

Engel v International Bus. Machs. Corp.

2024 NY Slip Op 32615(U)

July 10, 2024

Supreme Court, New York County

Docket Number: Index No. 654556/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X	
THOMAS ENGEL,	INDEX NO. <u>654556/2020</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>005</u>
INTERNATIONAL BUSINESS MACHINES CORPORATION,	DECISION + ORDER ON MOTION
Defendant.	
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 214, 215, 216, 217, 225, 234

were read on this motion to/for MISCELLANEOUS.

This action arises out of defendant International Business Machines Corporation's (IBM) alleged failure to provide its sales representatives with written contracts, as well as defendant's alleged practice of capping its sales representatives' commissions while representing that earning opportunities are uncapped. (See NYSCEF Doc No. [NYSCEF] 51, First Amended Class Action Complaint [FAC] ¶¶ 1-2.) Plaintiff seeks injunctive and declaratory relief and to recover unpaid commissions. In motion sequence no. 005, plaintiff Thomas Engel moves certify this matter as a class action and designate class counsel.¹

¹ Parties are reminded that "[a]ll citations to the NYSCEF record/docket in all motion papers require NYSCEF Document Numbers with pinpoint citations to NYSCEF page number and, where possible, hyperlinks to the actual NYSCEF Document." (Part 48 Procedures ¶ 5 [A].)

Background

Plaintiff alleges that he worked for defendant as a sales representative in New York from January 1, 2010, until February 3, 2020. (*Id.* ¶ 7.) He received a base salary and sales commissions that “consisted of varying percentages based on products sold, which were established for six-month periods, every January 1 and July 1.” (*Id.* ¶ 16.) Defendant provided plaintiff and other salespeople with “Incentive Plan Letters” (IPL), which set forth commission plans and six-month sales target quotas. (See *id.* ¶¶ 16, 27.) IPLs “disclaimed constituting an enforceable contract or promise by [defendant] to pay any sales commissions.” (*Id.* ¶ 17.) About the same time as sales representatives received IPLs, defendant also offered a PowerPoint presentation describing the terms of the applicable commission plans. (*Id.* ¶ 18.) In the presentation, defendant represented that “[e]arnings opportunity remains uncapped,’ [p]ayments uncapped,’ and that sales must have ‘ledger-based and auditable measurements.’” (*Id.* ¶ 19.) These representations were “often repeated in sales meetings that are widely attended by salespeople like [plaintiff] and were separately repeated to” plaintiff by his managers. (*Id.* ¶ 20.) Defendant’s written guidance to managers provided that:

“Conditions that may lead to an adjustment [of commissions] include the need to correct errors or the need to balance with employee’s contribution to the success of a large sales transaction (which criteria must be clearly provided to Commissions team).

Adjustments must not be done only as a ceiling or cap on the total earnings allowable to employees.” (*Id.* ¶ 21.)

“In other words, IBM’s official policies provide that sales representatives’ commissions may be adjusted to correct errors, but their commissions may not be arbitrarily capped for the purpose of limiting their earnings.” (*Id.* ¶ 22.)

From 2015 through June 2016, plaintiff was “the only sales representative and person principally responsible for trying to close” a large deal with nonparty Citigroup. (*Id.* ¶ 26.) In March or April 2016, plaintiff told his manager that the deal was likely to close. (*Id.* ¶ 28.) Shortly thereafter, defendant classified the Citigroup deal as a Target Account Absolute Plan (TAAP) account, taking the “deal away from [plaintiff’s] normal commission plan,” an Individual Quota Plan. (*Id.* ¶ 29.) The Individual Quota Plan and another plan relevant here, the Straight Rate Absolute Sales Plan, dictated that commissions be determined using a formula based on the seller’s sales; measurements for these plans are designed to be “for the most part” automated. (See NYSCEF 183, tr at 32:23-33:9 [Lipner depo²].) Plaintiff alleges that the decision to move the deal “into a TAAP account was designed to cap [his] commission on what was going to be a most substantial software and services sale, something that IBM has done with other salespeople in similar circumstances, and all part of IBM’s pattern and practice of capping commissions.” (*Id.* ¶ 30.)

In June 2016, plaintiff closed the Citigroup deal, which was “a \$21 million total sale, well in excess of his \$1.5 million quota [for the applicable period] with \$9 million ... in revenue alone for the first six months after closing of the deal.” (*Id.* ¶ 35.) Plaintiff was “the only IBM sales representative on the deal and, while a few other IBM personnel had been put on the account and were responsible for some of the ancillary parts of the sale, his product was the heart of the deal.” (*Id.*) Plaintiff would have

² Maria Lipner is defendant’s Vice President of Global Sales Incentives. (NYSCEF 183, tr at 22:11-14 [Lipner depo].) Plaintiff’s counsel Matthew E. Lee states that the parties agreed to use deposition transcripts that were taken in another action against defendant, *Comin v International Business Machines Corporation*, No. 19-cv-07261-JD (ND Cal). (NYSCEF 176, Lee aff ¶¶ 41-47.)

“earned a commission of approximately \$770,000 under the formula that usually applied to his sales under” the Individual Quota Plan. (*Id.* ¶ 37.) Under TAAP, however, “his commission was only \$181,800, but after [plaintiff] pushed back, [defendant] paid him \$218,000.” (*Id.* ¶ 37.) Plaintiff alleges that his commission was “not adjusted as a result of any errors or to balance his contribution against that of others who worked on the deal. Rather, his commission was arbitrarily capped to limit his earnings.” (*Id.* ¶ 38.) Defendant has allegedly “had a pattern and practice of failing to adhere to its promise not to cap commissions and pay earned commissions in their entirety.” (*Id.* ¶ 40.)

Class Allegations and Claims

Plaintiff seeks to certify a class of “[i]ndividuals residing or who resided in the State of New York while working for IBM on a commissions incentive plan since September 18, 2014, none of whom were provided with the terms of their commissions in a written contract signed by IBM.” (NYSCEF 190, Proposed Order at 1.) Additionally, he seeks to certify a subclass of:

“[s]alespeople whose commissions were manually adjusted by IBM, and who: (1) worked for IBM under one of two types of commissions plans, an Individual Quota Plan or a Straight Rate Absolute Sales Plan; (2) earned commissions after September 18, 2014; (3) had those commissions reduced through the exercise of discretion by an IBM manager or executive; and (4) reside or resided in New York when their commissions were reduced.” (*Id.*)

On behalf of both the class and subclass, plaintiff alleges a claim for violation of Labor Law § 191 (1) (c).^{3,4} (NYSCEF 51, FAC ¶¶ 115-121.) He alleges that defendant violated section 191 (1) (c) by failing to pay the full commissions. (*Id.* ¶ 117.) Plaintiff alleges that defendant violated section 191 (1) (c) also by failing to provide the sales representatives with a written signed contract, which violation “continues today and ... will continue unless enjoined by this Court.” (*Id.* ¶ 119.) Plaintiff seeks to recover unpaid commissions, statutory damages, attorneys’ fees, costs pursuant to Labor Law § 198 (1),⁵ as well as “declaratory and injunctive relief in order to ensure that IBM’s continued Labor Law violations do not occur hereafter.”⁶ (*Id.* ¶ 121.) Plaintiff clarifies in his reply brief that “the [c]lass’s claim is ... for declaratory and injunctive relief and costs not to exceed \$50.00 per Class member, pursuant to” section 198 (1) (NYSCEF 225,

³ Labor Law § 191 (1) (c) states that “A commission salesperson shall be paid the wages, salary, drawing account, commissions and all other monies earned or payable in accordance with the agreed terms of employment, but not less frequently than once in each month and not later than the last day of the month following the month in which they are earned.... The agreed terms of employment shall be reduced to writing, signed by both the employer and the commission salesperson, kept on file by the employer for a period not less than three years and made available to the commissioner upon request The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment.” (Labor Law § 191 [1] [c] [emphasis added].)

⁴ Although plaintiff repeatedly mentions the class in the fraud claim (see NYSCEF 51, FAC ¶¶ 122-131), he states that only the Labor Law claim is alleged on behalf of the class. (NYSCEF 173, MOL at 16.)

⁵ Labor Law § 198 (1) states that “[i]n any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court may allow such employee in addition to ordinary costs, a reasonable sum, not exceeding fifty dollars for expenses which may be taxed as costs.” (Labor Law § 198 [1].)

⁶ Plaintiff provides no further clarification as to the declaratory or injunctive relief he seeks.

Reply MOL at 6⁷), while the subclass seeks the payment of “wrongfully cut commissions.” (*Id.* at 7.)

Plaintiff’s remaining claims for fraud, quantum meruit, and unjust enrichment on behalf of the subclass only.⁸ In the fraud claim, plaintiff alleges that defendant misrepresented to him and other sales representative that the commissions were uncapped. (See NYSCEF 51, FAC ¶¶ 90-102.) In the quantum meruit claim, plaintiff alleges that defendant failed to pay him reasonable value of his services. (See *id.* ¶¶ 103-108.) In the unjust enrichment claim, plaintiff alleges that defendant was unjustly enriched by capping commissions notwithstanding its promise not to do so. (See *id.* ¶¶ 109-114.)

Discussion

CPLR 901 (a), which “should be broadly construed” (*City of NY v Maul*, 14 NY3d 499, 509 [2010] [internal quotation marks and citation omitted]), provides that a class action may be maintained 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.” (CPLR 901 [a].)

⁷ NYSCEF pagination.

⁸ The court dismissed claims for negligent misrepresentation and prima facie tort. (NYSCEF 141, Decision and Order at 21 [mot. seq. no. 003].) The court also dismissed the fraud claim to the extent it is based on the misrepresentations alleged in paragraphs 20 and 21 of FAC. (*Id.* at 9.)

“Once these prerequisites are satisfied, the court must consider the factors set out in CPLR 902.” (*Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998].) Those factors 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; [and] 5. the difficulties likely to be encountered in the management of a class action.” (CPLR 902.)

Plaintiff must establish by competent evidence the requirements set forth in CPLR 901 and 902 for obtaining class certification. (*See Ackerman*, 252 AD2d at 191.) “The determination of whether or not a matter qualifies as a class action ... rests within the sound discretion of the motion court.” (*Rabouin v Metro. Life Ins. Co.*, 25 AD3d 349, 350 [1st Dept 2006].) “New York courts have ... found that [f]ederal jurisprudence is helpful in analyzing CPLR 901 issues ... because CPLR article 9 has much in common with Federal rule 23, ... the federal class action provision.” (*Maul*, 14 NY3d at 510 [internal quotation marks and citations omitted].)

1. CPLR 901

Numerosity

“There is no mechanical test to determine whether ... numerosity ... has been met, nor is there a set rule for the number of prospective class members which must exist before a class is certified Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and commonsense assumptions from the facts before it.” (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137-38 [2d Dept 2008] [internal quotation marks and citations omitted].)

Plaintiff estimates that the class is comprised of about 2,000 sales representatives but proffers no evidence in support. However, plaintiff’s estimate is “not specifically

challenged by a defendant despite the fact that information as to the size of the class is within the defendant's control ... [and thus] the numerosity requirement is satisfied" as to the class. (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980] [citation omitted].) Further, class certification is preferred to joinder of 2,000 employees which would be impracticable. (See *Pesantez v Boyle Env'tl. Servs., Inc.*, 251 AD2d 11, 11-12 [1st Dept 1998] [class of 80 workers]; *Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept 2011] [class of 50 to 100 laborers].)

As to the subclass, plaintiff proffers a spreadsheet of 110 of defendant's New York sales representatives, identified by employee number, who worked on the Individual Quota Plan or Straight Rate Absolute Sales Plan and whose commissions have been allegedly reduced (Exhibit A).⁹ (See NYSCEF 176, Lee aff ¶¶ 36-38;

⁹ Lee explains that Exhibit A was created by plaintiff based on two documents produced by IBM, IBMEngel100417 (NYSCEF 216) and IBMEngel100418 (NYSCEF 217). (See NYSCEF 176, Lee aff ¶¶ 36, 38.) The court rejects Lee's averment that "IBM marked each of the entries included on Exhibit A with a code or description indicating that the commissions calculated were reduced through the exercise of management discretion, not because of some kind of error." (*Id.* ¶ 38.) First, IBMEngel100417 (NYSCEF 216) does not have the description of all the applicable codes, which Lee avers are "400%ADJ, 400%CAP, HOLDIANR, LARGENOR, LARGEAP, MEEINSPP, MEEINSPECS, and MEEINSPT." (*Id.* ¶ 38.) For those codes that are described in IBMEngel100417 (NYSCEF 216), the descriptions are ambiguous. (See *e.g.* NYSCEF 216, BEngel100417 [claim code: "400%ADJ," category: "400% - High Achievement - Adj. Request from Approvers," description of manual adjustment: "[w]hen BU VP & BU CFO do reply to notification on high achvmts >= 400% and ask for an adjustment".]) Further, Lee avers that "[f]or the entries identified on Exhibit A that came from ... IBMEngel000418, those entries related to reductions that are identified as applying to ELA (Enterprise License Agreement) deals or other large deals after those deals closed, which are reductions that involve the exercise of management discretion." (NYSCEF 176, Lee aff ¶ 38.) No support for this statement is found in IBMEngel000418 (NYSCEF 217). Thus, the court accepts Exhibit A as an estimate of the subclass membership but makes no finding as to the reasons for commission adjustments with respect to each subclass member. Indeed, as discussed *infra*, such a determination involves individualized issues of fact.

NYSCEF 177, Exhibit A Spreadsheet). This estimate is not challenged by defendant. Thus, the numerosity prerequisite is met as to the subclass. (See *Pesantez*, 251 AD2d at 11-12; *Dabrowski*, 84 AD3d at 634.)

Commonality/Predominance

“When individualized proof is required for the claims alleged or individual factual questions with respect to individual class members preponderate, commonality is lacking.” (*Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 422-23 [1st Dept 2010] [citations omitted].)

“However, the rule requires predominance not identity or unanimity among class members Thus, commonality is not merely an inquiry into whether common issues outnumber individual issues but rather whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.” (*Id.* [internal quotation marks and citations omitted].)

Plaintiff has established the commonality prerequisite as to the class, which includes the sales representatives who “were [not] provided with the terms of their commissions in a written contract signed by” defendant. (NYSCEF 190, Proposed Order.) In the single cause of action for the violation of Labor Law brought on behalf of the class, plaintiff seeks declaratory and injunctive relief in connection with defendant’s alleged failure to provide the sales representatives with a signed writing as required pursuant to Labor Law § 191 (1) (c) and costs not to exceed \$50.00 per class member pursuant to Labor Law § 198 (1). (NYSCEF 51, FAC ¶¶ 119-121; NYSCEF 225, Reply MOL at 6.) One common issue at to the class predominates, namely, whether defendant provided its sales representatives with “[t]he agreed terms of employment ... reduced to writing, signed by both the employer and the commission salesperson.” (Labor Law § 191 [1] [c]; see *Matter of Smith v Berlin*, 43 Misc 3d 1209[A], 2013 NY Slip

Op 52305[U], *8 [Sup Ct, NY County 2013] [in action for declaratory and injunctive relief to assure compliance of notices with constitutional, statutory, and regulatory requirements, commonality is satisfied because “[t]he predominant legal claims regarding the adequacy of the predicate notices do not require individualized proof for the class to establish the claims or for the court to determine their merit”]; *see also Neal v Casey*, 43 F3d 48, 61 [3d Cir 1994] [in action for declaratory and injunctive relief where class of 6,000 children sought to ensure Philadelphia’s Department of Human Services’ compliance with statutory requirements, commonality was satisfied because “DHS’s systemic deficiencies in providing legally mandated child care services is a sufficiently common legal basis to support class certification”].¹⁰

Defendant proffers evidence¹¹ to show that in 2018, the language stating that “[t]he Plan does not constitute an express or implied contract or a promise by IBM to make any distributions under it” has been removed from IPLs. (NYSCEF 199, tr at 126:22-127:21 [Engel depo]; NYSCEF 210, IPL version comparison at 4.) However, the mere fact that the IPLs were changed in 2018 makes no difference. Whether either of

¹⁰ Defendant’s counsel asserted for the first time during the oral argument that plaintiff “has no standing to make a claim for declaratory relief or injunctive relief” because plaintiff is no longer defendant’s employee. (NYSCEF 237, tr at 33:18-20 [Dec. 19, 2023 oral argument].) This “defense of lack of standing was waived inasmuch as it was not raised in the ... pre-answer dismissal motion.” (*Wex Capital, Inc. v Bakhchi*, 2022 NY Slip Op 30313[U], *3 [Sup Ct, NY County 2022]; *see Mtge. Elec. Registration Sys., Inc. v Gifford*, 133 AD3d 429, 430 [1st Dept 2015] [“[t]he defenses of standing and capacity to sue are both subject to the same waiver rule under CPLR 3211(e)” (citation omitted)]; NYSCEF 92, MOL [mot. seq. no. 003 seeking dismissal].)

¹¹ Defendant’s counsel is reminded that e-filled documents shall be clearly labeled and described with specificity. (See Part 48 Procedure 5 [B].) Defendant’s NYSCEF 195 through 198, 200 through 207, 210, and 211 are not so described. The accompanying attorney affirmation provides no aid in describing the exhibits. (See e.g. NYSCEF 194, Crawford aff ¶ 3 [“Exhibit 1 is a true and correct copy of a document produced by IBM in this action Bates-stamped IBMEngel000017”].)

the two versions constitutes a “writing” pursuant to Labor Law § 191 (1) (c) is still an issue that is sufficiently common to the class.

The commonality prerequisite as to the subclass, however, is not met because plaintiff fails to demonstrate that liability can be established by common proof on subclass-wide basis. The subclass asserts the causes of action for violation of Labor Law § 191 (1) (c), quantum meruit, unjust enrichment, and fraud and seeks, inter alia, unpaid commissions. The court agrees that the issue of whether defendant had a secret policy of capping commissions, which it promised not to cap, is common to the subclass. However, to establish liability in light of plaintiff’s own allegations, an individual determination would need to be made as to every subclass member whether their commissions were capped in violation of the alleged promise that commissions remain uncapped or rather adjusted for other reasons, e.g., “as a result of any errors or to balance his contribution against that of others who worked on the deal.” (NYSCEF 51, FAC ¶ 38.) Likewise, plaintiff’s evidence does not establish that any commission adjustment would necessarily be due to capping. (See e.g., NYSCEF 183, tr at 128:12-17 [Lipner depo] [“I believe that IBM currently adjusts commissions for errors”].) Because factual questions of liability as to each subclass member would predominate, commonality is lacking. (See *Evans v Johnstown*, 97 AD2d 1, 3 [3d Dept 1983] [“the main issues of whether a specific injury to property or person was caused by the sewerage plant and of the extent of any damages require individualized investigation, proof and determination The necessity for such particularized consideration of liability and damages precludes a finding of predominance of common questions of law or fact” (citation omitted)]; *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830, 830 [4th

Dept 1979] [commonality is lacking where the “two central issues pertaining to each residential property (i.e., whether any discoloration was caused by defendants’ actions on January 28, 1977 and, if so, the extent of the damages resulting therefrom) are questions which require individual investigation and proof and which must be decided separately with respect to each individual claim” (citations omitted)], *lv dismissed* 47 NY2d 802 [1979].)

Plaintiff argues that because the subclass includes only those sales representatives whose “commissions [were] reduced through the exercise of *discretion* by an IBM manager or executive,” the subclass members whose commissions were adjusted to correct errors “would fall out.” (NYSCEF 225, Reply MOL at 10 [citation omitted].)

Plaintiff’s argument is unavailing. As to each potential subclass member, the same individual determination would still need to be made whether any of their commission reductions were due to capping. Plaintiff’s attempt to “presuppose[] proof of one of the contested elements” in the subclass definition makes no practical difference. (*Wojciechowski*, 67 AD2d at 830.) As discussed herein, individual determinations would predominate over questions of law or fact common to the subclass. (*See Batas v Prudential Ins. Co. of Am.*, 37 AD3d 320, 321 [1st Dept 2007] [in class “limited to plan participants who have been denied care through an improper review process ... each class member’s recovery against [defendant] ... would depend on a determination that the care denied to him or her was *medically necessary*.... [T]he medical necessity issue--unique and complex in each class member’s particular case--would predominate over the questions of law or fact common to the class as a whole”

(citations omitted)]; *Gawez v Inter-Connection Elec., Inc.*, 9 Misc 3d 1107[A], 2005 NY Slip Op 51443[U], *9 [Sup Ct, Kings County 2005] [“courts generally will find that class action certification is inappropriate where a case-by-case analysis is necessary to ascertain the viability of individual membership in the class” (citations omitted)], *affd* 44 AD3d 898 [2d Dept 2007].)

Orgill v Ingersoll-Rand Co., 110 AD3d 573, 574 [1st Dept 2013], upon which plaintiff relies, is distinguishable. *Orgill* involved a claim arising from alleged deductions from wages in violation of Labor Law § 193, and “[a]ll members of the class allege[d] the deprivation of monies that defendants allegedly wrongfully deducted.” (*Id.*) In *Orgill*, “[t]he central issue [which was the same for all class members was] ... when commissions were earned.” (*Id.*) *Orgill* did not involve the issue of whether the alleged deduction affected every class member. Accordingly, to the extent plaintiff seeks certification of the subclass, his motion is denied.¹² The court discusses herein whether certification of the class is warranted.

Typicality

Plaintiff’s claim seeking declaratory and injunctive relief and costs is typical of the class’s claim as the claims derive from the same alleged practice of failing to provide the commissioned sales representatives with a writing required pursuant to Labor Law § 191 (1) (c). (*C.H. v Columbia Grammar & Preparatory Sch.*, 204 AD3d 601, 601 [1st Dept 2022] [plaintiff’s claims “are typical of those in the class ... if they derive[] from the

¹² Plaintiff’s request to certify an issue class, which is made in a footnote, will not be considered as plaintiff fails to articulate which issues it seeks to have resolved on a subclass-wide basis. (NYSCEF 173, MOL at 17 n 9 [NYSCEF pagination].) Moreover, the court notes that certification of an issue class is not sought in the Notice of Motion. (NYSCEF 172, Notice of Motion.)

same practice or course of conduct that gave rise to the remaining claims of other class members and [are] based upon the same legal theory” [internal quotation marks and citation omitted].)

Adequacy of Representation

A class representative is adequate is they “will fairly and adequately protect the interests of the class.” (CPLR 901 [a].) “A class representative acts as principal to the other class members and owes them a fiduciary duty to vigorously protect their interests.” (*Rochester v Chiarella*, 65 NY2d 92, 100 [1985] [citations omitted].) “The factors to be considered in determining adequacy of representation are whether any conflict exists between the representative and the class members, the representative’s familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel.” (*Ackerman*, 252 AD2d at 202 [citations omitted].)

Plaintiff ceased his employment with defendant on February 3, 2020. (NYSCEF 51, FAC ¶ 7.) Thus, he has no stake in whether defendant will be enjoined from violating Labor Law § 191 (1) (c), which requires that a writing be provided to commissioned sales representatives. “[A] class representative with no stake in a prospective injunction has no incentive to vigorously pursue those claims” and thus plaintiff is an inadequate class representative insofar as injunctive relief is sought. (*Barrett v Pioneer Natural Resources USA, Inc.*, 2018 US Dist LEXIS 135019, *12 [D Colo, July 26, 2018, No. 17-cv-1579-WJM-NYW], quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 3:59 [5th ed., June 2018 update] [denying class certification where plaintiff was no longer retirement plan participant and sought prospective equitable relief]; see *Mayo v USB Real Estate Sec., Inc.*, 2011 US Dist

LEXIS 31390, *14 [WD Mo, March 25, 2011, No. 08-00568-CV-W-DGK] [as plaintiff “has no stake in whether injunctive relief is given or not, he will not be particularly interested in this aspect of the case, and his lack of interest would be antagonistic to those who might benefit from injunctive relief”]; see also *Lyons v Georgia-Pacific Corp. Salaried Emples. Retirement Plan*, 221 F3d 1235, 1253 [11th Cir 2000] [“Indifference as well as antagonism can undermine the adequacy of representation” (footnote omitted)].) This rationale similarly applies to plaintiff insofar as he seeks declaratory relief as to defendant’s alleged practices taking place after February 3, 2020, to the extent such practices have changed since plaintiff has left employment.

To the extent plaintiff seeks declaratory relief as to defendant’s practices that applied to him while he was employed with defendant, however, his claim is typical of those of the class, and thus, plaintiff and the class members share a common goal. Under such circumstances, there is no conflict of interest. (*Griffith v W. 171 Assoc., LP*, 2019 NY Slip Op 30322[U], *7-8 [Sup Ct, NY County 2019] [holding that no conflict of interest existed where named plaintiffs’ claims were typical of those of class and they shared common goal].) Further, plaintiff has demonstrated familiarity with the lawsuit in his deposition testimony. (See e.g., NYSCEF 199, tr at 12:14-14:3 [Engel depo].) There is no doubt as to the competency and experience of plaintiff’s counsel, Klafter Lesser LLP (see NYSCEF 174, Seth R. Lesser aff ¶ 4; NYSCEF 175, resume) and

Milberg Coleman Bryson Phillips Grossman, PLLC. (See NYSCEF 176, Lee aff ¶¶ 4-35; NYSCEF 178, bios.)¹³

However, plaintiff fails to proffer any evidence to show that he has the financial resources to prosecute this action on behalf of the class, which by plaintiff's estimation would include more than 2,000 class members. The bare assertion in the moving brief that "[p]laintiff is fully prepared to prosecute this case" is insufficient. (NYSCEF 173, MOL at 22.) There is no indication that plaintiff's litigation costs are advanced. (See *Gudz v Jemrock Realty Co., LLC*, 105 AD3d 625, 626 [1st Dept 2013] [plaintiff's "financial ability to adequately represent the class ... was adequately shown by counsel's assumption of the risk of costs and expenses in the litigation"].) In such circumstances, the court cannot make a threshold determination that plaintiff has the financial resources to adequately protect the interests of the class. (See *Abdale v N. Shore-Long Is. Jewish Health Sys., Inc.*, 51 Misc 3d 1226[A], 2016 NY Slip Op 50827[U], *11 [Sup Ct, Queens County 2016] [as plaintiffs provided no information regarding their financial resources, adequacy of class representatives is not established].)

Plaintiff's "failure to establish that ... [he] is an adequate class representative, requires that the motion for certification be denied at this time, but without prejudice to renew." (*Borden v 400 E. 55th St. Assoc. L.P.*, 34 Misc 3d 1202[A], 2011 NY Slip Op

¹³ The court need not determine whether Bronson Legal LLC, plaintiff's remaining counsel of record, is an adequate class counsel as plaintiff does not seek that Bronson Legal LLC be appointed as class counsel. (See NYSCEF 172, Notice of Motion at 1.)

52322[U], *2 [Sup Ct, NY County 2011].) As discussed below, the remaining requirements to certify the class are met.

Superiority

The court finds that plaintiff has made an adequate showing of superiority under the particular facts and circumstances of this action. Indeed, as to the class's Labor Law claim, "[c]lass action treatment will conserve judicial resources, reduce litigation expenses, and avoid inconsistent outcomes." (*Roberts v Ocean Prime, LLC*, 148 AD3d 525, 526 [1st Dept 2017].)

2. CPLR 902

The CPLR 902 factors weigh in favor of class certification. There is no indication that the class members have any interest in individually controlling the prosecution of any separate action or have commenced any litigation. If any of the class members are unwilling to maintain a claim against defendant, they may opt out of the class. The prosecution of individual actions seeking declaratory and injunctive relief would be inefficient. Finally, given that the class members are employees who reside or previously resided in this state, litigation in this forum is desirable.

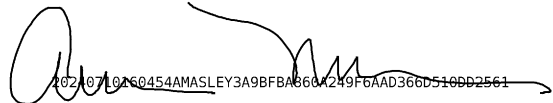
The court has considered the parties' remaining argument and finds that they either do not change the outcome or have been improperly raised for the first time during oral argument. (*See e.g. Simon v FrancInvest, S.A.*, 192 AD3d 565, 569 [1st Dept 2021] ["An argument raised for the first time in reply—when the other party has no chance to respond—should not be considered" (citations omitted)], *appeal dismissed* 37 NY3d 1005 [2021].)

Accordingly, it is

ORDERED that plaintiff's motion for class certification is denied with prejudice to the extent plaintiff seeks to certify the subclass; and it is further

ORDERED that plaintiff's motion for class certification is denied without prejudice to the extent plaintiff seeks to certify the class; and it is further

ORDERED that plaintiff's motion to renew shall be made within 20 days of this decision, otherwise waived.



7/10/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE