to appear for a settlement conference" and for sanctions. Defendant, in

connection with that motion, claimed, in essence, that counsel for plaintiffs were negotiating for a settlement in bad faith, given that in this matter, the defendant's liability would be based on easily computable prevailing wage damages and the statutory damages for the wage notice claims. Defendant points out that this court, during oral argument of the motion, expressed concern with the open-ended class certification deadline—60 days after depositions, without a firm date. Defendant states that this court then issued an order which denied the defendant's motion but specified a deadline for plaintiffs' motion for class certification, to wit: July 26, 2022.

Defendant acknowledges that the CPLR allows a court to extend the statutory deadline—60 days after the answer is due—for a plaintiff to move for class certification. However, defendant argues, such an extension should be granted only when the plaintiff shows "good cause." Here, defendant claims, nowhere in the arguments supporting plaintiffs' motion have they even so much as acknowledged the untimeliness of their motion for class certification, much less attempted to make any showing of the requisite "good cause." Defendant asserts that plaintiffs have, by their litigation tactics, wrongfully obtained a twenty-month extension of time. As the answer was filed on October 2, 2020, the ordinary deadline for a class certification motion was December 1, 2020, but defendant claims that plaintiffs were allowed to move for class certification on July 26, 2022—without making any "good cause" showing. Defendant concludes that plaintiffs should not be permitted to move for class certification at this late date.

Alternatively, defendant argues that the May 14, 2021 order, which granted plaintiffs an extension of time to move for class certification, implicitly did contain a firm deadline for

plaintiffs to make such a motion. Defendant argues that counsel for plaintiffs made, in the papers supporting that motion, a sworn representation that all party depositions would be concluded by May 21, 2021. Accordingly, defendant argues, the court could not have intended to extend the class certification motion deadline beyond July 20, 2021. To interpret this order otherwise, defendant claims, would mean that the court intended the order to "eviscerate the statutory regime" limiting the time period for a class certification motion, and instead allow plaintiffs "carte blanche to defer, indefinitely, their filing of such motion." Defendant avers that the Justice who wrote the earlier decision "inadvertently neglected . . . to explicitly tether the deadline for the filing of Plaintiffs' motion for class certification to the May 21, 2021, date by which [plaintiffs' counsel] had affirmed that all depositions would be concluded[.]"

In short, defendant argues that plaintiffs have taken unfair advantage in the litigation by repeatedly asking for and obtaining extensions of the deadline for moving for class certification. Defendant claims that plaintiffs have shown no "good cause" for waiting until July 26, 2022 to make a motion that was, pursuant to the CPLR, timely only if made on or before December 1, 2020. Defendant characterizes plaintiffs' litigation tactics as abusive, performed in bad faith and cynical. For these reasons, defendant concludes that plaintiffs' motion is untimely and should not be considered, and that all of the class action claims should be dismissed with prejudice.

Alternatively, defendant argues that the claims in plaintiffs' third cause of action, which allege that defendant failed to provide wage notices, must be dismissed. Defendant notes that Labor Law §195 (1-b) imposes damages for an employer's failure to provide

requisite wage notices; defendant claims that since these damages are non-waivable and statutory, these damages are, therefore, penalties. Defendant contends that article 9 of the CPLR is clear: penalties are not available in class actions unless the underlying statute that creates the penalty specifically authorizes use of the class action mechanism. Since Labor Law §195 (1-b) does not do so, defendant argues that plaintiffs may not litigate the question of defendant's liability under §195 (1-b) via a class action. Therefore, defendant claims that, insofar as plaintiffs' wage notice allegations are class claims, these claims must be dismissed. Defendant concludes that, for these reasons, this court must deny plaintiffs' motion and grant defendant's motion dismissing the complaint, or, in the alternative, dismiss plaintiffs' third cause of action regarding wage notices.

Plaintiffs' Arguments in Opposition

In opposition to defendant's motion, plaintiffs first allege that there is no merit to defendant's argument that their class certification motion was untimely. More specifically, plaintiffs claim that their class certification motion was timely filed despite the delays precipitated by defendant. Moreover, plaintiffs claim, defendant's arguments are almost exclusively based on alleged "understandings" never reduced to writing or a directive contained in this court's orders. Plaintiffs claim that the court should not consider defendant's characterization of unwritten intentions. To the contrary, plaintiffs aver, all of the orders that imposed deadlines for the class certification motion are straightforward and unambiguous. First, plaintiffs note, the order dated May 14, 2021 granted their motion for an extension of time to move for class certification and imposed a deadline of sixty days after defendant's deposition. Second, plaintiffs note, this court's order dated May 27, 2022

directed plaintiffs to move for class certification no later than July 26, 2022. Plaintiffs further note that the instant motion for class certification was timely filed under the explicitly stated deadline of the most recent applicable order. For these reasons, plaintiffs argue that the court should ignore defendant's protestation that an "understanding" required plaintiffs to move for class certification earlier; the court, plaintiffs continue, found good cause—plaintiffs' need for discovery with respect to the proposed class—for plaintiffs' belated motion and extended the deadline accordingly.

In any event, plaintiffs press, any delay in moving for class certification was brought on by defendant. Plaintiffs note that they are, to date, still waiting for defendant to produce wage and hour documents, including daily sign-in logs for 2021 and 2022 and certified payroll reports for the time period from July 2020 through the present. Plaintiffs point out that they moved for class action certification within the time period set by this court despite defendant's failure to produce a witness for a deposition. For these reasons, plaintiffs conclude that the court should ignore defendant's arguments concerning the alleged untimeliness of the class certification motion.

Plaintiffs also oppose defendant's arguments concerning Labor Law §198 (1), the statute requiring employers to provide workers with applicable wage notices and which provides for remedies if employers fail to do so. Specifically, plaintiffs continue, defendant is confusing two separate subsections of this statute and the different case decision concerning them. Plaintiffs state that §198 (1-a) allows workers to recover "liquidated damages" for certain underpayments of wages; plaintiffs add that aggrieved workers can recover up to three times the underpayment, depending upon whether the employer's conduct was willful.

Plaintiffs acknowledge that some courts have held that claims for damages pursuant to §198 (1-a) cannot be brought as class actions, following the general rule in this State that the class mechanism is generally not allowed for the recovery of statutory "liquidated damages" and penalties. However, plaintiffs argue, §198 (1-b) contains a distinct provision; this subsection simply allows for a court to award "damages." Plaintiffs assert that this award is discretionary, and not (in contrast with §198 [1-a]) dependent on the willfulness of an employer's failure to provide requisite wage notices. More importantly, plaintiffs add, §198 (1-b) does not provide for a fixed amount of damages, but provides a weekly rate, up to a cap; plaintiffs reason that, therefore, these damages are intended to compensate for actual harm incurred by workers over time, and are not penalties. Plaintiffs note that courts have generally held that statutory damages that are intended to compensate are not considered penalties or "liquidated" damages; accordingly, plaintiffs argue there is no impediment to using the class action mechanism to recover statutory compensatory damages. For this reason, plaintiffs conclude that this court should deny defendant's motion insofar as it seeks an order dismissing plaintiffs' class-wide wage notice claims as set forth in their third cause of action.

Defendant's Arguments in Opposition

In opposition to plaintiffs' motion, defendant argues that plaintiffs have not, and cannot, satisfy the class action requirements of CPLR 901. First, defendant points out that a proponent of class certification must show that the class is so numerous that joinder of all members is impracticable. Defendant contends that only individuals actually aggrieved by the offending conduct may count toward the numerosity requirement. In contrast, here,

defendant claims, plaintiffs seek to certify a class of "all persons employed . . . from June 30, 2014 through entry of judgment in this case who worked as non-union flaggers on public works projects in New York City." Defendant claims that this class description is insufficient, since it is not limited to workers that (allegedly) were not paid prevailing wages despite being entitled to receive them. Defendant emphasizes that not all individuals who work on public projects are entitled to prevailing wages; only those workers actually performing tasks that fit a particular classification are entitled to such compensation. Defendant adds that it is not sufficient that a plaintiff merely worked on the same construction project as other prevailing wage employees to establish a right to a prevailing wage; indeed, defendant posits, workers on the same construction site or project may not be in the same trade or occupation for purposes of eligibility for the prevailing wage rate. Defendant urges that the necessary inquiry is about the nature of the work actually performed by the workers in question. Defendant maintains that courts of this State have repeatedly acknowledged that certain tasks and occupations, although performed at or near a public works construction site, are nonetheless ineligible for receipt of prevailing wages. Defendant emphasizes that the purpose of the "prevailing wage" statute is to ensure that laborers, workers, and mechanics performing "construction-like labor" on public projects are paid the applicable prevailing wages.

Here, defendant claims that plaintiffs' assertions that the members of the proposed class performed tasks beyond those of a typical crossing guard and more akin to those of a "flagger" are uncorroborated, with "boilerplate affidavits." Defendant argues that the record contains no evidence that any putative class member was actually engaged in "construction-

like labor" while employed by defendant. Moreover, defendant adds, the courts have held that workers who direct traffic are akin to crossing guards and are thus not protected by the prevailing-wage laws. To the extent that the pleadings state otherwise, defendant argues that the statements are conclusory, and conclusory averments in pleadings or affidavits are insufficient to demonstrate satisfaction of the class action requirements. Indeed, defendant continues, the record suggests that a case-by-case analysis of the tasks actually performed by each worker will be necessary to determine which workers are eligible to be placed in the proposed class, and, as such, the class mechanism is inappropriate here. Defendant asserts that plaintiffs' motion should be denied on this ground alone.

Defendant also claims that plaintiffs have failed to establish the requisite commonality or typicality. Defendant notes that plaintiffs seeking class certification must demonstrate that common questions of law or fact predominate over any questions which only affect individual members, and that the claims of the named plaintiffs must be typical of those of the members of the proposed class. Defendant argues that plaintiffs' contentions about numerosity also demonstrate that class certification must be rejected; specifically, defendant argues that if individualized proof is required for the claims alleged, or if there are a preponderance of individual factual questions with respect to individual class members, commonality is lacking. Here, defendant avers, the entitlement of a proposed class member to a prevailing wage is inherently fact-specific, as the prevailing wage law applies only to specifically enumerated kinds of work. Defendant adds that any work performed by proposed class members other than the eligible kinds of work does not entitle the worker to the prevailing wage. Defendant also claims that plaintiffs' blanket characterization of the proposed members as "flaggers" is

misleading, and, if class certification is allowed, the court will have to determine what percentage (if any) of any class member's work qualifies for a prevailing wage. Defendant notes that courts have held that, if the amount of damages for each individual worker has to be separately investigated and established, the class action mechanism is inappropriate. Here, defendant argues, individualized and highly fact-intensive inquiries will be required in order to establish, inter alia, not only each member's prevailing wage eligibility, but also the number of hours, if any, that each individual spent performing eligible tasks. These individualized inquiries, defendant argues, demonstrate that plaintiffs cannot show that they have complied with the typicality or commonality requirements of a class action. Defendant concludes that this is an additional reason to deny plaintiffs' motion.

Next, defendant asserts that plaintiffs and their counsel are inadequate representatives for the proposed class. In this regard, defendant notes that class representatives are charged with making decisions reasonably, in good faith, and in the interests of the majority of the class members. Defendant argues that the actions of plaintiffs' counsel herein demonstrate a lack of adequacy. Defendant points out that, here, it has offered plaintiffs "full satisfaction on their claims, inclusive of maximum statutory penalties and prejudgment interest" only to have the settlement offer rejected. Moreover, defendant continues, the counteroffer made by plaintiffs' counsel (which defendant rejected) would cause plaintiffs to receive a lower settlement, while increasing the contingency fee received by their attorneys. Defendant characterizes this as "cynicism" and indicative of bad faith, and further points out that plaintiffs (through counsel) have "suspiciously expressed a purportedly selfless desire" to assist their "fellow flagger co-workers at JRCruz to recover what they are owed[.]"

Defendant notes that at least one court has expressed concern about class representative adequacy in similar circumstances, and has denied class certification on the ground, essentially, that the litigation was excessively "lawyer-driven." Lastly, and further to that point, defendant asserts that "counsel [for plaintiffs] are serial filers of putative prevailing wage and wage-and-hour class and collective actions" [Doc 123 Page 8]. In sum, defendant argues that counsel for plaintiffs are litigating this action in a manner which subordinates the interests of the proposed class members to the law firm's pecuniary gain; for this reason, defendant urges, the motion for class certification should be denied on the additional ground of lack of adequacy of representation.

Next addressing the ancillary issues involved with class certification, defendant asserts that the proposed class notice is improper and must be modified. Defendant points to plaintiff's contention that the proposed notice is substantially similar to a notice that was approved in a similar action. However, defendant claims that the notice in the similar action was not objected to; here, in contrast, objections exist. First, defendant reiterates, as was argued in support of its motion to dismiss the class claims, that any reference to Labor Law §195 (1-b) (wage notice claims) is not properly in a class notice, as such claims may not be pursued via a class action. Next, defendant contends that the proposed notice is also improper because it fails to apprise potential members that any Labor Law §195 (1-a) claims they have will be waived unless they either join or timely opt out. Also, defendant continues, the proposed notice affords potential class members merely 30 days in which to timely opt out; defendant argues that "[s]uch a truncated opt-out period, coupled with the public's general disregard for class notices, all but guarantees that a significant number of potential

class members will be deemed, through mere inadvertence, to have joined the class[.]" Defendant characterizes the proposal of a 30-day opt-out period, as opposed to the customary 60-day, is yet another deliberate attempt by plaintiffs' counsel to ensure the creation of as large a class as possible. Lastly, defendant asserts that the proposed notice is improperly overbroad, both because it includes people who performed work that does not qualify for prevailing wages and it includes workers who, in fact, were paid the wages required by the prevailing wage law. In sum, defendant concludes that the proposed class notice does not ensure either that the proposed members are "fully made aware of their rights and the consequences of class joinder" or that they are "afforded a meaningful opportunity to duly consider their options, and determine whether it is, in fact, in their best interests to join the class."

Lastly, and again assuming that this court grants class certification, defendant claims that plaintiffs are not entitled to the social security numbers of the proposed class members. If required, defendant asserts that it will provide contact information for the proposed members, in order to facilitate notice, which class members are customarily entitled to. However, defendant claims that, class action representatives are not entitled to social security numbers absent a showing that mailed notices have been returned as undeliverable. Defendant reasons that, accordingly, this request is premature even if this court grants class certification.

Discussion

The court, in its discretion, grants plaintiffs' motion insofar as it seeks certification of

the proposed class with respect to the prevailing-wage claims. CPLR 901 ("Prerequisites to a class action") states that:

> "a. 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."

These five requirements are generally referred to as numerosity, commonality, typicality, adequacy and superiority (*see e.g., Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421-422 [1st Dept 2010]). "CPLR 902 states that a class action can only be maintained if the prerequisites promulgated by CPLR 901 (a) are met" (*Id.* at 421, citing *Weinberg v Hertz Corp.*, 116 AD2d 1, 4 [1st Dept 1986], *affd* 69 NY2d 979 [1987]). "Whether a lawsuit qualifies as a class action matter is a determination made upon a review of the statutory criteria as applied to the facts presented; it ordinarily rests within the sound discretion of the trial court" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999], citing *Brown v State of New York*, 250 AD2d 314, 320 [3d Dept 1998]). Lastly, CPLR 902 ("Order allowing class action") states that the court must find that the CPLR 901 (a) requirements are met before certifying a class, and that "among the matters which the court shall consider" are:

> "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."

CPLR Article 9 is based on Rule 23 of the Federal Rules of Civil Procedure and must be liberally construed (*Matter of Colt Indus. Shareholder Litig.*, 155 AD2d 154, 158-159 [1st Dept 1990], *mod on other grounds*, 77 NY2d 185 [1991]; *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]). "Thus, '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], quoting *Esplin v Hirschi*, 402 F2d 94, 101 [10th Cir 1968], *cert denied* 394 US 928 [1969]). Lastly, although the court, in the context of class certification, should consider whether the underlying claims have merit, "this 'inquiry is limited' and such threshold determination is not intended to be a substitute for summary judgment or trial . . . and [c]lass action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman*, 74 AD3d 420 at 422, quoting *Bloom v Cunard Line*, 76 AD2d 237, 240 [1st Dept 1980]; *see also Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [1st Dept 2009]; *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]).

The main underlying substantive claim here is that plaintiffs and the proposed class members, as "flaggers," were and are entitled to prevailing wages on public works projects within the City of New York; the wage schedules are set by the New York City Comptroller (*see e.g., Herman v Judlau Contr., Inc.*, 204 AD3d 496 [1st Dept 2022]; *see also* Labor Law §220 [3] [c] and [5] [e]). The class action mechanism is appropriate for such claims (*see e.g.,*

Lewis v Hallen Constr. Co., Inc., 193 AD3d 511 [1st Dept 2021] [approving class action certification for prevailing wage claims]). Here, the affidavits submitted by plaintiffs, which describe defendant's pattern of failing to pay prevailing wages with respect to "flagger" duties, and which list more than two hundred of defendant's current and former employees who allegedly performed "flagger" duties as putative class members, establish the requisite numerosity, commonality and typicality (*Id.* at 512, citing *Stecko v RLI Ins. Co.*, 121 AD3d 542 [1st Dept 2014]; *Dabrowski v Abax Inc.*, 84 AD3d 633 [1st Dept 2011]; *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482 [1st Dept 2009]; *Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1st Dept 1998]). "Moreover, 'a class action is the superior vehicle for resolving wage disputes since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court'" (*id.*, quoting *Stecko*, 121 AD3d 542 at 543). Thus, plaintiffs have demonstrated four—numerosity, commonality, typicality and superiority—of the five requirements for class certification (*id.*).

Defendant's arguments to the contrary lack merit. First, defendant claims that plaintiffs and the proposed class members were not "flaggers," but were instead "crossing guards," for which there is no prevailing wage schedule promulgated by the Comptroller. This argument, which focuses on the wording of job descriptions, appears foreclosed by *Herman v Judlau Contr., Inc.*, 204 AD3d 496 [1st Dept 2022], as any merits inquiry here is limited (*Pludeman*, 74 AD3d 420 at 422). The court notes that "flagger" duties constitute "work involving protection of public safety near a construction site" which qualifies under the prevailing wage requirements of Labor Law §220 (*Herman*, 204 AD3d 496 at 496).

Moreover, "[w]hile defendant may have characterized plaintiffs as 'crossing guards,' the pivotal question is not how defendant characterized them, but whether the nature of the work they actually performed required the payment of prevailing wages" (*id.* at 496-497, citing *Matter of Tenalp Constr. Corp. v Roberts*, 141 AD2d 81, 85 [2d Dept 1988]; *Matter of Sewer Envtl. Contrs. v Goldin*, 98 AD2d 606, 606 [1st Dept 1983]). On this record, it is "not a sham" (*Pludeman*, 74 AD3d 420 at 422) for plaintiffs to claim that they and the proposed class members were working to ensure public safety on or near defendant's public works construction sites (*see also Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019] [class action claims accepted as true in opposition to motion to dismiss]).

Additionally, defendant's claims that plaintiffs do not satisfy the requirements of CPLR 901 lack merit. The court reiterates that the "[c]lass action is an appropriate method of adjudicating wage claims arising from an employer's alleged practice of underpaying employees, given that 'the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court'" (*Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016], quoting *Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011]). Next, the court notes that numerosity, in the context of employee wages, can be satisfied by "100 to 150" workers (*Maor v Hornblower N.Y., LLC*, 51 Misc 3d 1231[A], [Sup Ct, NY Co 2016]). Also, "[p]laintiffs established the commonality prerequisite 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" (*Vandee v Suit-Kote Corp.*, 162

AD3d 1620, 1620-1621 [4th Dept 2018], citing *City of New York v Maul*, 14 NY3d 499, 514 [2010]; *Cherry v Resource Am., Inc.*, 15 AD3d 1013, 1013 [4th Dept 2005]). "Commonality is not to be confused with unanimity" (*Maddicks*, 34 NY3d 116 at 125, citing *City of New York v Maul*, 14 NY3d 499 at 514), and individualized damage assessments are also not a bar to class certification (*Vandee*, 162 AD3d 1620 at 1621, citing *Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]; *DeLuca v Tonawanda Coke Corp.*, 134 AD3d 1534, 1536 [4th Dept 2015]). Lastly, in the context of prevailing-wage class actions, "the non-exclusive CPLR 902 factors weigh in favor of class certification" (*Vandee*, 162 AD3d 1620 at 1621).

The court next turns to the issue of adequacy of representation. The inquiry is two-fold: whether the interests of the named plaintiffs conflict with the interests of the members of the proposed class, and whether the proposed class attorneys are qualified, experienced and able to conduct the class action (*see e.g., Cordes & Co. Fin. Servs., Inc. v A.G. Edwards & Sons, Inc.*, 502 F3d 91, 99 [2d Cir 2007]). Given that the proposed class consists of construction workers who were underpaid for "flagging" duties by the same employer, there is no apparent conflict of interest. Also, the unrebutted record demonstrates that proposed class counsel, Pelton Graham LLC, has extensive experience in bringing wage class actions (*see e.g., Porter v MooreGroup Corporation*, US Dist Ct, ED NY, 17 Civ 7405, 2021 U.S. Dist. LEXIS 151187*, 2021 WL 3524159, Matsumoto, K., August 11, 2021 [granting motion for class certification for wage claims and appointing Pelton Graham LLC as class counsel]). Indeed, this firm was plaintiff's counsel in *Herman v Judlau Contr., Inc.* (204 AD3d 496 [1st Dept 2022]), where the award of summary judgment to plaintiffs was upheld on appeal. For these reasons, the court finds that Pelton Graham LLC can adequately represent the class.

Defendant's argument that the alleged bad-faith settlement negotiations preclude a finding of adequacy lacks merit. Defendant notes that in one instance, in an unreported case, the United States District Court declined to certify a class where a named plaintiff had, apparently irrationally, declined to accept a settlement offer that would have fully compensated him for his individual claims (*see Franco v Allied Interstate LLC*, US Dist Ct, SD NY, 13 Civ 4053, 2018 U.S. Dist. LEXIS 117208*, 2018 WL 3410009, Forrest, K., July 13, 2018). Defendant, in essence, expresses incredulity that a named plaintiff would accept a lower amount of damages in exchange for assisting counsel with obtaining class-wide recovery, and points out that the District Court in *Franco* found fault with a proposed class action that was "entirely lawyer-driven." Based on this contention, defendant asserts that since the named plaintiffs herein refused a settlement offer that would have (purportedly) fully compensated them, the conclusion must be that counsel for the named plaintiffs is improperly proceeding in an attempt to increase its fees.

The court rejects this argument. First, it is well settled that federal district court opinions are "not binding" on New York State courts (*see Teshabaeva v Family Home Care Services of Brooklyn and Queens, Inc.*, __AD3d __, 2023 NY Slip Op 01170 [1st Dept 2023]). Nevertheless, in the context of prevailing-wage litigation, the class action is the appropriate method of adjudicating wage claims arising from an employer's alleged practice of underpaying employees (*Weinstein*, 138 AD3d 546 at 547). This is in sharp contrast to the observation of the U.S. District Court in *Franco*, which noted "the [United States] Supreme Court's clear recognition that class litigation is the exception rather than the rule" (*Franco v Allied Interstate LLC*, US Dist Ct, SD NY, 13 Civ 4053, 2018 U.S. Dist. LEXIS 117208*,

2018 WL 3410009, Forrest, K., July 13, 2018). Defendant cites no binding authority that suggests that the named plaintiffs and proposed class counsel here are inadequate and not representative solely because they sought to maximize class-wide recovery and associated attorneys' fees. For these reasons, the court rejects defendant's adequacy arguments.

The court also rejects defendant's argument that the instant motion for class certification was untimely. As stated in the court order dated May 14, 2021, good cause (specifically, incomplete class certification discovery) existed for the application for an extension of time to move for class certification; the court order extended the deadline to 60 days after defendant's deposition was held. This court's subsequent order, dated May 27, 2022, modified the prior order and imposed a firm deadline of July 26, 2022. The record reflects that plaintiffs electronically filed the instant motion for class certification on July 26, 2022; accordingly, the motion is timely. It is also noted that this action was commenced in June 2020, at the beginning of the COVID-19 Pandemic. Defendant's argument that this motion should have been made by November 30, 2020 is unreasonable in light of the various Governor's Executive Orders and the Administrative Orders issued by The Chief Administrative Judge which extended statutory deadlines due to the Pandemic.

The court now turns to whether "wage notice" claims may properly be brought in a class action. CPLR 901 (b) states that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." Additionally, Labor Law §198 (1-b) provides for damages whenever an employer fails to provide wage notices required by Labor Law §195.

Plaintiffs acknowledge that subsection (1-a) of Labor Law §198, which specifically refers to "liquidated damages" on unpaid wages, may not properly be asserted via class actions; however, plaintiffs state that subsection (1-b), which uses the modified term "damages," despite the use of "liquidated damages" in the prior provision, may properly be prosecuted as class claims.

This court disagrees with the plaintiffs. The prohibition against class actions in CPLR 901 (b) applies to claims under a statute that either imposes a "penalty, or a minimum measure of recovery[.]" While Labor Law §198 (1-b) does not contain the phrase "liquidated damages[,]" it does provide that an aggrieved worker "may recover in a civil action damages of fifty dollars for each work day that the violations occurred or continue to occur[.]" On its face, this is a description of "a minimum measure of recovery[,]" and, therefore, class action claims for damages pursuant to Labor Law §198 (1-b) are prohibited by CPLR 901 (b).

Lastly, the court finds that the proposed class action notice essentially comports with CPLR 904; plaintiffs are directed to provide proposed class members with notice of this class action in accordance with the CPLR. The proposed notice at Document 114 shall be amended to remove the references to "wage notices," [¶¶ 3 and 4] and shall provide for 60 days to opt out in ¶ 7. Additionally, the court directs that defendant, within 45 days of service of a copy of this order with notice of entry, shall provide plaintiffs with the names, telephone numbers, last known addresses and email addresses of all proposed class members. However, the court declines to order disclosure of Social Security numbers at this stage; absent a showing that class notices were returned as undeliverable, such an order compelling disclosure of the social security numbers would be premature (*cf. Robinson v Big City*

Yonkers, 2017 NY Slip Op 30177[U] [Sup Ct, Nassau County Jan 17, 2017] [requiring that "defendants shall provide the Social Security numbers of any Class Member whose Class Notice is returned as undeliverable and without a forwarding address by the U.S. Postal Service"]).

Conclusions of Law

Accordingly, it is hereby

ORDERED that the branch of the motion of plaintiffs Latisha Thomas and Aieshai London for certification of the proposed class, namely, all persons employed by defendant JRCruz Corp. from June 30, 2014 through the date of entry of judgment in this case who worked as non-union flaggers on public works projects in New York City and were not paid prevailing wages, insofar as plaintiffs' claims are based on defendant's failure to pay prevailing wages, is granted, and the proposed class is so certified; and it is further

ORDERED that the branch of the motion of plaintiffs Latisha Thomas and Aieshai London for certification of the proposed class, namely, all persons employed by defendant JRCruz Corp. from June 30, 2014 through the date of entry of judgment in this case who worked as non-union flaggers on public works projects in New York City, insofar as plaintiffs' claims, as set forth in their third cause of action, are based on defendant's alleged failure to provide wage notices, a violation of NY Labor Law 195, actionable pursuant to Labor Law 198 (1-b), is denied, and the two named plaintiffs may pursue these claims solely as individual claims; and it is further

ORDERED that Pelton Graham LLC is appointed counsel for the class; and it is further

ORDERED that the proposed class notice [Document 114] is approved as modified above, and plaintiffs are directed to provide notice to class members in accordance with the CPLR; and it is further

ORDERED that defendant shall, within 45 days of service of a copy of this order with notice of entry, provide plaintiffs with the names, telephone numbers, last known addresses and email addresses (if known) of all class members; and it is further

ORDERED that defendant's motion is granted solely to the extent that plaintiff's third cause of action, their wage notice class claims pursuant to Labor Law §198 (1-b), are dismissed without prejudice to the proposed class members bringing individual, and not class-based, wage notice claims, and is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.