SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

----------X

BLEU LANZA, BRITTNEY HERRERA

Plaintiffs,

- v -

WHOLE FOODS MARKET GROUP, INC.,

Defendant.

----------X

INDEX NO. 154534/2022

MOTION DATE 07/14/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 75, 76, 77, 78, 79, 80, 81, 82, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for DISCOVERY.

Plaintiffs, Bleu Lanza (Lanza) and Brittney Herrera (Herrera), commenced this putative class action for unpaid wages, against defendant, Whole Foods Market Group, Inc. (defendant or Whole Foods), stemming from plaintiffs' employment with defendant. Plaintiffs now move pursuant to CPLR 3124 for pre-certification discovery. The motion is opposed. For the following reasons, the motion is granted in part.

BACKGROUND

Lanza was employed by Whole Foods as a cashier at its 808 Columbus Avenue location between December 17, 2019, and January 3, 2021 (NYSCEF doc. no. 32, Lanza aff, ¶ 1). Lanza states that she "received two weeks of paid training at Defendant's Columbus Circle and Houston Street locations, all in Manhattan" (*id.*). She was paid $15.50 per hour throughout her employment (*id.*, ¶ 2). Herrera was employed by Whole Foods as a cashier at its 125th Street location in Manhattan between June 2017 and February 2020 (NYSCEF doc. no. 31, Herrera aff, ¶ 1). In addition, Herrara received two (2) weeks of paid training at defendant's Columbus Circle location, also in Manhattan (*id.*, ¶ 2).

In the complaint, plaintiffs allege on behalf of themselves, and all non-exempt workers employed by Whole Foods in New York State on or after the date that is six (6) years before the filing of this Complaint (the Class). They further allege that defendant's policies and protocol led to a failure to pay all wages owed due to a policy of time shaving. Plaintiffs allege that the number and identity of class members are determinable from defendant's records, and that the hours assigned and worked, the position held, and rates of pay for each class member are also determinable from defendant's records.

Plaintiffs further allege they collectively worked at four different Whole Foods stores in New York, where they claim that if they returned late from their paid break, they were required

to work through their 30-minute unpaid meal break that day, and then were not paid for those 30 minutes. According to the complaint, both Herrera and Lanza were frequently a few minutes late when they clocked back in after the paid break (compl, ¶¶ 12, 24). Plaintiffs claim that defendant had a policy according to which any employee who took longer than 15 minutes for their short, paid break would not be permitted to take the longer thirty 30- minute unpaid break, and yet, those 30 minutes would still be deducted from their total hours. So, an employee who took 20 minutes for what was supposed to their 15-minute paid break would be deducted not merely 5 minutes for that extra time but an entire 30 minutes, meaning that they would be time shaved an entire 25 minutes.

In the first cause of action, violation of Labor Law, time shaving, plaintiffs allege as follows:

> "At all relevant times, Class members were employed by Defendant within the meaning of the New York Labor Law §§ 2 and 651.
>
> Defendant knowingly and willfully failed to pay Plaintiff and Class members all wages owed due to a policy of time shaving, in violation of New York Labor Law.
>
> Defendant knowingly and willfully failed to provide Plaintiff and Class members with accurate wage statements as required under the New York Labor Law.
>
> Defendant knowingly and willfully failed to provide Plaintiff and Class members with wage notices as required under the New York Labor Law"

(complaint, ¶¶ 42-45).

The complaint defines the class as: "all non-exempt workers employed by Defendant in New York State on or after the date that is six (6) years before the filing of this Complaint" (compl, ¶ 30). Plaintiffs' Article 9 allegations include:

> "Plaintiffs and Class members are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subjected to Defendant's decisions, policies, plans, programs, practices, procedures, protocols, routines, and rules, all culminating in a willful failure to pay all wages owed due to a policy of time shaving.
>
> The number and identity of Class members are determinable from the records of Defendant. The hours assigned and worked, the position held, and rates of pay for each Class member are also determinable from Defendant's records. For purposes of notice and other purposes related to this action, their names and addresses are readily available from Defendant.
>
> The proposed Class is so numerous that a joinder of all members is impracticable, and the disposition of their claims as a class will benefit the parties and the Court. Although the precise number of such persons is unknown, such information being in the exclusive

> possession of Defendant, there is no doubt that there are more than forty (40) Class members in the Class.
>
> Plaintiffs' NYLL claims are typical of claims that could be alleged by any member of the Class, and the relief sought is typical of the relief that would be sought by each member of the Class or in separate actions. All Class members were subject to the same corporate practices of Defendants, as alleged herein, of failing to pay all wages owed due to a policy of time shaving, in violation of NYLL"

(compl, ¶¶ 31-34).

Lanza states that, based upon her personal observations and conversations with co-workers, she learned that other nonexempt Whole Foods employees would also often clock back in a few minutes late and be routinely time-shaved as a result (Lanza aff, ¶ 8). Likewise, according to Herrera:

> "I estimate that this happened to me about twice a week. Based on my personal observations of, and conversations with, my co-workers, I can say that it happened about that often to other employees as well. It didn't matter whether they were cashiers like me or held some other position. The same break policy applied to everyone, and everyone frequently had trouble returning to work exactly on time-though most people were rarely more than just a few minutes late"

(Herrera aff, ¶ 4).

Further, Herrera states that, "supervisors-in my case Shaquana-would know that we had returned late because they would jot down the time we began our short breaks in a log. That way, they could see who had come back late" (*id.*, ¶ 5). My co-workers and I frequently talked to each other about Defendant's time-shaving . . . two of these co-workers were Amanda [LNU] and Brittney [LNU], who were also cashiers (*id.*, ¶¶ 7-8). Likewise, Lanza states that the supervisors would record the break times in a book: "Defendant would know that employees had returned late because we were required to notify our supervisors of when we were taking our short break. They would write down the time in a book, so they would know how long we had taken when we returned" (Lanza aff, ¶ 5). In the complaint, Herrera and Lanza allege that they did not receive a wage notice, and the wage statements they received were inaccurate because they failed to account for time-shaved hours (compl, ¶¶ 14, 25).

Plaintiffs filed this putative class action seeking to recover unpaid wages under New York Labor Law and damages for individual claims for discrimination and retaliation on behalf of all current and former non-exempt store workers employed by Whole Foods in New York State any time between May 26, 2016 and the date of the certification of the class (*id.*, ¶ 30).

According to defendant, Whole Foods has 30 stores in New York State. The stores are typically managed by a store team leader and associate store team leader. At all times relevant to this lawsuit, Whole Foods offered its employees who worked a daily six to eight-hour shift, one 15-minute paid break and one unpaid 30-minute meal break. In 2021, Whole Foods changed that

policy to two 10-minutes paid breaks and one unpaid 45-minute meal break. According to defendant, these breaks are scheduled according to the individual practices of each Whole Foods store, and, therefore, there is no uniform policy throughout the stores. Defendant states that it already has produced 891 pages of documents in response to plaintiffs' requests for production of documents, including Lanza and Herrera's timekeeping, wage, medical leave, W-2, job description, and other personnel files; the relevant break policies from defendant's general information guide; and training materials provided to plaintiffs during their employment.

Whole Foods submitted affidavits of its "team leaders" to the court in support of its opposition to plaintiffs' motion to certify the class. These affidavits contain statements from Whole Foods' team leaders who have worked in stores throughout New York City and in areas outside the city, in New York State. The affidavits repeat statements that support the argument that practices vary from store to store and likewise contain statements supporting the proposition that there are Whole Foods' corporate policies that control activity in every store throughout the state.

According to the affidavits, any time worked by employees is always on the clock, employees receive and are required to review and acknowledge the Whole Foods General Information Guide (GIG), which is available to all team members during their employment, and contains, among other things, information on Whole Foods' time recording, paid break, and meal break policies. As stated in some of the affidavits, the teams are provided with a sheet each day that reflects when team members are supposed to take their breaks. Employees must clock out and in before and after the paid breaks. Employees must be clocked in before they can work and are never told not to take their break.

Several team leaders aver that if a team member takes a break that is a little too long, they would be spoken to by a team leader, and if it continues, they referred to store management. According to several of the affidavits, the timekeeping system, Kronos, generates an initial schedule for the teams, but some team leaders might modify those schedules based on business needs. Team leaders aver that they have always been paid for all their time worked at Whole Foods, and they have also never seen anyone directed to punch out and continue working. That, according to the affidavits, would be a violation of policy and is not allowed, since everyone is told to be on the clock when working and everyone is paid for all time worked.

Plaintiffs now seek pre-certification discovery as follows:

1. For each Whole Foods store in New York State during the statutory period (05/26/16 to the present), complete records of all time-keeping records and wage statements of a randomly selected sample of 10% of all nonexempt, non-Team Leader employees;

2. For each Whole Foods store in New York State during the statutory period, all documents, whether a handwritten log or otherwise, used by Defendant to track employee breaks of less than 20 minutes;

> 3. For all current and former store managers, assistant managers, and human resources executives at each Whole Foods store in New York State during the statutory period, copies of all emails and text messages, with the following search terms: (break w/5 late) (break w/5 short) (break w/5 unpaid) (break w/5 rest) (break w/5 return) (break w/5 fifteen) (break w/5 15) (break w/5 10) (break w/5 ten) (clock w/5 in) (clock w/5 out);
>
> In addition, we ask that you supplement your response to our interrogatory requests with a complete list of all the custodians described in #3, along with all available contact information, including, but not limited to, addresses, phone numbers, and emails.

(NYSCEF doc. no. 82, pla memo in support, ¶13).

DISCUSSION

"At the pre-class certification stage, plaintiffs are entitled to limited discovery, to determine whether the prerequisites to class certification listed in CPLR 901 are present, and to assess the feasibility considerations listed in CPLR 902 in relation to the particular facts" (*Chang v Westside 309 LLC*, 206 AD3d 491, 491-492 [1st Dept 2022] [internal quotations and citations omitted]). "The purpose of pre-class certification discovery is to ascertain the dimensions of the group of individuals who share plaintiff's grievance" (*id.*, at 494). "Thus, pre-class certification disclosure should be limited to ascertaining only those facts which are necessary to support an application for class status" (*id.* [internal quotation marks and citations omitted]). In *Chang*, the court denied the plaintiff's motion for pre-class certification because the plaintiffs' did not explain how the requested discovery would help establish the requirements under CPLR 901 (*id.*; *see also Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 843 [2d Dept 2010] [upholding order denying defendant's motion to strike certain discovery requests because "those discovery demands were appropriate in the pre-certification stage of this putative class action"]).

The sufficiency of evidence supporting the appropriateness of a class action rests on whether the prerequisites contained in CPLR 901 have been met. Those considerations are: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class which predominate over questions affecting only individual members; (3) the claims of the representative party are typical of those of the class; (4) the representative party will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy (*Dugan v London Terrace Gardens, L.P.*, 186 AD3d 12, 19 [1st Dept 2020]; *Stecko v RLI Ins. Co.*, 121 AD3d 542, 542 [1st Dept 2014];

Here, plaintiffs' submissions, the complaint, and the plaintiffs' affidavits, contain vague statements with respect to the numerosity and commonality requirements of CPLR 901, and, therefore, pre-certification discovery is appropriate (*see Geiger v American Tobacco Co.*, 252 AD2d 474, 476 [2d Dept 1998]). It is unclear from plaintiffs' documents whether the claims concerning time shaving at Whole Foods are unique to plaintiffs' employment experiences or are

the product of a Whole Foods' corporate policy subjecting a larger class of employees to similar uncompensated hours of work. In *Katz v NVF Co.* (100 AD2d 470 [1st Dept 1984]), the court directed pre-class certification discovery where the record was insufficient to determine "with some precision the nature and size of the class and the claimed basis for reliance," and class action consideration was, therefore, premature (*id.* at 474). The court further stated: "[o]n this record, without such discovery, we are invited to speculate whether plaintiff purchased and retained her stock in reliance upon the proposed merger and, equally critical, whether she adequately represents others similarly situated" (*Katz* at 474).

In *Bloom v Cunard*, 76 AD2d 237 [1st Dept 1980], the court held that discovery proceedings were necessary to determine the nature and size of the proposed class. In directing this type of inquiry, the court instructed that the parties should make known whether nonresidents of the State were within the class sought to be protected. The defendant was directed to furnish plaintiffs with a list of passengers on the subject cruises in order to illuminate the approximate number of New York potential class members are available who wish to participate (*id.* at 242-243; *see also Konstantynovska v Caring Professionals Inc.*, 215 AD3d 405, 406 [1st Dept 2023] [in a wage violation action, class certification was affirmed where plaintiffs submitted affidavits, testimony, and payroll records to establish class claim were neither "spurious nor sham"]).

Furthermore, plaintiffs allege and aver, the existence of a Whole Foods policy to penalize employees who exceed their time for paid breaks by docking their pay and making them work through unpaid breaks. In their affidavits, plaintiffs describe discussions with other employees about this treatment. Defendant denies the existence of such a policy. In *Weinstein v Jenny Craig Operations, Inc.* (138 AD3d 546 [1st Dept 2016]), the court held that the defendant's submission of declarations from current employees, denying the existence of such a practice, was insufficient to defeat certification. The court found that "this is especially so given that defendant's statistical analysis of employee time-card data provides support for plaintiffs' claim that the practice was routine" (*id.* at 547). Here, because plaintiffs have not established support for its claim of the practice, pre-certification discovery for this purpose is necessary. In *Lamarca v Great Atl. & Pac. Tea Co.* (55 AD3d 487 [1st Dept 2008]), the court found that because the defendants conceded that "all of its stores are managed according to uniform policies set by it and those corporate policies drove managers to deprive employees of overtime pay, the plaintiffs met the questions of law or fact common to the class requirement" (*id.*, 55 AD3d at 487). Here, plaintiffs are entitled to the opportunity to demand evidence on the alleged existence of a Whole Foods' policy regarding time shaving.

Here, plaintiffs' complaint alleges that plaintiffs and a number of other non-exempt Whole Foods employees, working in stores across New York State, were systematically deprived of compensation due to a policy of shaving time created and implemented by Whole Foods. Specifically, plaintiffs allege that the two named plaintiffs were compelled to work off the clock without compensation. Yet, plaintiffs do not offer credible evidence of any other class members, let alone a number, approximated or specific, sufficient to meet the numerosity requirement. Lanza's description of "conversations" with other employees does not offer the number of those employees, the identity of those employees or any identifying criteria for those employees, and, therefore, other than the two named plaintiffs, there is no information

concerning the size of the class. The New York State Legislature "contemplated classes involving as few as 18 members," (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014][internal citation omitted]["In these cases, the classes range in size from 53 to over 500 members, well above the numerosity threshold contemplated by the legislature and approved by courts"]). Again, pre-certification discovery is needed to determine the nature and size of the putative class.

In their motion to compel pre-certification discovery, plaintiffs seek complete records for the six-year period prior to the filing of the complaint of all time-keeping records and wage statements of a randomly selected sample of 10% of all nonexempt, non-Team Leader employees, as well as any records Defendant kept regarding when employees returned late from breaks. On this motion, plaintiffs demand a 5% sample, instead of 10%.

In its memorandum in opposition, defendant states that plaintiffs made the 5% concession for the first time on this motion, and that defendant is willing to meet and confer with plaintiffs on this demand. The court finds that this demand is overbroad as it seeks documents for employees that were not cashiers, as plaintiffs were, and for stores where plaintiffs did not work without any compelling proof, such as an affidavit from an employee in another work category or employed in another store, to support this demand (*see Chimenti v American Express Co.*, 97 AD2d 351, 352 [1st Dept 1983]; *Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 843 [2d Dept 2010]) and also unduly burdensome in nature (*see Jordan v City of New York*, 137 AD3d 1084, 1084 [2d Dept 2019][the Court found plaintiff's discovery demands were overbroad and burdensome and stated "a party is not entitled to unlimited, uncontrolled, unfettered disclosure"]). Plaintiffs have not offered any explanation as to how cashiers would be similarly situated to all other categories of non-exempt, non-managerial employees. Thus, in order to ascertain facts concerning the contours of the class, and since the plaintiffs collectively worked at four Whole Foods stores in New York, the 808 Columbus Avenue location, the Houston Street location, the 125th Street location, and the Columbus Circle location, the court directs defendant to provide time-keeping records and wage statements for a randomly selected sample of 5% of all cashiers, from these four stores for a six-month period that occurred during the dates of employment for Lanza and Herrera, to be selected by plaintiffs. Plaintiffs are directed to send a written proposal to defendant within 14 days of this Order. Defendant is directly to provide the documentation to plaintiffs within 45 days of this Order.

Plaintiffs additionally seek, for the same six-year period, all documents, whether a handwritten log or otherwise, used by the defendant to track employee breaks of less than 20 minutes, for each Whole Foods store. Defendant argues that they have already produced over 800 documents, including Lanza and Herrera's timekeeping, wage, medical leave, W-2, job description, and other personnel files; the relevant break policies from Defendant's General Information Guide; and training materials provided to plaintiffs during their employment. The court finds this demand is also overbroad and unduly burdensome and directs defendant to provide all documents, whether a handwritten log or something else, used by the defendant to track employee breaks of less than 20 minutes, for cashiers for the four Whole Foods locations in which plaintiffs were employed, for the same six-month period selected by plaintiffs above, within 45 days of this Order.

Plaintiffs further seek for all current and former store managers, assistant managers, and human resources executives at each Whole Foods store in New York State during the statutory period, copies of all emails and text messages, with the following search terms: (break w/5 late) (break w/5 short) (break w/5 unpaid) (break w/5 rest) (break w/5 return) (break w/5 fifteen) (break w/5 15) (break w/5 10) (break w/5 ten) (clock w/5 in) (clock w/5 out). Defendant argues in opposition that plaintiffs were cashiers and did not work on computers or have email accounts or company phones, and, therefore, there is no ground for this demand. Plaintiffs explain that they need these communications as they may reflect discussion among managers concerning an undocumented policy to shave time. The court finds that plaintiffs' demand, as well as search terms, for emails/communications between store managers etc. that would evidence the existence of a policy at Whole Foods that fostered uncompensated work by non-exempt employees is too broad and not tailored to support its claims for a class action pursuant to CPLR 901. The court directs plaintiffs to narrow this request and send defendant a written proposal within 14 days of this Order, defendant is to send a response within 14 days of this Order, and parties are then directed to meet and confer to agree upon a narrowing of this request and exchange the agreed-upon documents within 45 days of this Order.

Finally, plaintiffs demand that defendant supplements its response to plaintiffs' interrogatory requests with a complete list of all the custodians described in response to plaintiffs' interrogatory demand numbered "3," and include all available contact information, including, but not limited to, their addresses, phone numbers, and emails, and whether they continue to be employed by defendant. The court directs plaintiffs to send a written demand clarifying this document request, and the parties are then directed to meet and confer as to this request within 45 days of this Order and exchange the agreed-upon information.

The court finds that plaintiffs request for an entire list of putative class members is premature.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted in accordance with this decision and order, and defendant shall furnish the aforesaid discovery within forty-five (45) days; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order upon defendant, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

12/18/2023
DATE

DAKOTA D. RAMSEUR, 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