SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

CONSTANZA ELLISON, on behalf of herself and all others similar situated,	:	Index No.: 2023/607508
Plaintiff,	:	Justice Assigned:
- against -	:	
ADAM REST CORP., CUBAN RESTAURANT OF BAYSIDE INC., THE CUBAN II, LLC, MARGARITAS CAFE ONE, INC., MARGARITAS CAFE TWO INC., MARGARITAS CAFE THREE, INC., MARGARITAS CAFE VI INC., MARGARITAS CAFÉ VII INC., MARGARITAS CAFE VIII INC., MARGARITAS CAFE XI, INC., PAMELA RESTAURANT CORP., and PUGLIAS OF GARDEN CITY INC.,	:	Return Date: Nov. 8, 2023
	:	Mot. Seq. No. 1
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

KESSLER MATURA P.C.
Troy L. Kessler
Garrett Kaske
Benjamin A. Goldstein
534 Broadhollow Road, Suite 275
Melville, New York 11747
Telephone: (631) 499-9100

Attorneys for Plaintiff and the Putative Class Action

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Plaintiff and Putative Class Representative Constanza Ellison seeks to certify a class of current and former bartenders and servers (collectively, "Tipped Employees") at Defendants' restaurants, under CPLR Article 9. Through this action, Plaintiff seeks unpaid minimum wages, spread-of-hours wages, and other relief based upon Defendants Adam Rest Corp., Cuban Restaurant of Bayside Inc., The Cuban II, LLC, Margaritas Cafe One Inc., Margaritas Cafe Two Inc., Margaritas Cafe Three, Inc., Margaritas Cafe VI Inc., Margaritas Cafe VII, Inc., Margaritas Cafe VIII Inc., Margaritas Cafe XI Inc., Pamela Restaurant Corp., and Puglias of Garden City Inc.'s (collectively, "Defendants" or "Willy's") violations of the New York Labor Law, Article 19 ("NYLL"), and the supporting Hospitality Industry Wage Order, 12 N.Y.C.R.R. §§ 146, *et seq*. ("HIWO").

The NYLL and HIWO generally permit restaurants to claim a "tip credit," lowering the minimum cash wage by a set amount for tipped employees, such that tips make up the remainder of the minimum wage. 12 N.Y.C.R.R. § 146-1.3. However, when tipped employees spend more than 20 percent of their time or two hours, whichever is less, on tasks unrelated to customer service ("sidework"), the employer cannot claim a tip credit, and must instead pay the full minimum wage. *Id.* § 146-2.9.

Separately, a restaurant employer must pay an additional hour of pay at the basic minimum wage for shifts with a "spread" of over 10 hours – otherwise known as "spread of hours pay." *Id.* § 146-1.6(a). The 10-hour spread is keyed to the employee's start and end times, regardless of whether the entire 10-hour period was compensable. *Id*.

Defendants routinely assign Tipped Employees to job duties outside the confines of tipped work. The sidework frequently amounts to more than two hours or 20 percent of the Tipped

Employees' workdays. However, Defendants always take a tip credit, paying Tipped Employees less than the full minimum wage. Furthermore, Defendants frequently require Tipped Employees to work shifts lasting over 10 hours, but never pay them spread-of-hours wages.

Plaintiff now seeks to certify a class of all Tipped Employees who worked for Defendants since Jun 1, 2017, through entry of the judgment in this case (the "Class" or "Class Members"). Plaintiff presents her sworn affidavit and other evidence demonstrating that Tipped Employees are subject to a common policy, thus satisfying the requirements of CPLR Article 9. This evidence demonstrates that: Defendants' restaurants are centrally controlled and uniformly operated; Tipped Employees share similar job duties and work hours; and Tipped Employees are uniformly denied the minimum wage for untipped work and spread-of-hours pay. Moreover, Plaintiff establishes that she and her counsel, Kessler Matura, P.C. ("KM"), are well suited to prosecute this matter on behalf of the Class. Thus, this case is appropriate for class action treatment.

FACTS

I. Defendants' Business.

Defendants operate two interrelated chains of restaurants in New York – Willy's Margaritas Cafe and Willy's The Cuban – all under the same owner, William Martinez. *See* Ex. A (Ellison Aff.) ¶¶ 5-12; Ex. B (Caro Aff.) ¶¶ 1, 7, 12; 15, Ex B.1 (Caro Offer Ltr.); Ex. C (Amd. Compl.) ¶¶ 96-128; Ex. D (Liq. Lic. Apps.); *see also* Ex. E (Margarita Website); Ex. F (Cuban Website); Ex. G (Facebook) at 15-17. Willy's employs bartenders and servers, like Plaintiff, to work in tipped positions in the various Willy's locations. Ex. A (Ellison Aff.) ¶¶ 3-4, 37; *see also* Ex. B (Caro Aff.) ¶¶ 16, 28-29; Ex. H.1 (Nunez Compl.) ¶¶ 15, 22, 23, Ex. H.2 (Nunez Ans.) ¶ 9, 15, 16. The Tipped Employees often work at more than one Willy's location. Ex. A. (Ellison Aff.) ¶¶ 4-5; Ex B (Caro Aff.) ¶ 15. For example, Plaintiff worked at Willy's Margaritas Cafes

in Wantagh and East Meadow, New York and Willy's The Cuban in Garden City, New York. Ex. A (Ellison Aff.) ¶ 4. Plaintiff's co-workers at her restaurant assignments also moved between Willy's restaurants. *See id.* ¶ 5. Tipped Employees are subject to the same payroll and management policies and practices across locations. *See id.* ¶¶ 6-12, 27-28, 35; Ex. B (Caro Aff.) ¶¶ 8, 9, 16, 28-29; *see also* Ex. H.2 (Nunez Ans.) ¶ 12 (noting that the manager of the location at issue had "certain authorities as more fully set forth and described in the manager's guidelines, manual, rules and/or regulations").

A. Defendants Operate 13 Locations in New York.

The 10 Willy's Margaritas Cafes include:

1. 1868 Front Street, East Meadow, NY ("East Meadow Location");
2. 445 S. Main St., Freeport, NY ("Freeport Location");
3. 392 Woodbury Road, Hicksville, NY ("Hicksville Location");
4. 124 E. Park Ave., Long Beach, NY ("Long Beach Location");
5. 139 B Merrick Ave., Merrick, NY ("Merrick Location");
6. 4747-16 Rte 347, Port Jefferson Station, NY ("Port Jefferson Location")
7. 95 Manorhaven Blvd., Port Washington, NY ("Port Washington Location");
8. 581-583 Smithtown Bypass, Smithtown, NY ("Smithtown Location");
9. 753 Wantagh Ave. Wantagh, NY ("Wantagh Location");
10. 38 Hillside Ave., Williston Park, NY ("Williston Park Location");

Ex. E (Margaritas Website); *see also* Ex. D (Liq. Lic. Apps.) (listing addresses of the applicable locations). The Willy's The Cuban locations include:

1. 39-17 Bell Blvd., Queens, NY ("Bayside Location");
2. 987 Stewart Ave., Garden City, NY ("Garden City Location");
3. 95 W. Main St., Patchogue, NY ("Patchogue Location").

Ex. F (Cuban Website); *see also* Ex. D (Liq. Lic. Apps.) (listing addresses of the applicable locations). Dozens of bartenders and servers work at the restaurants. *See* Ex. A (Ellison Aff.) ¶ 4 (approximate number of bartenders and servers at Plaintiff's locations); Ex. B (Caro Aff.) ¶ 13-14 (noting the average number of servers and bartenders working on just Friday nights).

B. Defendants Are Interrelated and Centrally Controlled.

As their name suggests, Willy's restaurants have common management and ownership. Each restaurant is owned and operated by William Martinez. *See* Ex. A (Ellison Aff.) ¶ 7; Ex. B (Caro Aff.) ¶¶ 4-10; Ex. C (Amd. Compl.) ¶¶ 120-126; Ex. D (Liq. Lic. Apps.). The restaurants' social media pages and William Martinez himself, have continuously held Mr. Martinez out as the owner of the two chains. *See, e.g.*, Ex. G (Facebook) at 15-17. Mr. Martinez names himself as owner in the press. *See* Ex. I (Tribune Art.); Ex. J (Nassau Ill. Art.). Moreover, Mr. Martinez is registered as the principal with the New York State Liquor Authority for Cuban Restaurants and the Margaritas Cafes. Ex. D. (Liq. Lic. Apps).

Defendants operate publicly as a unified operation. For example, Willy's Margaritas Cafe's Facebook page markets for both the Willy's Margaritas chain and The Cuban chain. Ex. G (Facebook) at 7-11. Willy's Facebook jointly announces grand openings and holiday closures of both chains. *See id.* at 7, 10, 11. On paper, Willy's letterhead covers both chains. Ex B (Caro Aff.) ¶ 7, Ex. B (Caro Offer).

Willy's Margarita Cafes and The Cubans also share employees and common personnel policies. Ex. A (Ellison Aff.) ¶¶ 4,5, 12, 13, 27, 28, 37; Ex. B (Caro Aff.) ¶¶ 2, 3, 7-11, 15-16, 28-29; *see also* Ex. H.1 (Nunez Compl.) ¶¶ 15, 22, 23, Ex. H.2 (Nunez Ans.) ¶ 9, 15, 16. For example, when Plaintiff was transferred between the Garden City Cuban and the Wantagh Margaritas, Defendants paid her the same $7.50 per hour as her "Tipped Regular" wage. *See* Ex. K (Paystubs) at 2-6.

Mr. Martinez is intimately involved in managing the restaurants. He travels from location to location to run frequent staff meetings and generally oversees daily operations. *See* Ex. A (Ellison Aff.) ¶¶ 6-12. In addition, Mr. Martinez employs a Director of Operations, Albert Vila, who oversees all managers and employees at each restaurant. *See id.* ¶10; Ex. B (Caro Aff.) ¶¶ 5-7, 10-12; *see also* Ex. G (Facebook) at 12-14 (listing Mr. Vila's email). Mr. Martinez and Mr. Vila distribute the weekly work schedules to the top-level managers at each Willy's location. Ex. B (Caro Aff.) ¶ 10.

The various restaurants are controlled and run out of their main office, where both Mr. Martinez and Mr. Vila have offices. *See* Ex. B (Caro Aff.) ¶¶ 6-8, 10-12, 115-16, 28-29; *see also* Ex. H.2 (Nunez Ans.) ¶ 12. Tipped Employees' hours are submitted to the main office from their respective managers. *See* Ex. B (Caro Aff.) ¶ 19. The main office then gives the checks to managers to distribute to the employees at the various restaurants. *See id*. ¶ 11. Furthermore, Willy's recruits and hires employees through top management, sending out recruiting posts for the chains as a whole and receiving applications through Mr. Vila. *See* Ex. G (Facebook) at 12-14. Mr. Vila hires managers who are trained to work, and ultimately do work, at any given location. *See id*. ¶¶ 5-9. Mr. Vila and Mr. Martinez set the schedules of the top-level restaurant managers and tell them which restaurants they are to report to on any given day. *See id*. ¶ 10. Tipped Employees' hourly wages are set by Willy's, regardless of the location. *See id*. ¶¶ 28-29.

II. Tipped Employees Share the Same Duties and Were Subjected to Defendants' Uniform Labor Management Policies.

A. Tipped Employees Perform Significant Sidework Across Restaurants.

Willy's requires its servers and bartenders to complete a significant amount of sidework each shift. *See* Ex. A (Ellison Aff.) ¶¶ 13-24; Ex. B (Caro Aff.) ¶¶ 24-27. As part of the process for opening the restaurants, Tipped Employees fold napkins, clean menus, fill and clean salt and

pepper shakers, prepare garnishes and mixes, and organize dining chairs. *See* Ex. A (Ellison Aff.) ¶¶ 17-18; Ex. B (Caro Aff.) ¶ 25. To close the restaurants, bartenders take inventory of empty bottles, clean the bar, refrigerators, bottles, and tables, bring dishes to the kitchen, sweep, polish silverware and glasses, and clean coffee machines and other pieces of equipment. *See* Ex. A (Ellison Aff.) ¶ 20; Ex. B (Caro Aff.) ¶ 26. During and after their shifts, bartenders transport dishes, glasses, and silverware to the kitchen, and retrieve ice. Ex. A (Ellison Aff.) ¶ 21. Servers separately handle substantial sidework at closing time, such as polishing glasses and silverware, ironing tablecloths, sweeping, vacuuming, folding napkins, and setting up chairs. *See id.* ¶ 22; Ex. B (Caro Aff.) ¶¶ 25-26.

Willy's mandates the sidework across its Tipped employees. *See* Ex. B (Caro Aff.) ¶ 24. In training, Tipped Employees are first introduced to the sidework requirements. *See* Ex. A (Ellison Aff.) ¶¶ 15-16. Restaurant managers also check that bartenders and servers have completed their sidework, reprimanding them if the sidework is deemed insufficient. *See id.* ¶ 24.

While Willy's has each Tipped Employee keep track of their work time and submit time sheets, Defendants do not track time spent on sidework. *See* Ex. A (Ellison Aff.) ¶¶ 27-28; Ex. L (Timesheets). Still, the sidework forms a substantial portion of their daily routine. Added together, Tipped Employees' sidework commonly amounts to more than two hours or 20 percent of their shifts. *See* Ex A (Ellison Aff.) ¶¶ 23, 29; Ex. B (Caro Aff.) ¶ 27. When the restaurants are short-staffed, Tipped Employees can spend in excess of 3 hours on sidework. *See* Ex. B (Caro Aff.) ¶ 27. Willy's failure to track sidework hits every Tipped Worker's paycheck, as the restaurants claim a tip credit for every hour of their Tipped Workers' time. *See* Ex. A (Ellison Aff.) ¶ 29; Ex. K (Paystubs).

B. Tipped Employees Worked Shifts Lasting Longer Than 10 Hours Without Spread-of-Hours Pay.

Tipped Employees frequently work shifts lasting over 10 hours. Tipped Workers' shifts often begin at 3:30 P.M. and end around 2:00 AM. *See* Ex. A (Ellison Aff.) ¶¶ 30-33. Brendan Caro, a manager for Defendants, also witnessed Tipped Employees working shifts lasting over 10 hours a day. Ex. B (Caro Aff.) ¶¶ 17-21. Despite this, Defendants failed to pay spread-of-hours pay. *See* Ex. A (Ellison Aff.) ¶¶ 34-35; Ex. B (Caro Aff.) ¶ 23; Ex. K (Paystubs); Ex. L (Timesheets). For example, on May 5, 2017, Plaintiff worked a 13-hour shift and then on May 26, 2017, a 10.5-hour shift, yet she did not receive any spread-of-hours pay for those workweeks. *See* Ex. A (Ellison Aff.) ¶¶ 34; Ex. L (Timesheets).

ARGUMENT

I. Plaintiff's Motion Is Subject to the CPLR's Liberal Application.

New York's class certification statute "should be liberally construed." *Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 481, 481 (1st Dep't 2009). This is because, in part, "'the Legislature intended [A]rticle 9 to be a liberal substitute for the narrow class action legislation which preceded it.'" *City of New York v. Maul*, 14 N.Y.3d 499, 509 (2010) (quoting *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 90-92 (2d Dep't 1980)). Considering this, and that the class can be amended or decertified later, if needed, "the interests of justice require that, where the case is doubtful, the benefit of any doubt should be given to allowing the class action." *Krebs v. Canyon Club, Inc.*, Index No. 10431/08, 22 Misc. 3d 1125(A), 2009 WL 440903, at *3 (Sup. Ct. Jan. 2, 2009).

With these touchstones in mind, this Court should certify a class of Tipped Employees seeking unpaid minimum wages and spread-of-hours wages. As described below, Plaintiff is entitled to class certification because she has presented a *prima facie* case (Section II), satisfied each element of CPLR Section 901 ("Section 901") (Section III), and shown that the factors in

CPLR Section 902 ("Section 902") weigh in her favor (Section IV). Lastly, as explained in Section V, the Proposed Notice is drafted to be sufficiently informative and readable.

II. Plaintiff's Claims Are Facially Valid.

Although the merits of the claims are not at issue, Plaintiff must set forth a *prima facie* case, as explained in subsection A. Plaintiff's minimum wage claim is premised on Willy's improper claim of tip credits. The spread-of-hours claim is premised on Willy's failure to pay Tipped Workers spread-of-hours pay when they worked over 10 hours in a shift. These arguments will be addressed in subsections B and C respectively.

A. The Merits Are Not At Issue.

To certify the class, Plaintiff must only satisfy the elements of Section 901 and factors of Section 902 – she does not need to prove her claims. *Lamarca v. Great A. & P. Tea Co., Inc.* ("*Lamarca I*"), Index No. 601973/2004, 16 Misc. 3d 1115(A), 2007 WL 2127354, at *3 (Sup. Ct. July 3, 2007) ("[P]laintiffs' argument is that the defendants' stores are run and managed in the same ways and that this created 'a company pandemic of uncompensated work.' Whether plaintiffs can prove this, is a question for another day."), *aff'd*, ("*Lamarca II*"), 55 A.D.3d 487 (1st Dep't 2008). At this stage, the Court does not rigorously analyze the merits of the claims. *Stecko v. RLI Ins. Co*., 121 A.D.3d 542, 534-44 (1st Dep't 2014) (noting that "the 'rigorous analysis' standard utilized by the federal courts" does not apply to Article 9). Rather, Plaintiff need only show that her claims are not a "sham." *Weinstein v. Jenny Craig Operations, Inc.* ("*Weinstein II*"), 138 A.D.3d 546, 547 (1st Dep't 2016), *aff'g*, ("*Weinstein I*"), Index No. 105520/2011, 41 Misc. 3d 11220(A), 2013 WL 5809397 (Sup. Ct. Oct. 24, 2013). *see, e.g.*, *Kudinov*, 65 A.D.3d at 482 ("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."). As set out below, Plaintiff's claims are meritorious and meet the minimal burden for class certification because she has provided the Court with sufficient evidence that Tipped Employees were denied (1) minimum wages due to improper claims of tip credits and (2) spread-of-hours pay.

B. Plaintiff's Minimum Wage Claims Meet the Burden for Class Certification

Plaintiff adequately alleged that Defendants improperly claimed tip credits. Restaurant employers cannot claim a tip credit when an employee spends more than 20 percent or 2 hours of their shift time, whichever is less, on sidework. 12 N.Y.C.R.R. § 146-2.9. Courts generally define "sidework" as work which is not tip-producing, such as dishwashing, food preparation, cleaning the restaurant, sweeping, mopping, and bringing products up from storage. *See, e.g.*, *Reyes v. Cafe Cousina Rest. Inc.*, No. 18 Civ. 1873, 2019 WL 5722475, at *10 (S.D.N.Y. Aug. 27, 2019), *report and recommendation adopted*, No. 18 Civ. 1873, 2019 WL 5722109 (S.D.N.Y. Oct. 7, 2019); *Salinas v. Starjem Rest. Corp.*, 123 F. Supp. 3d 442, 470-71 (S.D.N.Y. 2015).

Plaintiff alleges that Defendants required Tipped Employees to complete substantial non-tipped sidework more than either 20 percent of their time or two hours shift, while paying them less than the minimum wage. *See supra* at Facts § II(A).

C. Plaintiff's Spread-of-Hours Claims Meet the Burden for Class Certification.

Plaintiff provided sufficient evidence that Defendants violated the spread-of-hour requirements of the HIWO. *See* Ex. A (Ellison Aff.) ¶¶ 30-35; Ex. B (Caro Aff.) ¶ 23; Ex. K (Paystubs); Ex. L (Timesheets). The HIWO requires employers to pay all employees one extra hour of pay at the minimum wage for shifts with a spread over 10 hours. 12 N.Y.C.R.R. § 146-1.6. Defendants, however, did not pay the extra hour to Tipped Employees, even though they regularly worked shifts over 10 hours per week. *See supra* at Facts § II(B).

III. Plaintiff Satisfies the Requirements of CPLR Article 9.

Section 901 requires that a plaintiff show that: (1) the class is so numerous that joinder is impractical ("numerosity"); (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members ("predominance"); (3) the representative party's claims are typical of the class claims ("typicality"); (4) the representative party and her attorneys will fairly and adequately protect the interests of the class ("adequacy"); and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority"). *See* C.P.L.R. § 901(a). If the Section 901 prongs are met, the Court will then consider the Section 902 factors. *Adams v. Bigsbee Enters. Inc.*, 53 Misc.3d 1210(A), 2015 N.Y. Slip Op. 52008(U), at *7 (Sup. Ct. Sept. 15, 2015).

A. The Class is so Numerous that Joinder is Impractical.

Numerosity is generally presumed at 40 putative class members. *Thomas v. Meyers Assocs., L.P.*, Index No. 651720/2011, 39 Misc. 3d 1217(A), 2013 WL 1777483, at *10 (Sup. Ct. Apr. 18, 2013). Numerosity is determined based on reasonable inferences drawn from the facts and commons sense. *Globe Surgical Supply v. GEICO Ins. Co.*, 59 A.D.3d 129, 138 (2d Dep't 2008). Here, the number of putative class members clearly exceeds 40, given the number of restaurants at issue (12), the number of years the claims date back (six), and testimony relating to the number of Tipped Employees working at Defendants' restaurants at any given time (generally, over a dozen over the course of a week). *See* Kessler Aff. ¶ 11; *see also* Ex. A (Ellison Aff.) ¶ 4; Ex. B (Caro Aff.) ¶¶ 13-14.

B. Questions of Law and Fact Common to the Class Predominate Over Questions Affecting Only Individual Punitive Class Members.

CPLR § 901(a)(2) requires that questions of law or fact common to the class predominate over questions affecting only individuals. A predominant question is one that "applies to the entire

class." *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014). This element does not require "identity or unanimity, among class members." *Krebs*, 2009 WL 440903, at *8. Variations among class members, such as the amount of damages due to the individuals or variations in job titles, pay rates, and work locations, will not preclude a finding of commonality. *See, e.g*, *Ferrari v. Natl. Football League* ("*Ferrari II*"), 153 A.D.3d 1589, 1591 (4th Dep't 2017) (noting that it is "well established" that differing damages cannot prevent certification); *Dabrowski v. Abax Inc.*, 84 A.D.3d 633 (1st Dep't 2011) (rejecting argument that "too many variables existed among the putative class of laborers to group them in a single action, including their varying job titles, pay rates, and the differing project sites and contracts involved"). Likewise, "that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action." *Friar*, 73 A.D.2d at 98.

The test is not "mechanical." *Id*. at 97. Rather, the focus is on whether the claims of the class can be advanced efficiently by using the class device to resolve common issues. *Id*. at 97-98. For example, the court in *Thomas* held that common questions of law affecting alleged independent contractors included, *inter alia*, "(1) whether the class members were employees; [and] (2) whether they were entitled to receive overtime pay . . . ." *Thomas*, 2013 WL 1777483, at *11 (common questions of law predominated where "the heart of the [class action complaint] is the claim that Meyers did not pay overtime and classified the brokers as exempt").

Here, Plaintiff satisfies Section 901(a)(2) because common questions of law and fact predominate over individual claims. In sum, the primary common questions of law at issue here include whether Class Members were entitled to: (a) receive the full minimum wage where sidework amounted to two hours or more than 20 percent of their shifts; and (b) receive spread-of-hours pay. *See* Ex. C (Amd. Compl.) ¶ 132. These allegations are on par with *Thomas*.

Likewise, the common questions of fact include whether Tipped Workers were: (a) paid less than the full minimum wage; (b) required to work an excessive amount of sidework; (c) worked shifts lasting over 10 hours; and (d) were not paid spread-of-hours pay. *See id*. These common questions of fact are sufficiently akin to other recent cases. *Jackson v. Citywide Mobile Response Corp.*, Index No. 811859/22E, 2023 WL 6135803, at *8 (Sup. Ct. Sept. 15, 2023) (common question of "whether defendant violated the law by failing to pay . . . appropriate" spread of hour wages); *Barlin v. Pizza Jerks, Ltd.*, 71 Misc. 3d 1230(A), 2021 N.Y. Slip Op. 50534(U), at *3 (Sup. Ct. June 9, 2021) (element met where plaintiff alleged that the class members were injured by the same practice of taking an improper tip credit in violation of the NYLL).

That Plaintiff and her fellow Tipped Employees worked at different locations, worked different shifts, or suffered unpaid wages in varying degrees is of no moment. Plaintiff's evidence shows that she and the other Tipped Employees and the challenged practices were uniform across all Willy's restaurants. This is all that is required to certify the class. *See, e.g.*, *Kudinov*, 65 A.D.3d at 482 ("[T]he commonality of claims predominates, given the same types of subterfuges allegedly employed to pay lower wages."); *Lamarca I*, 2007 WL 2127354, at *3 (rejecting argument that the class claims were "'too individualized to warrant collective action treatment'" because the plaintiffs alleged that the defendants' stores were run in the same manner), *aff'd*, *Lamarca II*, 55 A.D.3d at 487 (certification upheld where the stores "were managed pursuant to uniform policies" that allegedly caused the deprivation in pay).

Thus, the second element of Section 901 is met.

C. Plaintiff's Claims are Typical.

A plaintiff's claim is typical when it "derives 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." *Friar*, 73 A.D.2d at 99. A plaintiff's claim need only be typical, not "identical to those of the class." *Adams*, 2015 N.Y. Slip Op. 52008(U), at *6 (cleaned up).

Here, the challenged practice at issue is identical for all putative Class Members, including Plaintiff. Plaintiff worked as a bartender at three of Defendants' restaurants and suffered the same alleged harms as the other Tipped Employees. Ex. A (Ellison Aff.) ¶¶ 4, 13-35. There are no factual distinctions between Plaintiff's claims and those of other Class Members. Their claims are based entirely on Defendants' uniform practices. Thus, typicality is satisfied. *See, e.g.*, *Thomas*, 2013 WL 1777483, at *11 (typicality met where claims of plaintiff "derive from the same course of conduct as the class members' claims and are based on the same cause of action" (cleaned up).

D. Plaintiff and KM Will Adequately Represent the Interests of the Class.

Plaintiff and her attorneys will fairly and adequately represent the Class. When considering adequacy, New York courts typically consider whether: (1) a conflict of interest exists between the plaintiff and the class; (2) the plaintiff is familiar with the lawsuit and committed to prosecuting it; and, (3) class counsel hold sufficient qualifications. *Globe Surgical Supply*, 59 A.D.3d at 144 ; *see also Nawrocki v. Proto Const. & Dev. Corp.*, 82 A.D.3d 534, 535 (1st Dep't 2011) (finding § 901(a)(4) satisfied where "plaintiffs seek the same relief as the class members—to receive the wages and benefits allegedly owed to them"). Here, Plaintiff and KM satisfy all three factors.

First, there is no potential conflict of legal interests between Plaintiff and the other members of the proposed class, as they are challenging practices applied uniformly to all Class Members. Plaintiff's interests do not differ from those of the class as a whole, in that she seeks to benefit the proposed class by obtaining damages for its members.

Second, Plaintiff has demonstrated the requisite personal character and familiarity with the case that is necessary to serve as the class representative. *See* Kessler Aff. ¶ 14; Ex. A (Ellison Aff.) ¶ 36-39.

Third, KM is qualified to serve as Class Counsel. *See e.g.*, *Dawson v. Sterling Bancorp., Inc*., No. 623157/2019, 2020 N.Y. Slip Op. 33715(U), at *4 (Sup. Ct. Oct. 29, 2020) (Kevins, J.S.C); ("[KM] has established that the law firm has substantial experience and is well versed on the subject matter of the lawsuit."); *Robinson v. Big City Yonkers, Inc.,* Index No. 600159/2016, 2017 N.Y. Slip Op. 30177(U) (Sup. Ct. Jan. 17, 2017) (Sher, A.J.S.C.) (appointing KM's attorneys and co-counsel as class counsel); *Rodriguez v. Joseph Eletto Transfer, Inc.*, Index No. 5431/2016, 2016 N.Y. Slip Op. 32592(U), at *3 (Sup. Ct. Dec. 15, 2016) (Brown, J.) ("[T]he court finds that [KM's attorneys and co-counsel] have established their significant experience prosecuting employment class actions and their work performed in representing the interests of the class members."). The attorneys at KM have extensive experience in representing workers, especially in wage-and-hour class and collective actions. *See* Kessler Aff. ¶¶ 3-8; Exs. M-O (CVs).

E. Class Adjudication is the Superior Method to Remedy the Violations Alleged.

A class action is the "superior" method for resolving unpaid wage claims. *See e.g.*, *Stecko*, 121 A.D.3d at 543 (quoting *Nawrocki*, 82 A.D.3d at 536); *Pesantez v. Boyle Envtl. Servs., Inc.*, 251 A.D.2d 11, 11-12 (1st Dep't 1998) (class actions are the "best method of adjudicating" wage and hour disputes). Class actions allow workers with relatively small claims to get their day in court. *Morales v. NAP Const. Co., Inc.*, Index No. 601764/2006, 2010 N.Y. Slip Op. 32150(U), 2010 WL 3285603, *6 (Sup. Ct. Jul. 2, 2010) ("in light of the small amount of the potential individual recoveries" a class would be "the best method" to pursue the case). They also conserve judicial resources and prevent the proliferation of lawsuits with varying results. *Id*. at *6. Further,

wage-and-hour class actions provide a collateral benefit to the public, in that they "induce social and ethical behavior in large entities[.]" *Ferrari v. Mateczun* ("*Ferrari II*"), 2016 N.Y. Slip Op. 30002(U), at *6 (Sup. Ct. Jan. 5, 2016). Finally, class actions like this allow workers to recover their unpaid wages without fear of retaliation. *See, e.g., Thomas*, 2013 WL 1777483, at *12.

Here, the class action device is preferred to individual cases on behalf of the class. The claims at stake are relatively small, as we are fighting over several dollars per hour per person. *See* Kessler Aff. ¶ 12. Thus, pooling the class members' claims is an efficient way for the class to have their day in court while alleviating the fear of retaliation. *See* Ex. A (Ellison Aff.) ¶ 38.

Thus, the class should be certified as it is the superior means to resolve this dispute.

IV. Plaintiff Meets the Requirements of Section 902.

In addition to Section 901's factors, courts also consider the five factors listed in Section 902 when certifying a class. These factors are: (1) the interest of members of the class in individually controlling the prosecution of separate actions; (2) the impracticality or inefficiency of prosecuting or defending separate actions; (3) the existence of other litigation regarding the same controversy; (4) the desirability of the proposed class forum; and (5) the difficulties likely to be encountered by management of a class action. C.P.L.R. § 902. For the same reasons that the requirements of Section 901 are met, so are the 902 factors.

With regards to factors one and two, Class Members have a minimal interest in controlling the litigation because each Class Member's damages are small when compared to the cost of litigation. *See supra*. at Argument § III(E); *see also Adams*, 2015 N.Y. Slip Op. 52008(U), at *7-8 ("Members of the class have only a limited interest in individually controlling the prosecution of their cases, since each member has sustained damages that are modest in amount compared to the cost of individual litigation."). This is particularly true in light of Defendants' vastly greater

resources. *Krebs,* 2009 WL 440903, at *15 ("Put another way, the mission of class actions taking care of the little guy and discouraging behavior harmful to the public" (internal quotations and citations omitted)). Likewise, given that there is likely to be over 150 class members, each with a relatively small claim (*see* Kessler Aff. ¶ 10), it is inefficient and impractical to prosecute these claims separately. *See Adams*, 2015 N.Y. Slip Op. 52008(U), at *8 (although not, "completely impractical for individuals to prosecute their own separate actions against defendants, it would be inefficient."); *Krebs,* 2009 WL 440903, at *16 (separate actions would be "highly impractical and very inefficient").

The third factor favors class certification because Plaintiff's claims are distinct from the claims asserted in the other actions pending against Defendants. *See* Kessler Aff. ¶ 13.

Nassau County is the most desirable forum because many of Defendants' locations are in Nassau County, Defendants are headquartered in Nassau, and the Class Members and witnesses are believed to reside within a reasonable distance of Nassau.

There are no anticipated difficulties in managing this case should it be certified as a class action because the class would consist almost entirely of New York residents, the Defendants are New York residents, and KM has offices on the border of Suffolk and Nassau, is experienced in litigating in Nassau County, and is experienced in litigating class actions.

Plaintiff has satisfied Section 902, thus class certification is warranted.

V. Plaintiff's Notice of Class Action Lawsuit and Distribution Plan Should be Approved.

"[R]easonable notice of the commencement of a class action shall be given to the class in such manner as the court directs." C.P.L.R. § 904(b). Like in federal court, class Action notices, should include the "nature of the action, the definition of the class, and the claims, issues, and defenses to be litigated." *Compare* Manual for Complex Litigation, Fourth § 21.31, *with Vickers*

v. Home Fed. Sav. & Loan Ass'n of E. Rochester, 56 A.D.2d 62, 65-6 (4th Dep't 1977) (holding that the notice must describe the class "so that an individual may determine whether he is actually a member" and "present a balanced statement of the potential class member's rights and liabilities"). The notice should be concise, clear, and easily understood. *Id*.

Here, the Proposed Notice provides details on each of these topics and is consistent with the Federal Judicial Center's sample notice. *Compare* Ex. P (Proposed Notice), *with* Ex. Q (Sample Notice).

CONCLUSION

For all the reasons set forth above, Plaintiff respectfully request that this Court: (1) certify the proposed class consisting of all Tipped Employees who worked for Defendants at any time from June 1, 2017 through the present; (2) appoint Plaintiff Ellison as Class Rrepresentative; (3) appoint KM as Class Counsel; (4) order Defendants to produce, within 10 days of the Court's decision, a computer-readable file containing the following for each Class Member: (a) name; (b) last known mailing address(es); (c) last known phone numbers; (d) last known email address(es); and (e) start and end dates; and (5) approve Plaintiff's Proposed Class Notice. For the Court's convenience, Plaintiff has submitted a Proposed Order Granting Class Action Certification and Authorizing Notice to Issue to the Class Member as Exhibit R to the Kessler Affirmation.

Dated: Melville, New York
October 16, 2023

Respectfully submitted,

/s/ Troy L. Kessler
Troy L. Kessler

KESSLER MATURA P.C.
Troy L. Kessler
Garrett Kaske
Benjamin A. Goldstein

534 Broadhollow Road, Suite 275
Melville, New York 11747
Telephone: (631) 499-9100
tkessler@kesslermatura.com
gkaske@kesslermatura.com
bgoldstein@kesslermatura.com

Attorneys for Plaintiff and the Putative Class Action

22 NYCRR § 202.8-b CERTIFICATION

The undersigned certifies that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 5,402 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I relied on the word-count feature of Microsoft Word, which is the word-processing system used to prepare this memorandum.

Dated: Melville, New York
October 16, 2023

By: /s/ Troy L. Kessler
Troy L. Kessler