At an IAS Term, Part 83 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 30th day of June, 2023.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

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MARVIN GARCIA, individually and behalf of himself and others similarly situated,

Plaintiff,

-against-

BEST PROFESSIONAL HOME CARE AGENCY, INC.,

Defendant.

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Index No.: 530659/2022

DECISION AND ORDER

The following e-filed papers read herein: NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	4-6, 27-28, 61, 63
Opposing Affidavits (Affirmations)	51-52, 73-74
Affidavits/ Affirmations in Reply	86

Upon the foregoing papers, defendant Best Professional Home Care Agency, Inc. ("defendant"), moves for an order: (1) pursuant to CPLR 3211 (a) (3), dismissing the complaint for lack of standing; (2) pursuant to CPLR 3211 (a) (7), dismissing the complaint for failure to state a cause of action; and (3) pursuant to CPLR 3211 (a) (10), dismissing the complaint for failure to join a necessary party (motion sequence number 1). Plaintiff Marvin Garcia ("plaintiff") cross-moves for an order: (1) pursuant to CPLR 3214, lifting/vacating the automatic stay of discovery arising from defendant's CPLR

3211 motion to dismiss; (2) granting plaintiff an extension of time to move for class certification; and (3) compelling defendant to respond to plaintiff's discovery demands (motion sequence number 3). Non-party RSC Insurance Brokerage, Inc. ("RSC") moves for an order, pursuant to CPLR 2304, quashing the subpoena served upon it by plaintiff, or, in the alternative, pursuant to CPLR 3103, issuing a protective order denying the subpoena in its entirety (motion sequence number 4).

In his putative class action complaint, plaintiff alleges that he and the putative class members are or were home health care aides employed by defendant to provide personal care, assistance, health-related tasks and other home care services to defendant's clients. Plaintiff further alleges that defendant (a) failed to pay wages in violation of the weekly wage payment requirements of Labor Law § 191, (b) improperly withheld wages in violation of Labor Law § 193, (c) willfully failed to pay prevailing wages as required by Home Care Worker Wage Parity Act (Public Health Law § 3614-c), (d) failed to pay living wages in violation of New York City Fair Wages for Workers Act (Administrative Code of City of N.Y. § 6-109), (e) failed to pay spread of hours premium as required by 12 NYCRR 142-2.4, and (f) failed to provide accurate wage notices and wage statements in violation of Labor Law § 195. Plaintiff alleges that he commenced this action on behalf of himself and a class consisting of each and every employee of defendant who provided home care services to defendant's clients since 2016. Among other things, plaintiff believes that the putative class consists of over 200 persons and that plaintiff's claims are typical of those of the class.

Initially, this Court finds that plaintiff has demonstrated that defendant's motion to dismiss pursuant to CPLR 3211 is unavailing. In the affidavit of service filed on October 28, 2022, plaintiff's process server states that he delivered a copy of the summons and complaint on October 27, 2022, to a person authorized to accept service upon defendant at defendant's corporate address. This affidavit of service constitutes prima facie evidence of proper service on that date pursuant to CPLR 311 (a) (1) (*see Hayden v Southern Wine & Spirits of Upstate N.Y., Inc.*, 126 AD3d 673, 674 [2d Dept 2015]; *see also U.S. Bank Trust, N.A. v Catalano*, 215 AD3d 992, 993-994 [2d Dept 2023]). Defendant had until November 16, 2022, to appear, answer or make a motion, which it failed to do. Thus, it is in default. Defendant's motion to dismiss, which was made on November 29, 2022, without a request for an extension of time to answer, appear or make a pre-answer motion pursuant to CPLR 3211, is untimely (CPLR 311 [a] [1]; 320 [a]; 3211 [e]) and may not be considered (*see Yan Ping Zu v Van Zwienen*, 212 AD3d 872, 875 [2d Dept 2023]; *Oteri v Oteri-Harkins*, 183 AD3d 902, 903 [2d Dept 2020]; *Holubar v Holubar*, 89 AD3d 802, 802-803 [2d Dept 2011]; *see also Wilmington Trust, N.A. v Ashe*, 189 AD3d 1130, 1131-1132 [2d Dept 2020]).

Assuming arguendo that defendant's motion was timely, the Court would still deny the motion for the following reasons. Plaintiff has adequately pleaded the prerequisites that are required for a claim to proceed as a class action under CPLR 901 (*see Maddicks v Big City Props., LLC*, 34 NY3d 116, 123-128 [2019]; *Quinn v Parkoff Operating Corp.*, 178 AD3d 450, 450 [1st Dept 2019]; *Rubman v Osuchowski*, 163 AD3d 1471, 1472-1473 [4th Dept 2018]; *Ackerman v New York Hosp. Med. Ctr. of Queens*, 127

AD3d 794, 796 [2d Dept 2015])[1] and adequately pleaded defendant's failure to pay wages as required by the various statutes and regulations (*see Rosario v Hallen Constr. Co., Inc.*, 214 AD3d 544, 544-545 [1st Dept 2023]; *Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 662-663 [2d Dept 2020]; *Ackerman*, 127 AD3d at 795-796). Thus, for purposes of CPLR 3211 (a) (7), plaintiff's complaint states a class action cause of action for failure to pay the required wages (*see Maddicks*, 34 NY3d at 123-128; *Griffin v Gregory's Coffee Mgt.*, 191 AD3d 600, 600-601 [1st Dept 2021]; *Rosario*, 214 AD3d 544-545; *Ackerman*, 127 AD3d at 795-796).

In support of its motion, defendant has also submitted an affidavit from Susan Smith ("Smith"), an administrator for defendant, who asserts that defendant is not the employer of plaintiff and the putative class members, but rather, is a "fiscal intermediary" within the meaning of a Medicaid program known as Consumer Directed Personal Assistance Program (Social Services Law § 365-f; 18 NYCRR 505.28). Smith further asserts that the consumers who are cared for by plaintiff and the putative class of home health care workers are the actual employers of plaintiff and the putative class members. This affidavit, however, fails to demonstrate for purposes of a CPLR 3211 (a) (7) motion that plaintiff's allegation that defendant is plaintiff's employer is not a fact at all (*see Cajigas v Clean Rite Ctrs.*, 187 AD3d 700, 701 [2d Dept 2020]; *Lomeli*, 179 AD3d at 662; *Yu Chen v Kupoint (USA) Corp.*, 160 AD3d 787, 788-789 [2d Dept 2018]; *Phillips v*

[1] This court notes that it will generally be "premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken" (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 91 [1st Dept 2013], *affd* 24 NY3d 382 [2014]; *see Griffin v Gregory's Coffee Mgt. LLC*, 191 AD3d 600, 600-601 [1st Dept 2021]).

Taco Bell Corp., 152 AD3d 806, 807-808 [2d Dept 2017]; *see also Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Moreover, assuming that Smith's affidavit is sufficient to conclusively establish that defendant acts as a fiscal intermediary, this does not necessarily exclude it from being deemed an employer for purposes of plaintiff's wage claims here (*see Hargers-Powell v Angels in Your Home LLC*, 330 FRD 89, 109 [WDNY 2019] [defendant fiscal intermediary was care worker's employer for purposes of wage claims under the federal Fair Labor Standards Act and New York's Labor Law]; *see also Priester v Frangakis*, 198 AD3d 1295, 1297 [4th Dept 2021]; *Ray v Los Angeles County Dept. of Social Servs.*, 52 F4th 843, 850-851 [9th Cir 2022]; *Alves v Affiliated Care of Putnam, Inc.*, 2022 WL 1002817[U], *7 [SDNY 2022]; *cf. State Farm Mut. Auto. Ins. Co. v Klein*, 190 AD3d 876, 878 [2d Dept 2021] [fiscal intermediary not employer for purposes of vicarious tort liability]).

Even if defendant is deemed an employer, defendant asserts that it is entitled to dismissal pursuant to CPLR 3211 (a) (10) because the consumer (i.e., the person cared for by plaintiff) is a necessary party to this action since the consumer is, at the very least, a joint-employer of plaintiff. Defendant, however, has failed to identify how the failure to join the consumer would impede the court's ability to provide complete relief between the parties or that the consumer would be inequitably affected by a judgment in this action (*see Rimberg v Horowitz*, 206 AD3d 832, 834 [2d Dept 2022]; *Blatt v Johar*, 177 AD3d 634, 635-636 [2d Dept 2019]; CPLR 3211 [a] [10]; 1001 [a]). In cases addressing liability under the similar requirements of the federal Fair Labor Standards Act ("FLSA"), a joint employer is generally not deemed a necessary party under federal

joinder rules because any employer held liable under the FLSA is jointly and severally liable with any other joint-employer (*see Roy v FedEx Ground Package System, Inc.*, 2020 WL 3799203[U], at 4 [D Mass 2020]; *see also Scalia v Employer Solutions Staffing Group, LLC*, 951 F3d 1097, 1103-1104 [9th Cir 2020], *cert denied* ___ US ___, 141 S Ct 1376 [2021]; *Robertson v REP Processing, LLC*, 2020 WL 5735081[U], *6-7 [D Col 2020]). The defendant has proffered no evidence why the same result should not apply under the Labor Law (*see Robinson v Great Performances/Artists as Waitresses, Inc.*, 195 AD3d 140, 143-147 [1st Dept 2021] [public policy bars employer from obtaining contractual indemnification for violation of Labor Law wage claims]; *Ting Yao Lin v Hayashi Ya II, Inc.*, 2009 WL 289653[U], *8-9 [SDNY 2009], *report & recommendation adopted* 2009 WL 513371[U] [SDNY 2009]).[2]

Finally, defendant's contention that it is entitled to dismissal pursuant to CPLR 3211 (a) (3) because plaintiff lacks standing to bring this class action is based only on defendant's assertion that plaintiff has failed to adequately plead the requirements for a class action (defendant's reply affirmation, at ¶¶ 8-19). Since this Court has found that plaintiff's allegations are sufficient at this pleading stage, it rejects defendant's arguments regarding standing.

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[2] Although the court in *Ting Yao Lin v Hayashi Ya II, Inc.* (2009 WL 289653[U], *8-9 [SDNY 2009]) did not address joinder of a necessary party, the court did hold that an employer defendant may be held jointly and severally liable under the Labor Law. As a joint tort-feasor defendant subject to joint and several liability is not deemed a necessary party under New York joinder rules (*see Blatt*, 177 AD3d at 635-636; *Gorbatov v Tsirelman*, 155 AD3d 836, 840 [2d Dept 2017]), this court sees no reason why the same result would not apply with respect to a joint employer's joint and several liability for a wage claim under the Labor Law.

Turning to plaintiff's cross motion, this Court finds that plaintiff's need to conduct pre-class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901 (a) can be satisfied constitutes good cause for the extension of the 60-day time for moving for class certification fixed by CPLR 902 (*see Lomeli*, 179 AD3d at 664; *Chavarria v Crest Hollow Country Club at Woodbury, Inc.*, 109 AD3d 634, 634 [2d Dept 2013]; *Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 842-843 [2d Dept 2010]). With respect to plaintiff's request to lift CPLR 3214 (b)'s automatic stay of disclosure during the pendency of defendant's CPLR 3211 motion, this request has been rendered moot by this court's denial of defendant's CPLR 3211 motion to dismiss. Finally, the portion of plaintiff's motion seeking to compel disclosure from defendant is denied as premature, since, until now, disclosure has been stayed pursuant to CPLR 3214, and, as such, defendant cannot be deemed to have failed to respond to plaintiff's discovery demands within the meaning of CPLR 3124 (*see U.S. Bank Trust, N.A. v Rose*, 176 AD3d 1012, 1016 [2d Dept 2019]; *Fulton v Allstate Ins. Co.*, 14 AD3d 380, 382 [1st Dept 2005]; *see also* 22 NYCRR 202.7, 202.20-f). However, the parties may consult each other regarding plaintiff's discovery demands (*see* 22 NYCRR 202.20-f) to expedite the pre-class certification discovery to which plaintiff is entitled (*Lomeli*, 179 AD3d at 664; *Chavarria*, 109 AD3d at 634; *Rodriguez*, 79 AD3d 842-843). Plaintiff's pre-class certification discovery demands at this juncture are "'limited to ascertaining only those facts which are necessary to support an application for class status'" (*Yen Hsang Chang v Westside 309 LLC*, 206 AD3d 491, 491 [1st Dept 2022]

quoting *Gewanter v Quaker State Oil Ref. Corp.*, 87 AD2d 970, 970 [4th Dept 1982]; *see Rodriguez*, 79 AD3d at 842-843).

Regarding RSC's motion for an order quashing the subpoena and/or providing for a protective order, this Court finds that the subpoena at issue provides ample information regarding the circumstances of the action and the reason disclosure is required such that plaintiff has satisfied the notice requirement of CPLR 3101 (a) (4) (*see TD Bank, N.A. v 126 Spruce St., LLC*, 143 AD3d 885, 885-886 [2d Dept 2016]). Nevertheless, since discovery at this pre-class certification stage of the action is limited to those facts necessary to support an application for class status, this Court finds that the subpoena is overbroad and burdensome in that it contains demands for 26 categories of documents that, for the most part, are irrelevant to the issue of class action certification (*see Yen Hsang Chang*, 206 AD3d at 491-492; *Sagristano v Equitable Life Assur. Socy. of U.S.*, 126 AD2d 541, 542 [2d Dept 1987]; *Matter of Gordon v D'Elia*, 125 AD2d 567, 568 [2d Dept 1986]).[3] Since it is counsel's burden to serve a proper demand and not the court's burden to correct a palpably bad one (*see Star Auto Sales of Queens, LLC v Filardo*, 216 AD3d 839, 839 [2d Dept 2023]), this Court elects to issue a protective order striking the entirety of plaintiff's patently overbroad demands and directs plaintiff to issue a new subpoena that is limited in scope (*see id.*; *U.S. Bank Trust, N.A. v Carter*, 204 AD3d 727, 729 [2d Dept 2022]; *Lomeli*, 179 AD3d at 663-664).

Accordingly,

[3] This court makes no determination regarding whether the document demands would be proper in the event that class certification is ultimately granted.

Defendant's motion (motion sequence number 1) is denied.

Plaintiff's cross motion (motion sequence number 3) is granted to the extent that plaintiff's time to move for class certification is extended until 90 days after service of a copy of this decision and order with notice of entry. That portion of plaintiff's cross motion requesting the lifting/vacatur of CPLR 3214's automatic stay of discovery is denied as academic based on this Court's denial of defendant's CPLR 3211 motion to dismiss. That branch of plaintiff's cross motion seeking to compel discovery is denied as being premature.

RSC's motion (motion sequence number 4) is granted to the extent that the subpoena is stricken pursuant to CPLR 3103 (a).

All other issues not addressed are either without merit or moot.

This constitutes the decision and order of the court.

HON. INGRID JOSEPH, J.S.C.