

Gatlin v Elecnor Hawkeye, LLC

2025 NY Slip Op 31840(U)

May 8, 2025

Supreme Court, Kings County

Docket Number: Index No. 531124/2021

Judge: Peter P. Sweeney

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At an IAS Term, Part 73, 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 8th day of May, 2025.

P R E S E N T:

HON. PETER P. SWEENEY,
Justice.

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CURTIS GATLIN and EARL PARCHMENT,
Individually and On Behalf of the Putative
Class Members,

Index No.: 531124/2021

Plaintiffs,

Motion Seq. 3

-against-

ELECNOR HAWKEYE, LLC,

Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	35-53
Opposing Affidavits (Affirmations) _____	57-68
Affidavits/ Affirmations in Reply _____	70-73
Other Papers: _____	_____

Upon the foregoing papers, plaintiffs Curtis Gatlin and Earl Parchment (plaintiffs) move for an order, pursuant to CPLR 901 and 902, certifying the proposed class, appointing plaintiffs as representatives of the class, appointing plaintiffs' counsel as class counsel, authorizing plaintiffs to send the proposed notice of class action to the members of the class, and directing defendant Elecnor Hawkeye, LLC (Hawkeye) to furnish plaintiffs with contact information of the proposed class (motion sequence number 3).

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Plaintiffs' motion (motion sequence number 3) is granted to the extent that it is **ORDERED** that:

(1) plaintiffs' causes of actions for unpaid overtime and failure to pay wages (first and second causes of action) are certified as a CPLR 901 class action on behalf of a class defined as: all individuals employed by Elecnor Hawkeye, LLC who worked as foremen, laborer-drivers, laborers, mechanics, mechanic helpers, fusers, operators, and other field construction workers at any time since April 22, 2015 through the present (the "Class Members");

(2) plaintiffs Curtis Gatlin and Earl Parchment are certified as class representatives for the Class;

(3) Pelton Graham LLC is appointed Class Counsel;

(4) the class action notice, entitled "NOTICE OF PENDENCY OF CLASS ACTION" (NYSCEF Doc No. 52; Exhibit 15 to the affirmation of Brent E. Pelton), shall be modified in paragraph 7 thereof to inform potential class members that they must opt out of the class if they wish to pursue potential statutory damage claims under Labor Law §198 (1) or § 198 (3), and with that modification, is approved for mailing to the Class Members;

(5) Hawkeye shall provide to plaintiffs, within thirty (30) days following the date that a copy of this order is served on Hawkeye with notice of entry, the names, addresses, phone numbers and email addresses of all potential Class Members who worked as foremen, laborer-drivers, laborers, mechanics, mechanic helpers, fusers, operators, and other field construction workers at any time since April 22, 2015 through the present. This

information shall be supplied digitally in one of the following formats: Microsoft Excel; or Microsoft Word;

(6) plaintiffs shall mail and email the Notice of Pendency of Class Action, as modified herein, to all potential plaintiffs no later than fifteen (15) days following receipt of Hawkeye's disclosure of the contact information for the Class Members; and

(7) Class Members may exclude themselves from the Class by sending a written request to Class Counsel within forty-five (45) days from the date that the Notice of Pendency of Class Action is mailed.

Background

In this putative class action, plaintiffs assert that they and the proposed class members, while employed by Hawkeye, were required to report to and perform work at Hawkeye's yards prior to traveling to jobsites and were required to return to the yard after leaving the jobsites each afternoon, without being compensated for this time (NYSCEF Doc No. 38 at 15-17). Plaintiffs also assert that Hawkeye failed to supply them, and the proposed class members yearly notice of wages as required by Article 6, § 195 (1) of the New York Labor Law (NYLL), or proper wage statements as required by NYLL § 195 (3). Plaintiff Gatlin also alleges unlawful retaliation as an individual claim.

In support of their motion for class certification, plaintiffs have submitted their deposition testimony as well as that of four non-party witnesses, and a representative of Hawkeye. Gatlin worked at Hawkeye as a foreman (NYSCEF Doc No. 40 at 4). He testified that he "was told to be at the yard between 6:00 and 6:15 in the morning," in order to complete paperwork, hook up a trailer if necessary for the day's work, and load up the back

of the truck with materials for the day (*id.* at 10, 26, 27). He also stated that safety meetings were held weekly between 6:30 a.m. and 7:00 a.m. and that all crew employees who worked on Con Edison crews were in attendance (*id.* at 38-39). In general, Gallin observed about 32 men working in the yard each day prior to 7:00 a.m. (*id.* at 49-50). He also explained that he was not paid for time worked in the morning prior to 7:00 a.m., including time worked in the yard and time driving from the yard to the jobsite (*id.* at 52-53). Further, he noted that he was not consistently paid for time spent driving back to the yard after work at the jobsite was concluded (*id.* at 52).

Parchment also worked at Hawkeye as a laborer (NYSCEF Doc No. 41 at 6). He also confirmed that everyone attended weekly safety meetings which typically started around 6:15 a.m. or 6:30 a.m. and took about 30 minutes (*id.* at 7). Parchment testified that he arrived at the Hawkeye Queens yard around 6:15 a.m. each morning, in order to prepare for the day (*id.* at 15, 22). He explained that “they want the guys to be at the yard by 6:30 ... They want you in the yard between 6:15 and 6:30, no later than that, because everything needs to get out the yard” (*id.* at 15). Generally, he would see at least about 25 other employees at the yard in the morning before 7:00 a.m., and he testified that he was not paid for time spend in the yard prior to 7:00 a.m. (*id.* at 34-35), Parchment also confirmed that he did not receive a written notice of wages when he started as a laborer with Hawkeye (*id.* at 37).

Non-party witness Vito DiMeglio, a laborer at Hawkeye through August 2023, worked at the Hawkeye Queens yard, as well as the Hawkeye Brooklyn yard (NYSCEF Doc No. 42 at 4). When he was working at the Queens yard, DiMeglio had to go to the

yard before traveling to the jobsite and would arrive at 6:00 a.m. on a typical day because the employees “had to be at the [jobsite] location by 7:00” (*id.* at 8-9, 13). He explained that safety meetings were also held regularly, and in order to set up for those meetings, he had to arrive at 6:00 a.m. (*id.* at 20). He stated that he was told that he should be in the yard every day around 6:00 a.m. or 6:15 a.m. and that he had to be at the jobsite by 7:00 a.m. (*id.* at 26, 27). With respect to travel time back to the yard at the end of the day, DiMeglio estimated that he was paid for approximately sixty percent of the time that he spent driving back to the yard (*id.* at 33). He also testified that his pay stubs never accurately recorded the numbers he worked, and he was not paid for any work done prior to 7:00 a.m., including time worked at the yard prior to 7:00 a.m. or his attendance at safety meetings (*id.* at 43-45). In support of plaintiffs’ motion, DiMeglio also submitted a signed declaration, in which he averred that “[t]hroughout [his] employment at Hawkeye, [he] was not paid for time spent working in Hawkeye’s yard in the mornings or traveling from the yard to the worksites” (NYSCEF Doc No. 50 at 4). He also averred that it was his understanding “that none of the other foremen, laborers, drivers, operators, fusers, mechanics, or mechanic helpers were compensated for the time that they spent working in the yard in the morning, for travel time in the morning between the yard and the jobsite to which they were assigned...and/or for time spent participating in safety or DOJT meetings” (*id.*). DiMeglio further stated that he “and the other foremen, drivers and operators were required to return to the yard in the afternoon to park [their] vehicles and/or machines in the yard” and that he was not compensated for time spent performing any required tasks in the yard at the end of the day, although he was paid for travel time at the end of the day that exceeded fifteen

minutes (*id.* at 4-5). He noted that his “paystubs indicated the incorrect number of hours worked each week because they did not include all time spent working in the Hawkeye yard or traveling between the yard and the jobsites” and that he did not “recall ever receiving a wage notice from Hawkeye” (*id.* at 5).

Plaintiffs also included excerpts of the deposition of non-party witness Anthony Cucuzza, who worked as a yard helper and a laborer at Hawkeye (NYSCEF Doc No. 43 at 4-5, 6-7). He testified that he worked out of the Queens yard and typically arrived at about 6:15 a.m. or 6:30 a.m. (*id.* at 7, 9). Generally, Cucuzza spent approximately thirty minutes in the yard in the morning, doing inspection reports for box trucks and loading up material for the day’s work (*id.* at 8, 9, 11-12). He also returned to the yard after completing work at the jobsite every day (*id.* at 15). Although Cucuzza stated that he was paid for driving time, he noted that he was given a specific amount of time that Hawkeye would pay for travel and this allotted time could be “stringent” (*id.* at 18-19). He also indicated that there were mandatory safety meetings that were regularly held at the yard, and that the field employees would not be able to leave for the jobsite until the safety meeting was concluded (*id.* at 29, 30, 32-33, 50). He testified that he was not paid for any time worked or spent attending safety meetings prior to 7:00 a.m. on a typical day, and he was told by supervisor John Costakis that his pay started at 7:00 a.m. (*id.* at 34, 42, 54, 66-67). He found out about any changes in his pay rate through his paycheck, and received a paycheck every week, although time spent in the yard prior to 7:00 a.m. was not reflected in this check (*id.* at 41, 43, 45, 52). Generally, on any given morning, Cucuzza observed thirty or forty employees arriving at the Queens yard prior to 7:00 a.m. (*id.* at 54).

Non-party witness Daniel Darling also worked for Hawkeye as a laborer in the Queens yard (NYSCEF Doc No. 44 at 4, 9). He testified that he would generally arrive in the yard at about 5:30 a.m. or 5:45 a.m. and would leave by 6:05 a.m. or 6:10 a.m. (*id.* at 5-6). Before leaving the yard, he would load up the truck with material for the day, return used fuel cans and retrieve new fuel cans, and attend safety meetings and stand-up meetings (*id.* at 10-11). Darling further testified that, on a typical day, there were about fifty to seventy-five people leaving from the yard before 7:00 a.m. (*id.* at 14, 27). He also testified that he would return to the yard at the end of the day, which usually took him about an hour and fifteen minutes or an hour and a half, but was only paid until the time that he left the jobsite (*id.* at 20-21, 23). His understanding was that no employee was paid for time spent in the yard preparing for the day or driving to the jobsite, time spent in the yard after returning from the jobsite, or for attending safety meetings (*id.* at 27).

Similarly, non-party witness Rafael Cruz, who worked as a laborer in the Hawkeye Queens yard, testified that Hawkeye employees were directed to arrive in the yard at 6:00 a.m. so that they could be at the jobsite by 7:00 a.m. (NYSCEF Doc No. 45 at 3-4, 6-7, 8-9). Although employees were expected to be in the yard by 6:00 a.m. to prepare their vehicles and gather materials for the day's work, Hawkeye field employees were paid beginning at 7:00 a.m. and were not compensated for the amount of time spent traveling back to the yard at the end of the day (*id.* at 3-4, 9-10). He further testified that the paychecks he received never reflected more than eight hours of work, unless he had performed authorized overtime at the jobsite, and that he was not paid for travel time back to the yard (*id.* at 25-26). He also testified that any work that he performed prior to 7:00

a.m. at the yard was uncompensated (*id.* at 29). He confirmed that there were regular safety meetings that occurred at the yard before 7:00 a.m., and that his paychecks never reflected the time worked in the yard in the morning or any time travelling between the jobsite and the yard (*id.* at 42, 44).

Joe Kennedy, a supervisor at Hawkeye testified that he typically opened the Hawkeye Queens yard around 5:30 a.m., and that foremen generally started arriving at about 6:30 a.m. or slightly before 7:00 a.m., but that there was no required time to arrive at the yard, as long as they were ready to work at 7:00 a.m. (NYSCEF Doc No. 39 at 4-5, 16-18). He noted that safety meetings occurred periodically, and probably began at 6:30 a.m. (*id.* at 24, 27). He further confirmed that, although all field employees were required to attend these meetings, none of the field employees were paid for this time (*id.* at 27-29). Kennedy testified that employees received compensation for drive time, or time spent returning to the yard after eight hours of work, and that employees were paid from 7:00 a.m. until 3:30 pm (*id.* at 30, 32).

In opposition, Hawkeye pointed to excerpts of the deposition testimony of Kennedy, the named plaintiffs, and the non-party witnesses, as well as the diary of plaintiff Gatlin and GPS entries for eleven days which indicated different arrival times than Gatlin's diary. Hawkeye argues that the deposition excerpts, many which are duplicative of those produced by the plaintiff, demonstrate that the putative class members include trade workers that are represented by different trade unions and have different reporting and quitting times (NYSCEF Doc 63 at 7-9, 10-11, 26; NYSCEF Doc No. 64 at 4-6, 8, 9; NYSCEF Doc No. 65 at 8; NYSCEF Doc No. 66 at 6; NYSCEF Doc No. 67 at 6; NYSCEF

Doc No. 68 at 3, 5). Hawkeye also pointed to testimony of the plaintiffs and non-party witnesses indicating that they received a pay stub every week and were aware of their pay rate (NYSCEF Doc No. 64 at 11; NYSCEF Doc No. 65 at 9; NYSCEF Doc No. 66 at 8; NYSCEF Doc No. 67 at 9). Hawkeye further noted that the GPS entries provided establish that plaintiff Gatlin's claims with respect to the time he reported to the Queens yard were inaccurate, and therefore, argued that Gatlin's claims of unpaid time are devoid of merit (NYSCEF Doc No. 61).

Discussion

"Article 9 of the CPLR is to be liberally construed in favor of the granting of class certification if all of the prerequisites of CPLR 901(a)(1)-(5) are met" (*Globe v Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 135 [2d Dept 2008]). CPLR 901(a) sets forth five requirements for the certification of a class action, including that "the class is so numerous that joinder of all members whether otherwise required or permitted is impracticable"; that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members"; that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; that "the representative parties will fairly and adequately protect the interests of the class"; and, that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." "The plaintiffs [have] the burden of establishing compliance with the statutory requirements for class action certification under CPLR 901 and 902" (*Rallis v City of New York*, 3 AD3d 525, 526 [2d Dept 2004]).

Here, plaintiffs contend that they have met their burden of establishing compliance with the statutory requirements of CPLR 901. Plaintiffs note that, although they have not determined the precise number of potential class members, the testimony of plaintiffs, non-party witnesses, and the defendant's witness all indicate that the proposed class meets the numerosity standard, as this testimony indicated that there were at least approximately forty employees working out of the Queens yard at any given time. Further, plaintiffs point to the declaration of non-party witness DiMeglio who indicated that there were an additional twenty employees and putative class members working out of the Brooklyn yard on any given day. Plaintiffs also maintain that there exist common questions of fact and law which have satisfied the predominance requirement, in that plaintiffs note that the defendant's representative testified that the relevant timekeeping, payroll, and wage notification policies were consistent for all Hawkeye field employees, which is echoed by the testimony of the plaintiffs and the non-party witnesses. Plaintiffs assert that there exist common factual and legal questions as to whether Hawkeye field employees were required to perform off-site work, and whether they were appropriately compensated for any such work, as well as whether Hawkeye provided required wage notices. Further, plaintiffs maintain that typicality is satisfied, as the claims from the plaintiffs and the putative class would arise from the same policies consistently applied by Hawkeye, and their claims would be based on the same legal theories. Plaintiffs further argue that they are appropriate representatives of the class, as they are members of the class they seek to represent, and there are no conflicts that would preclude the plaintiffs from representing them. Further, they note that plaintiffs' counsel is experienced in handling multi-party class actions

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seeking unpaid wages and is fully qualified to pursue the action. Finally, plaintiffs note that the expense of multiple trials in a claim for unpaid wages would be wasteful and duplicative, and that the class action method is therefore superior to other available methods for the adjudication of this matter.

In opposition, Hawkeye contends that plaintiffs have failed to satisfy the CPLR 901 requirements of commonality, as “[e]ach worker performed different tasks on different crews that required different reporting locations and different reporting times” and “determining whether each individual employee of Hawkeye over the span of nine-plus years is included in the putative class will require individual inquiries into each individual’s role and job requirements” (NYSCEF Doc No. 57 at 18). Further, Hawkeye argues that plaintiffs have failed to establish typicality, as Gatlin “is an entirely different position that that of the putative class” as established by the GPS records which indicate that he did not report to the Queens yard on occasion, and because the plaintiffs’ claims are inconsistent with those of the putative class “because there are defenses to which Gatlin and Parchment are uniquely subject” (NYSCEF Doc No. 57 at 22). Hawkeye further contends that the plaintiffs have failed to establish that they can fairly and adequately protect the interests of the class, as Gatlin, as a foreman, had a conflict of interest with other putative class members, because he was responsible for time-keeping for the other Hawkeye field employees and therefore “was participating in the alleged wrongful conduct against his crew, who are included in the proposed class” (NYSCEF Doc No. 57 at 23). Hawkeye also maintains that it has unique defenses against Gatlin’s claims, as it “has provided GPS records that directly conflict with Gatlin’s claims” (*id.* at 24), and that Gatlin’s retaliation

claim, brought individually, makes him an inadequate representative for the proposed class. Finally, Hawkeye maintains that the plaintiffs have failed to establish the superiority of a class action, as they have failed to exhaust their administrative remedies by filing a complaint with the New York Department of Labor.

Numerosity

With respect to the numerosity requirement, Hawkeye concedes that it “does not dispute” the numerosity of the proposed class. Further, as plaintiffs have provided testimony indicating that there were at least approximately forty Hawkeye field employees present at the Queens yard, along with an additional twenty present in the Brooklyn yard, the plaintiffs have satisfied the numerosity requirement as set forth by CPLR 901(a)(1) (NYSCEF Doc No. 39 at 65; NYSCEF Doc No. 40 at 49-50; NYSCEF Doc No. 41 at 34-35; NYSCEF Doc No. 43 at 54; NYSCEF Doc No. 44 at 14, 27; NYSCEF Doc No. 50 at 4) (*see Chua v Trim-Line Hitech Construction Corp.*, 225 AD3d 565, 566 [1st Dept 2024] [“The affidavit submitted by the named plaintiffs and two other former employees ... established the numerosity of the class by identifying at least 39 coworkers who performed construction work, including sheet-metal work and other construction-related tasks at issue, on behalf of those defendants during the relevant time period ... There is no requirement that plaintiff must identify at least 40 members to demonstrate numerosity”] [internal citations omitted]; *Dabrowski v Abax*, 84 AD3d 633, 634 [1st Dept 2011] [“Abax’s argument that there was insufficient evidence that laborers other than the named plaintiffs (and three other identified employees) had been ‘aggrieved’ by alleged improper pay practices, thus precluding a finding of requisite numerosity, is unavailing given the

affidavits proffered by six laborers who attested, inter alia, that in the relevant years ... they worked with between 50 and 100 laborers, and that Abax engaged in a regular practice of not paying the prevailing wages and attendant benefits”). Furthermore, the extent that Hawkeye contends that any putative class action should be contained to the Queens yard location only, Hawkeye fails to account for the declaration of non-party witness, Vito DiMeglio, in which he averred that the alleged systemic policy of failing to pay Hawkeye field laborers for any time spent working or preparing for the day, traveling to the yard after the completion of work at the jobsite, and attending safety meetings at the yard prior to the 7:00 a.m. start time was also applied to the field employees working out of the Brooklyn Yard and Gatlin’s testimony that employees in the Westchester yard were also required to attend safety meetings (NYSCEF Doc No. 40 at 42; NYSCEF Doc No. 50). As such, plaintiffs have established that any putative class should not be limited solely to the Queens Yard.

Commonality

With respect to the requirements set forth by CPLR 901 (a) (2), “[c]ommonality of factual and legal questions ‘requires predominance[,] not identity or unanimity among class members’” (*Dzaira v Human Development Association, Inc.*, 231 AD3d 615, 617 [1st Dept 2024], quoting *Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 423 [1st Dept 2010]). “[C]ommonality cannot be determined by any mechanical test and ... the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action” (*Maddicks v Big City Properties, LLC*, 34 NY3d 116, 125

[2019] [internal quotation marks omitted]; *see also City of New York v Maul*, 14 NY3d 499, 514 [2010]).

Although defendant contends that any commonality of factual and legal questions to the putative class is necessarily undermined by the differences in position and reporting times of each individual Hawkeye employee, plaintiffs have proffered consistent testimony from the plaintiffs, non-party witnesses, and the defendant's witness who all alleged that there was a generally applied policy that did not credit field employees for time spent in the yard prior to arrival at the jobsite, whether that time was spent preparing for the day's work at the jobsite or attending mandatory safety meetings (NYSCEF Doc No. 39 at 27-29, 60-61, 71; NYSCEF Doc No. 40 at 52-53; NYSCEF Doc No. 41 at 34-35; NYSCEF Doc No. 42 at 33, 43-45; NYSCEF Doc No. 43 at 34, 31-43, 45, 42; NYSCEF Doc No. 44 at 27; NYSCEF Doc No. 45 at 25-26, 29; NYSCEF Doc No. 50 at 5). While there are differences with respect to the reporting times and working hours of the various witnesses, such differences, in the face of the alleged systematic policy of failing to pay any individual employee for additional time spent working or attending mandatory safety trainings in the yard would relate to an individual assessment of damages and do not undermine the commonality of factual and legal questions of the putative class with respect to unpaid overtime or failure to pay wages, or weigh substantially against certification (*see Chia v Trim-Line Hitech Construction Corp.*, 225 AD3d at 566 ["Individualized damages assessments based on the Trim-Line Defendants' purportedly systemic policies of paying lower wages do not undermine commonality or weigh substantially against class certification"]; *Brown v Mahdessian*, 206 AD3d 511, 512 [1st Dept 2022] ["However, any

factual issues relating to whether individual employees took breaks is related to damages, and individualized damages assessments in wage-and-hour actions based on systematic policies do not undermine commonality or weigh substantially against class certification”]; *Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014] [“We reject defendant RLI Insurance Company’s contention that wages owed to the different trades would be too highly individualized”]; *Nawrocki v Proto Const. & Dev. Corp.*, 82 AD3d 534, 535-536 [1st Dept 2011] [“In addition, it is irrelevant that plaintiffs were employed by defendants as bricklayers yet seek to represent all the trades that were present at the public works construction sites. Indeed, [t]he fact that different trades are paid on a different wage scale and thus have different levels of damages does not defeat certification”] [internal quotation marks omitted]). As such, plaintiffs have established the commonality requirement as set forth by CPLR 901 (a) (2).

Typicality

With respect to typicality, “to be typical, ‘it is not necessary that the claims of the named plaintiff be identical to those of the class.’” (*Pruitt v Rockefeller Center Properties, Inc.*, 167 AD2d 14, 22 [1st Dept 1991], quoting *Super Glue Corp. v Avis Rent a Car Sys.*, 132 AD2d 604, 607 [2d Dept 1987]). “If it is shown that a plaintiff’s claims derive ‘from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory ... [the typicality] requirement is satisfied’” (*Pludeman v Northern Leasing Systems, Inc.*, 74 AD3d at 423, quoting *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980]). Here, plaintiffs’ claims that they were required to perform work, including attending safety meetings, preparing their

vehicles for the day, completing paperwork, and travelling to and from jobsites, that they were not compensated for, as it took place outside of the stated hours of 7:00 a.m. to 3:30 p.m., arise from the same alleged course of conduct by Hawkeye (NYSCEF Doc No. 39 at 65; NYSCEF Doc No. 40 at 49-50; NYSCEF Doc No. 41 at 34-35; NYSCEF Doc No. 43 at 54; NYSCEF Doc No. 44 at 14, 27; NYSCEF Doc No. 50 at 4). Insofar as Hawkeye contends that plaintiffs testimony regarding their arrival times and the frequency that they reported to the yard are inconsistent, any such differences do not undermine the typicality of the plaintiffs' claims, which arise from the same alleged Hawkeye practices in failing to compensate the putative class members for any time spent at the yard prior to or at the conclusion of the workday (*see Stecko v RLI Ins. Co.*, 121 AD3d at 543 ["Similarly, plaintiffs' claims are typical of the claims of all class members since they each arise from Three Generations' alleged failure to pay prevailing wages and supplemental benefits"]; *Lamarea v Great Atlantic and Pacific Tea Co., Inc.*, 55 AD3d 487, 487 [1st Dept 2008] ["The named plaintiffs' claim that they were not paid for overtime work is typical of the claims of the class, as it arises out of the same course of conduct, i.e., that, as a result of the pressure defendant placed on individual store managers to keep payroll costs down, in conjunction with its express policy forbidding off-the-clock work and mandating payment of overtime, stores were chronically understaffed and employees were permitted, or pressured, to work overtime without compensation"]). Accordingly, the plaintiffs have satisfied the typicality requirement as set forth by CPLR 901 (a) (3).

Adequacy of Class Representative and Counsel

Further, plaintiffs have established that they are adequate to serve as class representatives. “The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel” (*Cooper v Sleepy’s, LLC*, 120 AD3d 742, 743-744 [2d Dept 2014], quoting *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d at 144). Hawkeye primarily contends that plaintiffs are inadequate class representatives because Gatlin worked as a foreman and therefore “was participating in the alleged wrongful conduct against his crew, who are included in the proposed class” (NYSCEF Doc No. 57 at 23). However, “[t]hat one of the named plaintiffs may have had some supervisory responsibilities over other members of the putative class does not create an insurmountable conflict of interest” (*Williams v Air Serv. Corp.*, 121 AD3d 441, 442 [1st Dept 2014]; cf. *Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1045-1046 [3d Dep 2008] [where “[p]laintiff’s complaint, in essence, is that defendant used its store level managers to implement a corporate-wide policy that systematically deprived many of its employees of proper compensation,” plaintiffs could not show they could fairly and adequately represent the interest of each member of the class when “the proposed class includes approximately 8,000 managerial employees, many of whom were involved in implementing the labor practices that are the subject of plaintiffs’ complaint”]).

Here, plaintiffs offered testimony from defendant’s witness, Joe Kennedy, which indicates that, although the foremen would fill out the timesheets of their crews, he would

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review it and then the project manager would review it, and though he “[didn’t] really revise times,” he didn’t know if anyone else adjusted the times as reported on the timesheets, which did not indicate start times, only hours worked (NYSCEF Doc No. 39 at 40-41, 42). Further, he acknowledged that everyone was paid from 7:00 a.m. to 3:30 p.m. (*id.* at 32) and that field employees were typically credited for an eight-hour day “[u]nless there was overtime involved” (*id.* at 29). Kennedy also acknowledged that field employees, including foremen, would typically come to the yard to load up tools and equipment for the day prior to 7:00 a.m., and were required to attend safety meetings for which they were not paid, at 6:30 a.m. (*id.* at 27-28). However, the same alleged policies regarding compensation for hours worked at locations other than the jobsite were allegedly applied to all class members, including the foremen, and plaintiffs seek the same relief as the class members – to wit, to receive compensation for time spent working in the yard allegedly uncompensated by Hawkeye (NYSCEF Doc No. 39 at 65; NYSCEF Doc No. 40 at 49-50; NYSCEF Doc No. 41 at 34-35; NYSCEF Doc No. 43 at 54; NYSCEF Doc No. 44 at 14, 27; NYSCEF Doc No. 50 at 4). Furthermore, to the extent that Hawkeye contends that it has unique defenses against Gatlin’s claims due to the GPS records or Gatlin’s individual retaliation claim, Hawkeye has failed to establish that either the eleven pages of GPS records indicating inconsistencies in Gatlin’s testimony and personal records of his arrival time indicate any conflict of interest with respect to the class members, or otherwise render him inadequate (*see Williams v Air Serv. Corp.*, 121 AD3d at 442).

Under these circumstances, the plaintiffs have established that they meet the requirements of CPLR 901 (a) (4) to fairly and adequately protect the interests of the class

(see *Williams v. Air-Serv. Corp.*, 121 AD3d at 442; *Nawrocki v. Proto Const. & Dev. Corp.*, 82 AD3d at 535 [plaintiffs met requirements of CPLR 901 (a) (4) where “[t]he record reveals no conflict of interest between the class members and the class representatives. Indeed, plaintiffs seek the same relief as the class members — to receive the wages and benefits allegedly owed to them under public works contracts”]).

Superiority

Finally, with respect to the requirements set forth by CPLR 901 (a) (5), Hawkeye contends that plaintiffs have failed to exhaust their administrative remedies with the New York Department of Labor and have failed to establish that a class action is a superior method of adjudication in this matter. However, “[a] class action is the superior vehicle for resolving wage dispute [where] 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” (*Ferrari v. National Football League*, 153 AD3d 1589, 1593 [4th Dept 2017] [internal quotation marks omitted]; see also *Stecko v. RLI Ins. Co.*, 121 AD3d at 543 [“[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 class members having no realistic day in court’”], quoting *Nawrocki v. Proto Construction & Dev. Corp.*, 82 AD3d at 536). Contrary to the defendant’s assertion, failure to exhaust administrative remedies is not a bar to superiority where, as here, plaintiffs have demonstrated that the damages allegedly suffered by individual class members are likely to be insignificant and the costs of prosecuting an individual action would result in the class

members having no realistic day in court (*see Dabrowski v Abax Inc.*, 84 AD3d 633, 635 [1st Dept 2011] [proposed class action found to be “superior to the prosecution of individualized claims in an administrative proceeding in view of the difference in litigation costs, the laborers’ likely insubstantial means, and the modest damages to be recovered by each individual laborer, if anything”]).

CPLR 902

“If all of the CPLR 901 prerequisites are satisfied, the court must then consider the discretionary factors listed in CPLR 902” (*Jenack v Goshen Operations, LLC*, 222 AD3d 36, 44 [2d Dept 2023]). CPLR 902 lists, as these discretionary factors, “[t]he interest of the members of the class in individually controlling the prosecution or defense of separate actions”; “[t]he impracticability or inefficiency of prosecuting or defending separate actions”; “[t]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class”; “[t]he desirability or undesirability of concentrating the litigation of the claim in the particular forum”; and, “[t]he difficulties likely to be encountered in the management of a class action” (CPLR 902 [1]-[5]). Here, contrary to Hawkeye’s contentions, the plaintiffs have established that the CPLR 902 factors also weigh in favor of class certification, given that, among other considerations, the burden on the litigants and on the court would likely be significantly increased if aggrieved employees were forced to pursue individual lawsuits (*see Chua v Trim-Line Hitech Construction Corp.*, 225 AD3d at 567; *Jenack v Goshen Operations, LLC*, 222 AD3d at 46-47).

Hawkeye's Contentions Regarding the Merits

Finally, Hawkeye maintains that class certification is inappropriate under the circumstances because plaintiff Gatlin's allegations are disproven by the submission and testimony with respect to the selected GPS records provided. "A class action certification must be founded upon an evidentiary basis" (*Yonkers Contr. Co. v Romano Enters. of N.Y.*, 304 AD2d 657, 658 [2d Dept 2003]), "In determining whether an action should proceed as a class action, a court may consider whether the asserted claims have merit. That inquiry, however, is limited; plaintiffs need show only that there appears to be some credible cause of action" (*Teshabaeva v Family Home Care Services of Brooklyn and Queens, Inc.*, 220 AD3d 519, 520-521 [1st Dept 2023]). Indeed, "[i]nquiry on a motion for class action certification vis-à-vis the merits is limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham" (*Jenack v Goshen Operations, LLC*, 222 AD3d 36, 40-41 [2d Dept 2023], quoting *Brandon v Chefetz*, 106 AD2d 162, 168 [1st Dept 1985]).

Here, plaintiffs have provided their testimony, as well as the testimony of non-party witnesses and the defendant's witness, as well as paystubs, which are sufficient to demonstrate that there is some credible cause of action with respect to their claims of uncompensated work performed at the yard prior to the commencement and after the completion of the work day (NYSCEF Doc No. 39 at 65; NYSCEF Doc No. 40 at 49-50; NYSCEF Doc No. 41 at 34-35; NYSCEF Doc No. 43 at 54; NYSCEF Doc No. 44 at 14, 27; NYSCEF Doc No. 49; NYSCEF Doc No. 50 at 4). Although the GPS records provided

by Hawkeye indicate inconsistencies with respect to Gatlin's testimony and personal diary of arrival times, such inconsistencies present issues for resolution by the trier of fact, and are not fatal to his claim for the limited purposes of whether to certify this class (*see Kudinov v Kel-Tech Const. Inc.*, 65 AD3d 481, 482 [1st Dept 2009] ["While Kudinov's testimony and his affidavit as to his record-keeping and the number of employees at the projects where he worked contained inconsistencies, his claim has sufficient merit for the limited purposes of determining whether to certify this class. Those inconsistencies present . . . issues for resolution by the trier of fact"]).

Plaintiffs' Claims under Labor Law § 195 (1) and § 195 (3)

In making this determination that certification is warranted, the court notes that it has considerable flexibility in overseeing a class action, and may divide the class into subclasses relating to particular issues, or it may decertify the class if it becomes apparent prior to a determination on the merits that class treatment is inappropriate (*see City of New York v Maul*, 14 NY3d at 513-514; *Pludeman v Northern Leasing Sys., Inc.*, 142 AD3d at 915; CPLR 902, 906 [2]).

The court, however, declines to certify plaintiffs' third and fourth causes of action premised on wage notice violations under Labor Law § 195 (1) and Labor Law § 195 (3) as those claims, at least as pleaded here, violate CPLR 901 (b), which provides 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." In this regard, the only damages plaintiffs have pleaded in their complaint

with respect to the wage notice causes of action are the statutory damages provided for in Labor Law §§ 198 (1-b) and 198 (1-d). As Labor Law §§ 198 (1-b) and 198 (1-d) do not specifically authorize recovery as part of a class action, and as their provision of statutory damages constitutes a “minimum measure of recovery” within the meaning of CPLR 901 (b), plaintiffs’ wage notice claims cannot be certified as a class action (*see Pesantez v Boyle Environmental Services, Inc.*, 251 AD2d 11, 12 [1st Dept 1998]; *Thomas v JRCruz Corp.*, 2023 NY Slip Op 31149 [Sup Ct, Kings County 2023], at *31; *Herman v Judlau Contr. Inc.*, 2024 WL 965216[U], *9 [Sup Ct, New York County 2024, Shamas, Special Referee]).

All arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this court, regardless of whether they are specifically discussed herein.

This constitutes the decision and order of the court.

ENTER
P.P.S

 J.S.C.

HON. PETER P. SWEENEY, J.S.C.

[*23]

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